



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Maintain Public Security – This bill authorizes the Department of Law Enforcement to compile and retain additional information regarding organized crime groups for law enforcement purposes, requires the Department of Law Enforcement to administer organized crime prevention and enforcement grants, and authorizes local law enforcement agencies to compile organized crime group information and to notify prosecutors of an arrested individual's organized crime group membership status.

Promote Personal Responsibility – This bill makes it a crime for any person to use electronic communication to further any criminal purpose, to intimidate or harass other persons, or to advertise his or her presence in the community. This bill also makes it a crime for any person to possess or manufacture any blank, forged, stolen, fictitious, fraudulent, counterfeit, or otherwise unlawfully issued identification document in furtherance of a criminal activity.

Safeguard Individual Liberty – This bill creates a term and condition of community supervision, that prohibits organized crime group members from communicating with any other organized crime group members through any means, except as authorized by certain entities for the purpose of aiding in the investigation of organized criminal activity.

Provide Limited Government – This bill requires the Department of Law Enforcement to create rules setting forth the organized crime prevention and enforcement grant application process, eligibility criteria, and performance standards.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Chapter 874, F.S. – Existing Sections of Statute**

###### Legislative Intent

Chapter 874, F.S., establishes the “Criminal Street Gang Prevention Act of 1996” (Act). The Act was enacted on the basis of a legislative finding that the state is facing a mounting crisis caused by criminal street gangs, and that criminal street gang activities present a clear and present danger that the state has a compelling interest in preventing.<sup>1</sup> The legislature further specified that the intent of the Act was to eradicate the terror created by criminal street gangs by providing enhanced penalties and by eliminating the patterns, profits, proceeds, instrumentalities, and property facilitating criminal street gang activity, including gang recruitment.<sup>2</sup>

###### *Effect of the Bill*

The bill renames the Act the “Organized Crime Group Prevention Act of 2007” and replaces the term “criminal street gang” with “organized crime group” throughout chapter 874, F.S. The bill adds that the state has a compelling interest in halting the danger posed by the proliferation of organized crime groups and the graduation from more primitive forms of criminal organizations to highly sophisticated criminal organizations. The bill specifies that the legislature has found that street gangs, in particular, have evolved into increasingly sophisticated and complex organized crime groups, and adds that it is the intent of the legislature to outlaw certain conduct associated with the existence and proliferation of organized crime activity.

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<sup>1</sup> s. 874.02, F.S.

<sup>2</sup> *Id.*

## Definitions

Section 874.03, F.S. provides the following definitions:

- "Criminal street gang" means a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.
- "Criminal street gang member" is a person who is a member of a criminal street gang and who meets two or more of the following criteria:
  - o Admits to criminal street gang membership.
  - o Is identified as a criminal street gang member by a parent or guardian.
  - o Is identified as a criminal street gang member by a documented reliable informant.
  - o Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
  - o Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
  - o Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
  - o Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
  - o Has been stopped in the company of known criminal street gang members four or more times.
- "Pattern of criminal street gang activity" means the commission or attempted commission of, or solicitation or conspiracy to commit, two or more felony or three or more misdemeanor offenses, or one felony and two misdemeanor offenses, or the comparable number of delinquent acts or violations of law which would be felonies or misdemeanors if committed by an adult, on separate occasions within a 3-year period.
- "Criminal street gang associate" means a person who:
  - o Admits to criminal street gang association; or
  - o Meets any single defining criterion for criminal street gang membership.
- "Gang-related incident" means an incident that, upon investigation, meets any of the following conditions:
  - o The participants are identified as criminal street gang members or criminal street gang associates, acting, individually or collectively, to further any criminal purpose of the gang;
  - o A reliable informant identifies an incident as criminal street gang activity; or
  - o An informant of previously untested reliability identifies an incident as criminal street gang activity and it is corroborated by independent information.

### *Effect of the Bill*

The bill replaces the terms "criminal street gang" and "gang" with "organized crime group." Additionally, the term "criminal street gang member" is replaced with "organized crime member."

