

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/CS/SB 1644

INTRODUCER: Appropriations Committee; Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senator Flores

SUBJECT: Victims of Human Trafficking

DATE: April 25, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Sadberry</u>	<u>Hansen</u>	<u>AP</u>	<u>Fav/CS</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/CS/CS/SB 1644 creates section 943.0583, F.S., relating to the expunction of criminal records for victims of human trafficking.

There is an expected fiscal impact of \$99,275 to the Florida Department of Law Enforcement; the bill appropriates nonrecurring general revenue funds in that amount for Fiscal Year 2013-2014 to fund the programming costs associated with this bill. The Office of the State Courts Administrator indicates a fiscal impact is expected; however, the impact is indeterminate.

Specifically, the bill:

- Defines “human trafficking,” “official documentation,” and “victim of human trafficking.”
- Provides a process for victims of human trafficking to petition the court for expunction of the criminal history record of certain crimes committed while a petitioner was the victim of human trafficking;
- Specifies that the standard of proof on an expunction petition is a preponderance of the evidence;

- Treats an expunged conviction as a vacated conviction due to a substantive defect in the underlying criminal proceedings;
- Requires a petitioner to file the petition with due diligence after the victim is no longer a victim of human trafficking or has sought services for victims of human trafficking subject to specified reasonable concerns;
- Creates a presumption that a person participated in an offense as the result of human trafficking if official documentation of the person's status as a victim of human trafficking exists. Otherwise, a person must show clear and convincing evidence that he or she was a victim of human trafficking.
- Provides a list of criteria for an expunction petition; and
- Provides requirements for judicial proceedings related to expunction of records.

The bill has an effective date of October 1, 2013.

In reference to admissibility of hearsay statements under the hearsay exception provided in s. 90.803(23), F.S., this bill increases the age of child victims from 11 to 16 years old.

This bill substantially amends the following sections of the Florida Statutes: 90.803, 943.0582, 943.0585, 943.059, and 961.06.

This bill creates section 943.0583, Florida Statutes.

II. Present Situation:

Human Trafficking

In 2000, the United States enacted the Trafficking Victims Protection Act (TVPA), and the United Nations adopted the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, also known as the Palermo Protocol.¹

The Palermo Protocol focused the attention of the global community on combating human trafficking. For the first time, an international instrument called for the criminalization of all acts of trafficking, including forced labor, slavery, and slavery-like practices. The Palermo Protocol also proposed a victim-centered approach to governmental response through prevention, criminal prosecution, and victim protection.² These protection efforts seek to provide appropriate services to the survivors, maximizing their opportunity for a comprehensive recovery.³

Survivors of human trafficking often face both criminalization and stigmatization long after they escape from their trafficking situations. Despite being victims, individuals who are trafficked are often arrested and convicted of prostitution and related offenses. Trafficked persons are not often recognized or treated as victims by law enforcement agencies and prosecutors, and are therefore pressured into pleading guilty or do not understand the consequences of the charges. Multiple

¹ U.S. Department of State, *Trafficking in Persons Report 2010*, available at <http://www.state.gov/documents/organization/142980.pdf>.

² *Id.*

³ U.S. Department of State, *Trafficking in Persons Report 2012*, available at <http://www.state.gov/documents/organization/192587.pdf>.

arrests, incarceration, police violence, deportation, and employment and housing discrimination may result.⁴

In 2010, New York became the first state to enact legislation that allows survivors of trafficking to vacate their convictions for prostitution offenses.^{5,6} While every state has a slightly different criminal procedure into which this type of remedy must fit, the central purpose of the law is to give survivors the ability to live their lives unhindered by a criminal record: “Even after they escape from sex trafficking, the criminal record victimizes them for life. This bill would give victims of human trafficking a desperately needed second chance they deserve.”⁷

The Urban Justice Center in New York, instrumental in drafting the law, recommends that a strong state law on vacating convictions should:

- Not be limited to vacating only certain prostitution offenses;
- Not require the survivor to present official documentation certifying them as a victim of trafficking;
- Not require the survivor to prove that he or she has left the sex industry or been “rehabilitated;”
- Offer confidentiality provisions to protect the client’s identity;
- Be the most complete remedy possible under the law;
- State that the court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements;
- Allow the court to take additional appropriate action beyond the mandate of the statute;
- Be retroactive and inclusive of victims with older convictions; and
- Ensure availability of the remedy by funding legal services attorneys.

