HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 409 Offenses Against Vulnerable Persons
SPONSOR(S): Judiciary Committee; Criminal Justice Subcommittee; Passidomo and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 588

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Cox	Cunningham
2) Justice Appropriations Subcommittee	13 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee	15 Y, 0 N, As CS	Cox	Havlicak

SUMMARY ANALYSIS

Section 825.103(1), F.S., defines "exploitation of an elderly person or disabled adult," (vulnerable adult) as:

- Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, a vulnerable adult's property with the intent to temporarily or permanently deprive the adult of the use, benefit, or possession of the property, or to benefit someone other than the vulnerable adult, by a person who stands in a position of trust and confidence with the adult, or has a business relationship with the adult;
- Breaching a fiduciary duty to a vulnerable adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

The bill deletes the requirement that a person use deception or intimidation to obtain or use a vulnerable adult's funds, assets, or property. The bill specifies that "unauthorized appropriation" occurs when a vulnerable adult does not receive reasonably equivalent financial value in goods or services or when fiduciaries violate specified duties.

The bill creates additional instances that constitute exploitation of a vulnerable adult by adding the following paragraphs to s. 825.103(1), F.S.:

- Misappropriating, misusing, or transferring without authorization (misuse) money belonging to a vulnerable adult from specified accounts in which the vulnerable adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misuse; or
- Intentionally or negligently failing to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence with the vulnerable adult.

The bill also:

- Decreases the property threshold values for exploitation of vulnerable adults offenses;
- Creates a permissive presumption that specified property transfers are the result of exploitation;
- Requires the court in specified cases to return the vulnerable adult's property before trial if, after conducting an evidentiary hearing, the court makes certain findings; and
- Limits the admissibility of an out-of-court statement to instances when a vulnerable adult is unavailable.

The bill enhances penalties for stealing the personal identification information of persons 60 years of age or older.

On March 3, 2014, the Criminal Justice Impact Conference determined that CS/HB 409 will have an insignificant negative prison bed impact on the Department of Corrections.

The bill is effective October 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Elderly and Disabled Populations

The 2010 Census recorded the greatest number and proportion of people aged 65 and over in the history of the United States - 40,300,000, or 13% of the total population.[1] In 2010, Florida had the highest proportion of people over the age of 65, making up 17% of the total state population.[2]

In 2011, there were 11,468,487 people aged 18 to 64 in Florida.[3] Of that number of people, 1,131,661, or 9.9%, had at least one disability.[4] The number of individuals aged 65 and older in Florida in 2011 totaled 3,296,861.[5] Of that number of people, 1,136,372, or 34.5%, had at least one disability.[6]

Nationwide, life expectancies of individuals reaching the ages of 65 and 85 are increasing. Individuals who survive to the age of 65 can be expected to live another 19.2 years.[7] As the population of elderly and disabled persons in Florida increases, so does the pool of potential victims of abuse.

Financial Exploitation of Elderly Persons and Disabled Adults

According to the National Center on Elder Abuse, financial exploitation of the elderly includes "the illegal or improper use of an elder's funds, property, or assets."[8] For example, forging an older person's signature, misusing or stealing an older person's money or possessions, coercing or deceiving an older person into signing a document, and improperly using a conservatorship, guardianship, or power of attorney are examples of financial exploitation.[9] Similar offenses are often committed against disabled adults, who can be equally vulnerable to financial crimes.

Financial exploitation of the elderly and disabled is reported less than other forms of abuse. It is believed that only 1 in 14 cases of financial exploitation against disabled adults are reported and that the yearly number of cases nationwide could exceed 850,000.[10] The "typical" victim of financial exploitation is between 70 and 89 years of age, Caucasian, female, frail, and cognitively impaired.[11] It has been estimated that the financial loss to victims as a result of these types of crimes is at least $2.9 billion nationwide.[12]

Florida Law – "Exploitation of an Elderly Person or Disabled Adult"

---

[1] Administration on Aging, National Center for Elder Abuse, *America's Growing Elderly Population*, available at www.ncea.aoa.gov/Library/Data/index.aspx (citing U.S. Department of Commerce, U.S. Census Bureau, *The older population: 2010*, 2011, Publication C2010BR-09) (last visited on February 3, 2014).