The bill adds "organized criminal syndicates," "street gangs," and "terrorist organizations" to the definition of "organized crime group" (i.e. the former definition of "criminal street gang"). The bill also adds persons who have "authored any communication indicating responsibility for the commission of any crime by the organized crime group" to the definition of "organized crime member" (i.e. the former definition of "criminal street gang member"). The bill also creates the following definitions:

- "Electronic communication" has the same meaning as provided in s. 934.02<sup>3</sup> and includes, but is not limited to, photographs, video, telephone communications, text messages,

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<sup>3</sup> Section 934.02, F.S., defines "electronic communication" as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system

facsimile, electronic mail messages as defined in s. 668.602<sup>4</sup>, and instant message real-time communications with other individuals through the Internet or other means.

- "Street gangs" are formal or informal ongoing organizations, entities, associations, or groups consisting of three or more persons with a common name or common identifying signs, colors, or symbols and two or more members who, individually or collectively, have as one of their primary activities the commission of criminal or delinquent acts and engage in or have engaged in a pattern of organized criminal activity.
- "Terrorist organization" means any organized criminal group engaged in or organized for the purpose of engaging in terrorism as defined in s. 775.30. This definition shall not be construed to prevent prosecution of individuals acting alone under this chapter.

### Penalty Enhancements

Section 874.04, F.S., permits a court to enhance penalties if it finds, by a preponderance of the evidence, that a defendant committed an offense for the purpose of benefiting, promoting, or furthering the interests of a criminal street gang.

### *Effect of the Bill*

The bill replaces the term "criminal street gang" with "organized crime group."

### Causing, Encouraging, Soliciting, or Recruiting a Person to Join a Criminal Street Gang

Section 874.05, F.S., makes it third-degree felony<sup>5</sup> to intentionally cause, encourage, solicit, or recruit a person to join a criminal street gang that requires as a condition of membership or continued membership the commission of any crime. Such offense is a second-degree felony<sup>6</sup> if it is a second or subsequent offense.

### *Effect of the Bill*

The bill replaces the term "criminal street gang" and "gang" with "organized crime group."

### Forfeiture

Section 874.08, F.S., provides that the following are subject to seizure and forfeiture under the Florida Contraband Forfeiture Act, s. 932.704, F.S.:

- All profits, proceeds, and instrumentalities of criminal street gang activity and criminal street gang recruitment;
- All property used or intended or attempted to be used to facilitate the criminal activity of any criminal street gang or of any criminal street gang member; and
- All property used or intended or attempted to be used to facilitate criminal street gang recruitment.

### *Effect of the Bill*

The bill replaces the term "criminal street gang" and "gang" with "organized crime group."

### FDLE's Gang Database

Section 874.09, F.S., authorizes the Department of Law Enforcement (FDLE) to develop and manage a statewide criminal street gang database to facilitate exchange of information pursuant to the intent and purpose of the Act.

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that affects intrastate, interstate, or foreign commerce, but does not include any wire or oral communication; any communication made through a tone-only paging device; any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object; or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

<sup>4</sup> Section 668.602, F.S., defines "electronic mail message" as an electronic message or computer file that is transmitted between two or more telecommunications devices; computers; computer networks, regardless of whether the network is a local, regional, or global network; or electronic devices capable of receiving electronic messages, regardless of whether the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval.

<sup>5</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and s. 775.084, F.S.

<sup>6</sup> A second-degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

### *Effect of the Bill*

The bill authorizes FDLE to:

- Notify all law enforcement agencies that reports of arrested organized crime group members or associates shall be entered into the database as soon as the minimum level of data specified by the department is available to the reporting agency and no waiting period for the entry of that data exists.
- Compile and retain information regarding organized crime groups and their members and associates in a manner that allows the information to be used by law enforcement and other agencies deemed appropriate for investigative purposes.
- Compile and maintain a history data repository relating to organized crime groups and their members and associates in order to develop and improve techniques used by law enforcement agencies and prosecutors in the investigation, apprehension, and prosecution of members and affiliates of organized crime groups.

The bill also authorizes *local* law enforcement agencies to:

- After carrying out any arrest of any individual whom they believe to be a member or associate of an organized crime group, create or update that individual's electronic file within the system.
- Notify prosecutors of the accused individual's organized crime group membership or associate status.