Penalties for Human Trafficking in Florida Law

The Florida Legislature established penalties for crimes involving human trafficking in 2004.⁸ Along with establishing human trafficking as a crime, the Legislature introduced the concept of coercion as a critical element to the crime of human trafficking. Today, s. 787.06(2)(a), F.S., defines coercion as:

- Using or threatening to use physical force against any person;

⁴ Melissa Broudo and Sienna Baskin, *Vacating Criminal Convictions For Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. Urban Justice Center. The Sex Workers Project (April 3, 2012) available at <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

⁵ N.Y. CRIM. PROC. LAW § 440.10(1)(i)

⁶ As of June 2012, Hawaii became the sixth state to implement a law to allow criminal records related to human trafficking to be vacated. The Washington Times. *Hawaii: New law allows trafficking victims to vacate prostitution convictions* (June 11, 2012) available at <http://communities.washingtontimes.com/neighborhood/rights-so-divine/2012/jul/11/hawaii-new-law-allows-trafficking-victims-expunge/>.

⁷ Melissa Broudo and Sienna Baskin, *Vacating Criminal Convictions For Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. Urban Justice Center. The Sex Workers Project (April 2012) available at <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

⁸ Chapter 2004-391, L.O.F.

- Restraining, isolating, or confining or threatening to restrain, isolate, or confine any person without lawful authority and against her or his will;
- Using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services is not applied toward the liquidation of the debt, or the length and nature of labor or services is not proportional to the debt;
- Destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person;
- Causing or threatening to cause financial harm to any person;
- Enticing or luring any person by fraud or deceit; or
- Providing a controlled substance listed in the schedule of controlled substances to any person to exploit them.

Expungement

Section 943.0585, F.S., provides the courts considerable discretion in the expunction of criminal history records, provided that certain requirements are met.

Requirements for Eligibility of Expunction

- The person seeking expunction must apply for and receive a certificate of eligibility.
- Criminal history records of certain violations are ineligible for expunction, which are charges of:
 - Sexual misconduct by staff with a client at a facility serving developmentally disabled persons (s. 393.135, F.S.)
 - Sexual misconduct by a public health employee with a patient (s. 394.4593, F.S.)
 - Luring or enticing a child (s. 787.05, F.S.)
 - Sexual battery (ch. 794, F.S.)
 - Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.)
 - Lewd or lascivious offenses upon or in the presence of persons under 16 (s. 800.04, F.S.); Lewd or lascivious against or in the presence of the elderly or a disabled person (s. 825.1025, F.S.)
 - Voyeurism (s. 810.04, F.S.)
 - Violations of the Florida Communications Fraud Act (s. 817.034, F.S.)
 - Use or viewing of a child in a sexual performance (s. 827.071, F.S.)
 - Offenses by county or municipal officers or employees (ch. 839, F.S.)
 - Showing obscene material to a minor (s. 847.0133, F.S.)
 - Violations of the Computer Pornography and Child Exploitation Prevention Act (s. 847.0135, F.S.)
 - Selling or buying of minors (s. 847.0145, F.S.)
 - Drug trafficking (s. 893.135, F.S.)
 - Sexual misconduct with a client at a civil or forensic facility (s. 916.1075, F.S.)
 - One of the enumerated, dangerous crimes justifying pretrial detention (s. 907.041, F.S.)
 - Sexual offender crimes (s. 775.21, F.S.)⁹

⁹ Section 943.0585, F.S.

The court is limited to expunging one criminal record of an arrest or incident, unless additional arrests relate directly to the original arrest.¹⁰

Petitions for Expunction

Petitions for expunction must include:

- A valid certificate of eligibility for expunction issued by the Florida Department of Law Enforcement (Department).
- A sworn statement from the petitioner attesting that the petitioner has never been adjudicated guilty or delinquent of an offense that would require fingerprinting as a juvenile; has not been adjudicated guilty or delinquent of any of the acts stemming from the arrest or criminal activity to which the petition pertains; has never secured a prior sealing or expunction, unless it is for a record previously sealed for 10 years; and believes him or herself to be eligible for an expunction.¹¹

Certificate of Eligibility

The Department must issue a certificate of eligibility if:

- The petitioner submits a written, certified copy of the disposition of the charge at issue and a statement from the prosecutor which provides that no charging document was filed or issued in the case; if a prosecutor filed a charging document, the case was dismissed or the state entered a nolle prosequi, and that none of the charges at issue resulted in a trial;
- The criminal history record does not contain one of the prohibited offenses;
- The petitioner pays the \$75 processing fee;
- The petitioner meets the requirements for expunction such as prior sealing and expunction;
- The petitioner is not under court supervision; and
- The petitioner has previously received a 10 year court order sealing the record at issue.¹²