[2] *Id.*

[3] U.S. Department of Commerce, U.S. Census Bureau, American FactFinder, *Selected Social Characteristics in the U.S.-Florida-2011 American Community Survey 1 year estimates*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP02&prodType=table (last visited on February 3, 2014).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 24.

[8] The National Center on Elder Abuse, *Types of Abuse- Financial or Material Exploitation*, http://ncea.aoa.gov/faq/index.aspx (last visited on February 3, 2014).

[9] *Id.*

[10] MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University, *Broken Trust: Elders, Family, and Finances, A Study on Elder Financial Abuse Prevention*, March 2009, page 8; see also The National Committee for the Prevention of Elder Abuse and The National Adult Protective Services Association, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, February 2006, page 20.

[11] *Id.*

[12] Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, Hastings Law Journal, Vo. 65, No. 4 at 125 (2014) (on file with the Criminal Justice Subcommittee). This report is further cited as "*Preying on the Graying*."

Section 825.101, F.S., defines the following terms:

- "Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning to the extent that the ability to provide adequately for his or her own care is impaired; and
- "Disabled adult" means a person 18 years or older who suffers from physical or mental incapacitation due to developmental disability, organic brain damage, or mental illness, or has at least one physical or mental limitation that restricts his or her ability to perform normal activities of daily living.

Section 825.103(1), F.S., defines exploitation of an elderly person or disabled adult (vulnerable adult) as:

(a) Knowingly, by deception[13] or intimidation,[14] obtaining or using, or endeavoring to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the vulnerable adult, by a person who:
    - Stands in a position of trust and confidence with the vulnerable adult; or
    - Has a business relationship with the vulnerable adult;

(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the vulnerable adult, by a person who knows or reasonably should know that the vulnerable adult lacks the capacity to consent;[15] or

(c) Breaching a fiduciary duty to a vulnerable adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

If the funds, assets, or property involved in a violation of the offense are:

- Valued at $100,000 or more, it is a first degree felony;[16]
- Valued at $20,000 or more but less than $100,000, it is a second degree felony;[17] and
- Valued at less than $20,000, it is a third degree felony.[18]

The offenses listed above are currently ranked at level 8, level 7, and level 6, respectively, for purposes of the Criminal Punishment Code offense severity ranking chart.[19]

Effect of the Bill

The bill amends paragraph (a) of the definition of "exploitation of an elderly person or disabled adult" to delete the requirement that a person use *deception or intimidation* to obtain or use a vulnerable adult's

[13] Section 825.101(3), F.S., defines "deception" as misrepresenting or concealing a material fact relating to: services rendered, disposition of property, or use of property, when such services or property are intended to benefit an elderly person or disabled adult; terms of a contract or agreement entered into with an elderly person or disabled adult; or an existing or preexisting condition of any property involved in a contract or agreement entered into with an elderly person or disabled adult; or using any misrepresentation, false pretense, or false promise in order to induce, encourage, or solicit an elderly person or disabled adult to enter into a contract or agreement.

[14] Section 825.101(8), F.S., defines "intimidation" as the communication by word or act to an elderly person or disabled adult that the elderly person or disabled adult will be deprived of food, nutrition, clothing, shelter, supervision, medicine, medical services, money, or financial support or will suffer physical violence.

[15] Section 825.101(9), F.S., defines "lacks capacity to consent" as an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause, that causes an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning the elderly person's or disabled adult's person or property.

[16] A first degree felony is punishable by up to 30 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.

[17] A second degree felony is punishable by up to 15 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.

[18] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.

[19] The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant's sentence is calculated based, in part, on points assigned for the offense severity ranking. The points are added in order to determine the "lowest permissible sentence" for the offense. Section 921.0022, F.S.

funds, assets, or property.[20] This will allow a prosecutor to pursue charges against an individual who exploits a vulnerable adult in a broader range of instances.

The bill expands paragraph (c) of the definition of "exploitation of an elderly person or disabled adult" to include trustees who are individuals (rather than only guardians and agents) and specifies that an "unauthorized appropriation" occurs when a:

- Vulnerable adult does not receive the reasonably equivalent financial value in goods or services; or
- Fiduciary appointed under chs. 709, 736, and 744, F.S., violates specified duties.