### **Chapter 874, F.S. – New Sections of Statute**

HB 1363 adds the following new sections of statute to chapter 874, F.S.:

#### Section 874.045, F.S. – Arrest and Prosecution Under Other Provisions

HB 1363 specifies that nothing in chapter 874, F.S., shall prohibit the arrest and prosecution of an organized crime group member under chapter 876<sup>7</sup>, chapter 895<sup>8</sup>, chapter 896<sup>9</sup>, s. 893.20<sup>10</sup>, or any other applicable provision of law except to the extent otherwise prohibited pursuant to a statutory or constitutional provision.

#### Section 874.07, F.S. – Communication Among Members or Associates

HB 1363 provides that as a term and condition of probation, parole, conditional release, or community control, organized crime group members or associates shall not communicate with any other organized crime group members or associates through any means, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of organized criminal activity. Organized crime group members or associates violating this section shall be deemed to have violated their probation, parole, community release, or community control, and the court shall revoke their probation, parole, conditional release, or community control.

#### Section 874.10, F.S. – Electronic Communication

HB 1363 makes it a third degree felony for any person to use electronic communication to further any criminal purpose, to intimidate or harass other persons, or to advertise his or her presence in the community, including, but not limited to, videotaping criminal activity or threats of criminal activity, posting images or audio of criminal activity or threats of criminal activity on the Internet, or reproducing photographs or audio recordings of criminal activity.

#### Section 874.11, F.S. – Identification Documents; Unlawful Possession or Creation

HB 1363 makes it a second degree felony for any person to possess or manufacture any blank, forged, stolen, fictitious, fraudulent, counterfeit, or otherwise unlawfully issued identification document in furtherance of a criminal activity.

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<sup>7</sup> Criminal Anarchy, Treason, and Other Crimes Against Public Order.

<sup>8</sup> Offenses Concerning Racketeering and Illegal Debts.

<sup>9</sup> Offenses Related to Financial Transactions.

<sup>10</sup> Continuing criminal enterprise.

The bill provides that the term "identification document" includes, but is not limited to, a social security card or number, a birth certificate, a driver's license, an identification card pursuant to s. 322.051, F.S., a naturalization certificate, an alien registration number, a passport, and any access credentials for a publicly operated facility or an infrastructure facility covered under 18 U.S.C. s. 2332f.

Section 874.12, F.S. – Grants

HB 1363 requires FDLE to administer organized crime prevention and enforcement grants from funds specifically appropriated for this purpose. The bill requires that the grants be used solely for the purpose of funding prevention programs or strengthening enforcement activities, and that funds be awarded on a competitive basis to applicants who meet department criteria. The bill requires FDLE to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., setting forth the grant application process, eligibility criteria, and performance standards.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 874.01, F.S., renaming chapter 874, F.S., the “Organized Crime Group Prevention Act of 2007.”

**Section 2.** Amends s. 874.02, F.S., relating to legislative findings and intent.

**Section 3.** Amends s. 874.03, F.S., relating to definitions.

**Section 4.** Amends s. 874.04, F.S., relating to organized criminal activity; enhanced penalties.

**Section 5.** Creates s. 874.045, F.S., relating to arrest and prosecution under other provisions.

**Section 6.** Amends s. 874.05, F.S., relating to causing, encouraging, soliciting, or recruiting organized crime group membership.

**Section 7.** Creates s. 874.07, F.S., relating to communication among members or associates.

**Section 8.** Amends s. 874.08, F.S., relating to organized crime group activity and recruitment; forfeiture.

**Section 9.** Amends s. 874.09, F.S., relating to crime data information.

**Section 10.** Creates s. 874.10, F.S., relating to electronic communication.

**Section 11.** Creates s. 874.11, F.S., relating to identification documents; unlawful possession or creation.

**Section 12.** Creates s. 874.12, F.S., relating to grants.

**Sections 13 – 22.** Amend ss. 435.04, 893.138, 895.02, 921.0022, 921.0024, 921.141, 984.03, 985.03, 985.047, and 985.433, F.S., to correct cross-references and conform terminology.

**Section 23.** Providing a directive to the Division of Statutory Revision.

**Section 24.** This bill takes effect July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not yet determined the prison bed impact of this bill. However, to the extent that the bill creates new felony offenses, there may be a prison bed impact.

FDLE provided the following fiscal analysis:

HB 1363 directs FDLE to administer a grants program to address organized crime prevention and enforcement efforts. Funds shall be awarded on a competitive basis to applicants who meet department criteria. FDLE must adopt rules setting forth the grant application process.