Effect of Criminal History Record Expunction

When the court orders expunction of a record, any criminal justice agency with custody of the record other than the department must destroy the record. The Department is required to retain the record; however, the record remains confidential and exempt from disclosure as a public record.¹³

Upon expunction, the person identified as a perpetrator in an expunged record may lawfully deny or fail to acknowledge the arrests, except when the person:

- Is a candidate for employment with a criminal justice agency;

¹⁰ *Id.*

¹¹ Section 943.0585(1)(b), F.S.

¹² Section 943.0585(2), F.S.

¹³ Section 943.0585(4), F.S.

- Is a criminal defendant;
- Is petitioning for a sealing or expunction of records;
- Is a candidate for admission to The Florida Bar;
- Is seeking employment, licensure, or a contract with the Department of Children and Family Services, the Division of Vocational Rehabilitation, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elder Affairs, the Department of Juvenile Justice, the Department of Education, or a local education entity or government entity that licenses child care facilities.
- Is seeking authorization for employment from a seaport.¹⁴

Vacation or Motions for Vacatur

The principle behind vacatur is that of a legal action being undone. Vacatur is defined as “the act of annulling or setting aside.”¹⁵

Hearsay Evidence

Chapter 90, F.S., provides the Florida Code on Evidence. Section 90.802, F.S., provides that hearsay evidence is generally inadmissible. Section 90.803, F.S., provides exceptions to inadmissibility, irrespective of whether a declarant is available. One of the exceptions is for out-of-court statements made by a child victimized by child abuse or neglect, including sexual abuse.¹⁶ These statements are admissible as evidence unless the source of information is unreliable, provided that a child victim is of an actual, mental, emotional, or developmental age of 11 years old or younger.¹⁷

III. Effect of Proposed Changes:

This bill creates s. 943.0583, F.S., to address expunction of criminal records for offenses committed while a person is a victim of human trafficking:

- Defines “human trafficking,” “official documentation,” and “victim of human trafficking.”
- Authorizes, but does not require, the courts to order a criminal justice agency to expunge the criminal history record of a victim of human trafficking who complies with the requirements for expunction.
 - Authorizes a person to petition for the expunction of any conviction for an offense committed while he or she was a victim of human trafficking, unless the offense is for an enumerated crime listed in s. 775.084(1)(b)1., F.S.¹⁸
 - Provides a standard of proof for the petition as a preponderance of the evidence.

¹⁴ Section 943.0585(4)(a), F.S.

¹⁵ BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁶ Section 90.803(23)(a), F.S.

¹⁷ *Id.*

¹⁸ Section 775.084(1)(b)1., F.S., lists the crimes of arson, sexual battery, robbery, kidnapping; aggravated child abuse, aggravated abuse of an elderly person or disabled adult, aggravated assault with a deadly weapon, murder, manslaughter, aggravated manslaughter of an elderly person or disabled adult, aggravated manslaughter of a child, unlawful throwing, placing, or discharging of a destructive device or bomb, armed burglary, aggravated battery, and aggravated stalking.

- Treats a conviction expunged under this section as vacated due to a substantive defect in the underlying criminal proceedings.
- Requires a petitioner to file a petition 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 through bringing the petition.
- Creates a presumption that official documentation of status as a victim of human trafficking shows that participation in the offense was a result of having been a victim of human trafficking.
- Provides that a determination made without official documentation requires clear and convincing evidence.
- Requires petitions for expunction to contain:
 - The petitioner's sworn statement attesting that the petitioner is eligible for expunction to and does not have any other petition to expunge or seal pending before any court.
 - Official documentation of the petitioner's status as a victim of human trafficking, if any exists.

Any person who knowingly provides false information on a sworn statement to the court commits a third degree felony.