The bill creates additional instances that constitute "exploitation of an elderly person or disabled adult" by adding the following paragraphs:

(d) Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer. This paragraph only applies to the following types of accounts:
    1. Personal accounts;
    2. Joint accounts created with the intent that only the elderly person or disabled adult enjoys all rights, interests, and claims to moneys deposited into such account; or
    3. Convenience accounts created in accordance with s. 655.80, F.S.; or

(e) Intentionally or negligently failing to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver[21] or a person who stands in a position of trust and confidence with the vulnerable adult.

The bill lowers the property threshold amounts applicable to s. 825.103, F.S., providing that if the funds, assets, or property involved in a violation of the offense are:

- Valued at $50,000 or more, it is a first degree felony;
- Valued at $10,000 or more but less than $50,000, it is a second degree felony; and
- Valued at less than $10,000, it is a third degree felony.

In cases where the taking of or loss of the vulnerable adult's property is valued at more than $5,000 and the property belonging to the victim is seized from the defendant pursuant to a search warrant, the bill requires the court to:

- Conduct an evidentiary hearing to determine if the defendant unlawfully obtained the victim's property; and
- Order that the property be returned to the victim before trial if the court finds, by a preponderance of the evidence, that the defendant unlawfully obtained the property.

The evidentiary hearing is for restitution purposes only, and the court's finding that the defendant unlawfully obtained the property is inadmissible at trial and does not give rise to any inference that the defendant has committed an offense under s. 825.103, F.S.

The bill makes conforming changes to ss. 775.0844 and 921.0022, F.S., and reenacts s. 772.11, F.S., relating to civil remedy for theft or exploitation, to incorporate changes made by the bill.

Permissive Presumption for Financial Exploitation of Elderly Persons

Permissive Presumptions

A presumption in a legal proceeding is an assumption of the existence of a fact which is in reality unproven by direct evidence.[22] A presumption is derived from another fact or group of facts that has

[20] The bill also deletes the definitions of the terms "deception" and "intimidation" as they are no longer applicable to ch. 825, F.S.

[21] Section 825.101(2), F.S., defines "caregiver" to mean a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. "Caregiver" includes, but is not limited to, relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of facilities as defined in s. 825.101(7), F.S.

been proven in the action.[23] There are two types of presumptions: conclusive presumptions, which *require* the jury to find the presumed fact if the underlying facts are proved; and permissive presumptions, which *allow*, but do not require, the jury to find the presumed fact if it finds the underlying fact to be true.[24]

Hundreds of presumptions exist in American jurisprudence.[25] There are several premises that support the creation of presumptions in the law, including fairness, the desire to advance substantive policies, and the need for some procedure to resolve certain issues that could not otherwise be resolved due to a lack of proof.[26] The strongest justification for most presumptions is the probabilistic determination that the existence of certain facts can be logically inferred from other facts.[27]

Prosecutions of Financial Exploitation of Elderly Persons
Prosecutions under s. 825.103, F.S., often face significant roadblocks due to the difficulty in proving that what may superficially look like voluntary gifts or loans is actually exploitation.[28] Exploited elders frequently are unable, and sometimes unwilling, to effectively assist prosecutors.[29] Prosecutions are further complicated by the fact that the transactions often occur in secret, and that often times the elderly person may not be a good witness as a result of cognitive or other impairments.[30]

Section 825.103, F.S., does not currently provide any presumptions.

Effect of the Bill
The bill creates a permissive presumption in s. 825.103, F.S., that an inter vivos transfer of money or property by a person 65 or older with the following characteristics was the result of exploitation:

- The property transferred is valued in excess of $10,000 at the time of the transfer;[31]
- The property is transferred to a nonrelative who knew the elderly person for fewer than 2 years before the first transfer; and
- The elderly person did not receive the reasonably equivalent financial value in goods or services from the transfer.

This presumption applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan. However, the presumption does not apply to a valid loan *evidenced in writing* that includes definite repayment dates, unless repayment of such loan is in default, in whole or in part, for more than 65 days. The bill provides exemptions from the presumption for:

- Persons who are in the business of making loans; or
- Bona fide charitable donations to nonprofit organizations that qualify for tax exempt status under the Internal Revenue Code.

The bill also requires the court to instruct the jury that:

- They may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in this subsection; and
- The presumption imposes no burden of proof on the defendant.

This presumption does not apply to a disabled adult, unless such disabled adult is also 65 years of age or older.

