

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1325 Victims of Human Trafficking

**SPONSOR(S):** Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Spano and others

**TIED BILLS:** HB 1327 **IDEN./SIM. BILLS:** CS/SB 1644

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Jones	Cunningham
2) Justice Appropriations Subcommittee	12 Y, 0 N, As CS	McAuliffe	Jones Darity
3) Judiciary Committee			

### SUMMARY ANALYSIS

Section 787.06, F.S., Florida's human trafficking statute, defines human trafficking as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person. The statute contains a variety of provisions prohibiting persons from knowingly engaging in human trafficking using coercion for labor or services and for commercial sexual activity. In addition to addressing the perpetrators of human trafficking, s. 787.06, F.S., addresses *victims* of human trafficking by providing legislative intent that "victims of trafficking be protected and assisted by this state and its agencies."

The bill creates s. 943.0583, F.S., which authorizes a victim of human trafficking to petition the court for the expunction of any conviction for an offense committed while he or she was a victim of human trafficking. A "victim of human trafficking" is defined as a person subjected to coercion for the purpose of being used in human trafficking, a minor who is a victim of human trafficking through coercion, or an individual subject to human trafficking as defined by federal law.

A petition must be initiated with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking. The bill requires the petition to include:

- A sworn statement attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation of the victim's status as a victim of human trafficking, if any exists. Official documentation of the victim's status creates a presumption that his or her participation in the offense was a result of having been a victim of human trafficking. However, a petition may be granted without official documentation.

The court's determination of the petition must be by a preponderance of the evidence. A determination made without official documentation must be made by a showing of clear and convincing evidence. If a court grants an expunction the bill requires criminal justice agencies with custody of the expunged record, except FDLE, to physically destroy the record. Persons who have had their human trafficking criminal history records expunged may lawfully deny or fail to acknowledge the arrests that were expunged unless they are a candidate for employment with a criminal justice agency or is a defendant in a criminal prosecution. The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.

The bill amends s. 90.803(23), F.S., by increasing the age of a child to which the hearsay exception applies from 11 to 16.

The Criminal Justice Impact Conference met on March 21, 2013 and determined this bill may have an insignificant negative impact on state prison beds. FDLE reports that the bill will have a negative fiscal impact. See fiscal section.

The bill is effective on January 1, 2014, except that FDLE or any other criminal justice agency is not required to comply with an order to expunge a criminal history record as this bill requires until March 1, 2014 to allow time for FDLE to perform the necessary computer programming and system testing.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Hearsay Evidence**

Section 90.803, F.S., contains a variety of hearsay exceptions. Subsection (23) of the statute specifies that unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing certain crimes<sup>1</sup> is admissible in evidence in any civil or criminal proceeding if:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability;<sup>2</sup> and
- The child either:
  - Testifies; or
  - Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability includes a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1), F.S.<sup>3</sup>

#### Effect of the Bill

The bill amends s. 90.803(23), F.S., by increasing the age of a child to which the hearsay exception applies from 11 to 16.

#### **Human Trafficking**

In October 2010, the Center for the Advancement of Human Rights at Florida State University provided the Florida Task Force on Human Trafficking a "Statewide Strategic Plan on Human Trafficking."<sup>4</sup> The Strategic Plan found that Florida is the third most popular American destination for human traffickers and that sex trafficking is the most under-reported offense.<sup>5</sup>

Florida first passed legislation specifically criminalizing human trafficking in 2004.<sup>6</sup> This legislation created separate statutes for involuntary servitude, human trafficking in labor and services, and human sex trafficking.<sup>7</sup> While the human trafficking statutes have been amended in various ways over the

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<sup>1</sup> These crimes include child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child. Section 90.803(23)(a), F.S.

<sup>2</sup> In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate. Section 90.803(23)(a)1., F.S.

<sup>3</sup> Section 90.804(1), F.S., specifies that "unavailability as a witness" means that the declarant:

- Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
- Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
- Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

<sup>4</sup> The Strategic Plan is available and can be viewed at

[http://www.cahr.fsu.edu/sub\\_category/Florida\\_StrategicPlanonHumanTrafficking.html](http://www.cahr.fsu.edu/sub_category/Florida_StrategicPlanonHumanTrafficking.html) (last visited March 14, 2013).

<sup>5</sup> Page 3 of the Strategic Plan.

<sup>6</sup> Chapter 2004-391, L.O.F.