- In judicial proceedings relating to expunction:
 - The clerk must serve a copy of the completed petition to expunge to the appropriate state attorney or the statewide prosecutor and the arresting agency. The appropriate state attorney or the statewide prosecutor and the arresting agency may respond to the court;
 - The petitioner or the petitioner's attorney may appear at any hearing under this section telephonically, via video conference, or by other electronic means;
 - If the court grants the expunction, the clerk of the court is required to certify copies of the order to the appropriate prosecutor's office and the arresting agency. The arresting agency is responsible for forwarding the order to any other agency listed in the court order to which the arresting agency disseminated the criminal history record information. The Florida Department of Law Enforcement (Department) must forward the order to expunge to the Federal Bureau of Investigation (FBI). The clerk of the court must certify a copy of the order to any other agency that the records of the court reflect has received the criminal history record from the court.
- When any criminal history record of a minor or an adult is ordered expunged by the court:
 - The record must be physically destroyed by any criminal justice agency with custody of the record, except that the Department must retain the criminal history record;
 - The petitioner of a criminal history record that is expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record; and
 - A person who has been granted an expunction may not be charged with perjury or the making of a false statement for failure to acknowledge an expunged record.

Key differences provided in this bill for victims of human trafficking, compared to the traditional expunction process currently in law are that this bill:

- Creates a new basis for expunction, which is that the petitioner was a victim of human trafficking at the time of the offense.
- Extends the opportunity to expunge to convictions, rather than just arrests or dismissals.
- Treats an expunction as a vacation due to a substantive defect in the underlying criminal proceedings.
- Provides a different set of offenses for which the petitioner may not seek expunction, although some offenses overlap.
- Does not appear to require the Florida Department of Law Enforcement to issue a certificate of eligibility, and instead only requires the petitioner to file a sworn statement with the court.
- Does not require a person who is granted an expunction to disclose the underlying offense or offenses to anyone, irrespective of future employment involving contact with vulnerable persons, unless they are a candidate for employment with a criminal justice agenda or a defendant in a criminal prosecution case.

This bill increases the age of child victims from 11 to 16 years old, in reference to admissibility of hearsay statements under the hearsay exception provided in s. 90.803(23), F.S.

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In addition to addressing expunctions of convictions for victims of human trafficking, this bill increases the age of child victims from 11 to 16 years old, in reference to admissibility of hearsay statements under the hearsay exception provided in s. 90.803(23), F.S. Article III, Section 6, of the State Constitution provides, in part: “Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” The title of the bill reads: “An act relating to the victims of human trafficking.” The title of the bill does not appear to capture the language addressing the hearsay exception. Additionally, the bill may contain multiple subjects, in violation of the constitutional single-subject requirement.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Department of Law Enforcement (Department) indicates an expected fiscal impact for programming, relating to dissemination of information, pursuant to this bill. The Department estimates a fiscal impact of \$99,275, related to programming costs, as a result of the bill. That amount of nonrecurring general revenue is appropriated in the bill for Fiscal Year 2013-2014 to fund these costs. The Department also indicates a need for additional time to implement the provisions of this bill, and requests an effective date of October 1, 2014.¹⁹

The Office of State Courts Administrator (OSCA) indicates that an impact is expected. The extent of filings for expunction on the basis of status as a victim of human trafficking is speculative, however. The OSCA acknowledges that while some increase in judicial workload is likely, the OSCA can absorb the workload with existing resources.²⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS/CS by Appropriations on April 23, 2013:**

This committee substitute:

- Appropriates the sum of \$99,275 in nonrecurring general revenue to the FDLE to fund programming costs for the 2013-2014 fiscal year.

¹⁹ Florida Dept. of Law Enforcement, *Senate Fiscal Note for CS/SB 1644* (March 22, 2013) (on file with the Senate Committee on Children, Families, and Elder Affairs and the Committee on Judiciary).

²⁰ Office of the State Courts Administrator, *2013 Judicial Impact Statement for CS/SB 1644* (March 26, 2013) (on file with the Senate Committee on Children, Families, and Elder Affairs and the Committee on Judiciary).

- Except as otherwise provides, adds an effective date of January 1, 2014, except that the FDLE or any other criminal justice agency is not required to comply with an order to expunge a criminal history record as required before March 1, 2014.
- Clarifies that a person may lawfully deny or fail to acknowledge any arrest covered by the expunged records, except when the person is a candidate for employment with a criminal justice agency or a defendant in a criminal prosecution case.

CS/CS by Judiciary Committee on April 8, 2013:

This committee substitute:

- Corrects a technical error.
- Increases the age of a child victim from 11 to 16, under the hearsay exception provided in s. 90.803(23).

CS by Children, Families, and Elder Affairs on March 18, 2013:

The committee substitute amends the term “victim of human trafficking” to remove the provision that minors who are victims of human trafficking are victims based on coercion.

B. Amendments:

None.