FDLE will incur a recurring fiscal impact of \$90,075 for the next three years (for two Grant Specialist IV FTE positions) and \$9,452 in non-recurring costs.

The legislation does not mention the amount of grant funds to be appropriated for the grant program. Therefore, it is impossible to determine what fiscal impact Section 874.12 would have on FDLE to implement the grants portion of the legislation.

Other than the management positions, Office of Criminal Justice Grants positions are funded from management and administrative funds from federal grant programs administered. Time spent on the management of this program would have to be charged against either general revenue or funds appropriated for organized crime prevention and enforcement grants.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

According to FDLE's fiscal analysis, because the bill does not define an eligible grant fund applicant, local units of governments may be eligible for grant funds.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to FDLE's fiscal analysis, because the bill does not define an eligible grant fund applicant, private sector entities may be eligible for grant funds.

D. FISCAL COMMENTS:

The Safety and Security Council chair's proposed budget does not include an appropriation for the costs FDLE estimates it will incur.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

### **Terms and Conditions of Supervision**

Section 7 of the bill (lines 236 – 249) provides the following:

As a term and condition of probation, parole, conditional release, or community control, organized crime group members or associates shall not communicate with any other organized crime group members or associates through any means, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of organized criminal activity. Organized crime group members or associates violating this section shall be deemed to have violated their probation, parole, community release, or community control, and the court shall revoke their probation, parole, conditional release, or community control.

Chapter 948, F.S., entitled “Probation and Community Control,” contains a variety of statutes that establish terms and conditions of probation and community control. Similarly, chapter 947, F.S., entitled “Parole Commission,” establishes terms and conditions of parole, conditional release, and control release. To the extent that this section of the bill establishes terms and conditions of probation, community control, parole, and conditional release, it may be better suited for placement in these chapters.

The First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. The bill makes it a violation of supervision for an organized crime group member to communicate with another organized crime group member. While there are existing conditions of supervision that prohibit offenders from *associating* with people engaged in criminal activities, there are no such conditions that prohibit an offender from *communicating* with a particular group of persons. This language may lead to challenges based on the First Amendment.

As drafted, the bill does not require that an offender *knowingly* communicate with another organized crime group member. This issue was addressed in *In Interest of D.S.*, 652 So.2d 892 (Fla. 4<sup>th</sup> DCA 1995). In that case, the court imposed a condition of community control barring the offender from associating with gang members (note that the condition barred *associating* with gang members rather than *communicating*). Recognizing the long-standing rule that probation or community control can only be revoked upon a *willful* and substantial violation of a condition, the appellate court held that “although the imposition of such condition was proper, no violation of that condition could occur unless the offender *knew* that the individuals he was associating with were gang members.”

The bill states that an organized crime group member who violates the above condition shall be deemed to have violated their supervision, *and the court shall revoke the supervision*. Section 948.06, F.S., specifies that when there are reasonable grounds to believe that an offender has violated the conditions of supervision, the offender may be arrested and brought before the court. If the violation is admitted, the court may revoke, modify, or continue the offender’s supervision, or place the offender in community control. If the violation is not admitted, the court may hold what is commonly referred to as a violation hearing. After such hearing, the court may revoke, modify, or continue the offender’s supervision, or place the offender in community control. The bill, as drafted, appears to take away the court’s sentencing discretion for violations of supervision in that it *requires* the court to revoke an offender’s supervision.

The issues outlined above could be addressed by the following language:

948.033 Condition of probation or community control; organized crime group.--

(1) Effective for a probationer or community controllee whose crime was committed on or after July 1, 2007, and who has been found by a court to have committed the crime for the purpose of benefiting, promoting, or furthering the interests of an organized crime group, the court shall, in addition to any other conditions imposed, impose a condition prohibiting the probationer or community controllee from knowingly associating with other organized crime group members or associates, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of organized criminal activity.

### **Penalty Enhancements**

In 1999, the Florida Supreme Court held that s. 874.04, F.S. (providing penalty enhancements if the court found at sentencing that the defendant was a member of a criminal street gang) was unconstitutional as a violation of substantive due process because the statute punished gang membership without requiring any nexus between the criminal activity and gang membership.<sup>11</sup> As a result, the statute was amended so that a defendant's penalty could only be enhanced if the court found that the defendant committed the charged offense *for the purpose of benefiting, promoting, or furthering the interests* of a criminal street gang.