<sup>7</sup> *Id.*

years, comprehensive legislation passed in 2012 that updated and enhanced Florida's human trafficking statutes, and consolidated the various laws into one statute.<sup>8</sup>

Section 787.06, F.S., is Florida's current human trafficking statute and defines human trafficking as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person.<sup>9</sup> The statute contains a variety of provisions prohibiting persons from knowingly engaging in human trafficking using coercion for labor or services and for commercial sexual activity.<sup>10</sup>

In addition to addressing the perpetrators of human trafficking, s. 787.06, F.S., acknowledges, through the following language, the Legislature's intent regarding victims of human trafficking:

It is the intent of the Legislature that...the victims of trafficking be protected and assisted by this state and its agencies. In furtherance of this policy, it is the intent of the Legislature that the state Supreme Court, The Florida Bar, and relevant state agencies prepare and implement training programs in order that judges, attorneys, law enforcement personnel, investigators, and others are able to identify...victims of human trafficking and direct victims to appropriate agencies for assistance. It is the intent of the Legislature that the Department of Children and Family Services and other state agencies cooperate with other state and federal agencies to ensure that victims of human trafficking can access social services and benefits to alleviate their plight.<sup>11</sup>

### **Sealing and Expunging Criminal History Records**

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record.<sup>12</sup> Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order.<sup>13</sup> FDLE is required to retain expunged records.<sup>14</sup> When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, criminal justice agencies for their respective criminal justice purposes, judges in the state courts system for the purpose of assisting them in their case-related decision-making responsibilities, and certain other specified agencies for their respective licensing and employment purposes.<sup>15</sup> Records that have been sealed or expunged are confidential and exempt from the public records law.<sup>16</sup> It is a first degree misdemeanor<sup>17</sup> to divulge their existence.<sup>18</sup>

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

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<sup>8</sup> Chapter 2012-97, L.O.F.

<sup>9</sup> Section 787.06(2)(d), F.S.

<sup>10</sup> Section 787.06(3), F.S.

<sup>11</sup> Section 787.06(1)(d), F.S.

<sup>12</sup> Section 943.0585(4), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Section 943.059(4), F.S.

<sup>16</sup> Sections 943.059(4)(c) and 943.0585(4)(c), F.S.

<sup>17</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>18</sup> Sections 943.059 and 943.0585, F.S., require FDLE to disclose sealed and expunged criminal history record to specified entities for specified purposes.

employment,<sup>19</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>20</sup>

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. In order to receive a certificate, a person must:

- Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor indicating that:
  - An indictment, information, or other charging document was not filed or issued in the case; or if filed, was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction;
  - None of the charges related to the record the person wishes to expunge resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt; and
  - The criminal history record does not relate to a violation of specified offenses.<sup>21</sup>
- Pay a \$75 processing fee.
- Submit a certified copy of the disposition of the record they wish to have expunged.
- Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in s. 943.051(3)(b), F.S.,<sup>22</sup> prior to the date of their application for the certificate.<sup>23</sup>
- Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged.
- Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction. A 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.<sup>24</sup>
- No longer be under any court supervision related to the disposition of the record they wish to have expunged.<sup>25</sup>

In addition to the certificate, a petition to seal or expunge a criminal history record must also include the petitioner's sworn statement that he or she:

- Has not previously been adjudicated guilty of any offense or comparable ordinance violation, or adjudicated delinquent for committing any felony or misdemeanor listed in s. 943.051(3)(b), F.S.;

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<sup>19</sup> These include candidates for employment with a criminal justice agency; applicants for admission to the Florida Bar; those seeking a sensitive position involving direct contact with children, the developmentally disabled, or the elderly with the Department of Children and Family Services, Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice; persons seeking to be employed or licensed by the Department of Education, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity that licenses child care facilities; or a Florida seaport.

<sup>20</sup> Sections 943.059(4)(c), and 943.0585(4)(c), F.S.

<sup>21</sup> These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; 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.

<sup>22</sup> These offenses include: assault, as defined in s. 784.011, F.S.; battery, as defined in s. 784.03, F.S.; carrying a concealed weapon, as defined in s. 790.01(1), F.S.; unlawful use of destructive devices or bombs, as defined in s. 790.1615(1), F.S.; negligent treatment of children, as defined in s. 827.05, F.S.; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b), F.S.; open carrying of a weapon, as defined in s. 790.053 F.S.; exposure of sexual organs, as defined in s. 800.03, F.S.; unlawful possession of a firearm, as defined in s. 790.22(5), F.S.; petit theft, as defined in s. 812.014(3), F.S.; cruelty to animals, as defined in s. 828.12(1), F.S.; arson, as defined in s. 806.031(1), F.S.; and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115, F.S.

<sup>23</sup> Section 943.0585(2)(d), F.S.

<sup>24</sup> Section 943.0585(2)(h), F.S.

<sup>25</sup> Sections 943.09(2) and 943.0585(2), F.S.

- Has not been adjudicated guilty or delinquent for committing any of the acts he or she is currently trying to have sealed or expunged;
- Has not obtained a prior sealing or expunction; and
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before any court.<sup>26</sup>

Once a petition to seal or expunge is submitted, it is up to the court to decide whether the sealing or expunction is appropriate.<sup>27</sup>

#### Effect of the Bill

The bill creates s. 943.0583, F.S., entitled “human trafficking victim expunction,” and provides the following whereas clauses:

- Whereas victims of trafficking may be forced to engage in a variety of illegal acts beyond prostitution;
- Whereas, trafficked persons are not always recognized as victims by the police and prosecutors and plead guilty or did not understand the consequences of criminal charges;
- Whereas, all persons with criminal records reflecting their involvement in the sex industry may face barriers to employment and other life opportunities long after they escape from their trafficking situations; and
- Whereas, there is a genuine need for a workable solution to alleviate the impact of the collateral consequences of conviction for victims of human trafficking.