---

[22] *Ibarrondo v. State*, 1 So.3d 226, 232 (Fla. 5th DCA 2008) ("A presumption permits or requires a fact finder to assume the existence of a presumed or ultimate fact after certain basic or preliminary facts have already been established.").
[23] *Id*.
[24] *Marcolini v. State*, 673 So.2d 3, 5 (Fla. 1996); *See also State v. Rygwelski*, 899 So.2d 498, 501(Fla. 2d DCA 2005) and *Ibarrondo*, 1 So.3d at 232.
[25] *Preying on the Graying*, at 125.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 106.
[31] The bill provides that it does not matter whether the transfer was made in a single transaction or multiple transactions.

Personal Identification Information

Section 817.568, F.S., contains a variety of provisions criminalizing the fraudulent use of a person's personal identification information.[32] For example, the statute makes it a third degree felony for a person to willfully and without authorization fraudulently use, or possess with intent to fraudulently use, personal identification information concerning an individual without first obtaining that individual's consent. The statute provides enhanced penalties if the pecuniary benefit exceeds a specified amount, if the person fraudulently uses the information of more than a certain number of people, or if the person commits the offense for purposes of harassment.

Subsections (6) and (7) of the statute makes it a second degree felony for a person:

- To willfully and without authorization fraudulently use personal identification information concerning an individual who is less than 18 years of age without first obtaining the consent of that individual or of his or her legal guardian.
- Who is in the relationship of parent or legal guardian, or who otherwise exercises custodial authority over an individual who is less than 18 years of age, to willfully and fraudulently use personal identification information of that individual.

Effect of the Bill

The bill expands the application of s. 817.568(6) and (7), F.S., enhancing the criminal penalties for a person to fraudulently use the personal identification information of a person who is 60 years of age or older, as well as a person less than 18 years of age.

Hearsay Exception for Vulnerable Adults

Hearsay in Criminal Cases

"Hearsay" is a statement,[33] other than one made by the declarant[34] while testifying at trial or a hearing,[35] offered in evidence to prove the truth of the matter asserted.[36] Currently, hearsay statements are not admissible at trial unless a statutory exception applies.[37]

Section 90.803(24), F.S., creates a hearsay exception specifically relating to vulnerable adults. 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 vulnerable adult describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant vulnerable adult, not otherwise admissible, 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;[38] and

---

[32] Section 817.568, F.S., defines "personal identification information" as any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

- Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.

[33] A "statement" is either an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion; *See* s. 90.801(1)(a), F.S.

[34] The "declarant" is the person who made the statement; *See* s. 90.801(1)(b), F.S.

[35] Often referred to simply as an "out-of-court statement."

[36] Section 90.801(1)(c), F.S.

[37] Section 90.802, F.S.

[38] In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate.

- The vulnerable adult either:
  - Testifies; *or*
  - Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability must include a finding by the court that the vulnerable adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1), F.S.[39]

The party seeking to introduce a hearsay statement under the exception at s. 90.803, F.S., bears the burden of establishing that the declarant is unavailable as a witness at a pretrial hearing.[40]

Confrontation Clause and the Admissibility of Hearsay Statements
Since the hearsay exception for vulnerable adults was enacted,[41] the United States Supreme Court (Court) has held the admission of certain out-of-court statements violates the Confrontation Clause of the Sixth Amendment.[42,43] In *Crawford*, the Court held that before an out-of-court statement that is testimonial in nature[44] can be admissible in a criminal proceeding the Confrontation Clause requires the:

- Declarant to be unavailable;[45] and
- Defendant to have had a prior opportunity to cross-examine such declarant.

The Court later held that the distinction of whether evidence is testimonial or nontestimonial in nature rests on the primary purpose of the statement, specifically:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[46]

---

[39] 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.