However, in 2000, the United States Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *citing Jones v. United States*, 526 U.S. 227 at 252-253 (1999).

Thus, pursuant to the United State Supreme Court's decision in *Apprendi*, the penalty enhancements provided in s. 874.04, F.S., may be subject to challenge in that the statute requires that the finding be made by the court rather than a jury, and only requires such finding be made using a "preponderance of the evidence" standard.

These issues could be addressed with the following language:

874.04 Organized criminal street gang activity; enhanced penalties.--Upon a finding by a jury ~~by the court at sentencing~~ that the defendant committed the charged offense for the purpose of benefiting; promoting, or furthering the interests of an organized crime group ~~a criminal street gang~~, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor of committed by an adult, may be enhanced. Penalty enhancement affects the applicable statutory maximum penalty only. Each of the findings required as a basis for such sentence shall be found beyond a

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<sup>11</sup> *State v. O.C.*, 748 So.2d 945 (Fla. 1999).

~~reasonable doubt by a preponderance of the evidence.~~ The enhancement will be as follows:

B. RULE-MAKING AUTHORITY:

This bill requires FDLE to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., setting forth the organized crime prevention and enforcement grant application process, eligibility criteria, and performance standards. The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The definition of “organized crime member” (lines 102 – 131) is unclear in that it defines an organized crime member, in part, as “a person who is a member of an organized crime group.” Generally, the term or phrase being defined should not be used in the definition itself. This issue could be resolved by using the following language:

“Organized crime member is a person who meets two or more of the following criteria:”

Line 291 authorizes local law enforcement agencies to, after carrying out an arrest of an individual whom they believe to be a member or associate of an organized crime group, create or update that individual’s electronic file within *the system*. However, it is unclear what “system” the bill is referring to.

Lines 292 – 293 authorize local law enforcement agencies to “notify the prosecutor of the accused individual’s organized crime group membership or associate status.” It is unclear how local law enforcement officials will be able to definitively determine whether an accused individual is a member of an organized crime group. This issue could be addressed by authorizing local law enforcement agencies to “notify the prosecutor of the accused individual’s *suspected* organized crime group membership or associate status.”

Lines 296-305 make it a third degree felony for any person to use electronic communication to further any criminal purpose, to intimidate or harass other persons, or to advertise his or her presence in the community, including, but not limited to, videotaping criminal activity or threats of criminal activity, posting images or audio of criminal activity or threats of criminal activity on the Internet, or reproducing photographs or audio recordings of criminal activity. It should be noted that there are a variety of statutes criminalizing harassment regardless of whether the harassment is conducted using electronic means.<sup>12</sup> Additionally, as drafted, the bill makes it a crime for any person to “advertises his or her presence in the community.” The bill does not limit the applicability of the statute to organized crime group member or to people who advertise an organized crime group’s presence in the community.

Lines 317 – 323 makes it a second degree felony for any person to possess or manufacture any blank, forged, stolen, fictitious, fraudulent, counterfeit, or otherwise unlawfully issued identification document in furtherance of a criminal activity. It should be noted that simply possessing such documents (without

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<sup>12</sup> See, e.g., s. 365.16, F.S., making it a second degree misdemeanor to use a telephone in certain ways to harass a person; s. 784.048, F.S., providing that any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree; s. 810.0975, F.S., providing that any person who does not have legitimate business in the school safety zone or any other authorization, license, or invitation to enter or remain in the school safety zone who is engaged in harassment or intimidation of students entering or leaving school property commits a second degree misdemeanor; s. 843.20, F.S., making it a misdemeanor of the first degree for any person to willfully harass, threaten, or intimidate an identifiable member of a neighborhood crime watch program while such member is engaged in, or traveling to or from, an organized neighborhood crime watch program activity or a member who is participating in an ongoing criminal investigation, as designated by a law enforcement officer.

such possession being in furtherance of a criminal activity) is currently a crime.<sup>13</sup> The bill does not limit the applicability of the statute to organized crime group member who possess such documents.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

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<sup>13</sup> See, e.g., s. 322.212, F.S., Unauthorized possession of, and other unlawful acts in relation to, driver's license or identification card.