The bill authorizes a victim of human trafficking to petition the court for the expunction of any conviction for an offense, except an offense listed in s. 775.084(1)(b)1, F.S., committed while he or she was a victim of human trafficking, which offense was committed as a part of the human trafficking scheme of which he or she was a victim, or at the direction of an operator of the scheme. A “victim of human trafficking” is defined as a person subjected to coercion<sup>28</sup> for the purpose of being used in human trafficking, a child under 18 years of age subjected to human trafficking, or an individual subjected to human trafficking as defined by federal law.

A petition must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking (subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition).

The bill requires the petition to include:

- A sworn statement<sup>29</sup> attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation of the victim’s status as a victim of human trafficking, if any exists.

The bill defines “official documentation” as any documentation issued by a federal, state, or local agency tending to show a person's status as a victim of human trafficking. Official documentation of the victim's status creates a presumption that his or her participation in the offense was a result of having been a victim of human trafficking. However, a petition may be granted without official documentation.

The completed petition must be served on the appropriate state attorney or statewide prosecutor and the arresting agency, who can each respond to the court regarding the petition.<sup>30</sup>

<sup>26</sup> Sections 943.059(1)(b) and 943.0585(1)(b), F.S. Any person knowingly providing false information on the sworn statement commits a third degree felony.

<sup>27</sup> Sections 943.0585 and 943.059, F.S.

<sup>28</sup> As defined in s. 787.06, F.S.

<sup>29</sup> Providing false information on the sworn statement is punishable as a third degree felony.

<sup>30</sup> In judicial proceedings on the petition, the petitioner and their attorney may appear telephonically, via video conference, or other electronic means.

The court's determination of the petition must be by a preponderance of the evidence. A determination made without official documentation must be made by a showing of clear and convincing evidence. If a court grants an expunction the bill requires:

- The clerk of the court to certify copies of the order to the appropriate state attorney or the statewide prosecutor, the arresting agency, and to any other agency that the records of the court reflect has received the criminal history record from the court;
- The arresting agency to forward the order to any other agency listed in the court order to which the arresting agency disseminated the criminal history record information to which the order pertains;
- FDLE to forward the order to expunge to the Federal Bureau of Investigation; and
- Criminal justice agencies with custody of the expunged record, except FDLE, to physically destroy the record.

The bill also allows for persons who have had their human trafficking criminal history records expunged to lawfully deny or fail to acknowledge the arrests covered by the expunged record and not face perjury charges or otherwise be liable for giving a false statement for failing to acknowledge an expunged criminal record unless they are a candidate for employment with a criminal justice agency or is a defendant in a criminal prosecution. The bill requires persons to acknowledge such arrests when applying for future sealing or expunctions under ss. 943.059, 943.0585, or 943.0583, F.S.

The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.

The bill makes conforming changes by adding the newly created statute s. 943.0583, F.S., to ss. 943.0582 (relating to juvenile diversion program expunction) and 961.06, F.S. (relating to administrative expunction).

#### B. SECTION DIRECTORY:

Section 1. Amends s. 90.803, F.S., relating to hearsay exceptions; availability of declarant immaterial.

Section 2. Creates s. 943.0583, F.S., relating to human trafficking victim expunction.

Section 3. Amends s. 943.0582, F.S., relating to prearrest, postarrest, or teen court diversion program expunction.

Section 4. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 5. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 6. Amends s. 961.06, F.S., relating to compensation for wrongful incarceration.

Section 7. Provides an appropriation.

Section 8. Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference met on March 21, 2013 and determined this bill may have an insignificant negative impact on state prison beds.

According to FDLE, because dissemination of information concerning these records will be different than the dissemination of information on records expunged under s. 943.0585, F.S., there will be a programming cost of \$99,275. The bill provides an appropriation to cover these costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not have any impact on local government revenues.

2. Expenditures:

The bill does not have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. The bill specifies that an expunged conviction is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings. Currently a sentence can only be vacated in narrow circumstances provided by the Florida Rules of Criminal Procedure.
2. The bill requires that a petition must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking. It is unclear how long a person will have to file a petition under this standard.
3. Under current expunction law, a person can only have one record expunged. The bill does not contain such a limitation.
4. The bill does not clearly establish a standard that courts must use when ruling on a petition.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 19, 2013, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorable as a committee substitute. The first amendment changed the definition of "victim of human trafficking" to conform to federal law. The second amendment added s. 90.803, F.S., to the bill and increased the age of a child to which the hearsay exception applies from 11 to 16.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

On April 9, 2013, the Justice Appropriations Subcommittee adopted two amendments and reported the bill favorably as a Committee Substitute. The first amendment provides that a person who is the subject of a criminal history record that is expunged may deny the arrest unless they are a candidate for employment with a criminal justice agency or is a defendant in a criminal prosecution. The second amendment provides an appropriation for FDLE programming costs and makes minor changes to the whereas clause.

This analysis is drafted to the bill with the amendments as passed by the Justice Appropriations Subcommittee.