[40] *See Jones v. State*, 678 So.2d 309, 314 (Fla. 1996).
[41] The hearsay exception in s. 90.803(24), F.S., was enacted by the Legislature in 1995. *Conner v. State*, 748 So.2d 950, 957 (Fla. 1999).
[42] *Crawford v. Washington*, 124 S.Ct. 1354 (2004).
[43] The Sixth Amendment of the U.S. Constitution provides, in part: "In all criminal prosecutions….the accused shall enjoy the right to….be confronted with the witnesses against him."
[44] The Court held that "testimonial evidence" includes at a minimum "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 124 S.Ct. at 1374. The Court also cited to other opinions it has rendered about what constitutes "testimonial evidence," including affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; or extrajudicial statements { "pageset": "S9a … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. *Crawford*, 124 S.Ct. at 1364.
[45] The Florida Supreme Court has held that "in order for a witness to be unavailable for confrontation purposes, the State must make a good faith showing of attempting to secure the witness. This includes going to reasonable lengths to procure the witness." *State v. Johnson*, 982 So.2d 672 (Fla. 2008), citing *Ohio v. Roberts*, 100 S.Ct. 2531 (1980).
[46] *Davis v. Washington*, 126 S.Ct. 2266, 2273 (2006).

Further, in *State v. Hosty,* the Florida Supreme Court has examined s. 90.803(24), F.S., in light of *Crawford* and held that the Confrontation Clause requires the declarant to be unavailable for testimonial hearsay statements to be admissible.[47]

The statute is not currently in conformance with these rulings since it states certain hearsay statements may be admitted even if the declarant testifies.

Effect of the Bill

The bill amends s. 90.803(24), F.S., deleting the language that allows a testimonial hearsay statement to be admissible even if the declarant testifies, thus conforming this exception to the holding in *Crawford* and *Hosty*.

Even though not stated in the statute, the requirement that the accused must have a prior opportunity to cross examine still applies to the admission of these types of statements based on case law.

B. SECTION DIRECTORY:

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

Section 2. Amends s. 817.568, F.S., relating to criminal use of personal identification information.

Section 3. Amends s. 825.101, F.S., relating to definitions.

Section 4. Amends s. 825.103, F.S., relating to exploitation of an elderly person or disabled adult; penalties.

Section 5. Amends s. 775.0844, F.S., relating to White Collar Crime Victim Protection Act.

Section 6. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 7. Reenacts s. 772.11, F.S., relating to civil remedy for theft or exploitation.

Section 8. Provides an effective date of October 1, 2014.

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:

   On March 3, 2014, the Criminal Justice Impact Conference determined that CS/HB 409 will have an insignificant negative prison bed impact on the Department of Corrections.

FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

[47] 944 So.2d 255 (Fla. 2006).

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

2. Expenditures:

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

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides a mechanism in specified instances for the court to return a vulnerable person's stolen property prior to trial. As a result, the victims of these crimes could be made whole at a much earlier stage in the litigation process than otherwise possible.

C. 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:

The Due Process Clauses of the United States and Florida Constitutions require the State to prove every element of a criminal offense beyond a reasonable doubt.[48] Conclusive presumptions that shift the burden of persuasion as to a statutorily defined element of the offense to the defendant are impermissible under the Due Process Clause.[49] Permissive presumptions can be constitutional, but only if they do not shift the burden of persuasion to the defendant.[50]

When reviewing a permissive presumption, the United States Supreme Court requires the challenging party to demonstrate its invalidity as applied.[51] Since a permissive presumption allows the trier of fact to accept or reject the inference and does not shift the burden of proof, the only instance that affects the application of the "beyond a reasonable doubt" standard is if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.[52] This is the only situation where any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination.[53]

For a permissive inference to withstand constitutional challenge, a rational connection must exist between the facts in the record and the ultimate fact to be presumed.[54] A permissive presumption will be upheld if it can be said with substantial assurance that the presumed fact is more likely to flow from the proved fact on which it is made to depend.[55]

The bill creates a permissive presumption of exploitation if the State proves the occurrence of an inter vivos transfer in excess of $10,000 by an elderly person to someone the elderly person knew

[48] *Burttram v. State*, 780 So.2d 224 (Fla. 2d DCA 2001).
[49] *Francis v. Franklin*, 105 S.Ct. 1965, 1971 (1985); *Sandstrom v. Montana*, 99 S.Ct. 2450, 2459 (1979); *State v. Rolle*, 560 So.2d 1154, 1159 (Fla. 1990); and *Tatum v. State*, 857 So.2d 331 (Fla. 2d DCA 2003).
[50] *County Court of Ulster County, N. Y. v. Allen*, 99 S.Ct. 2213 (1979).
[51] *U.S. v. Gainey*, 85 S.Ct. 754, 757 (1965); *Turner v. U.S.*, 90 S.Ct. 642, 653 (1970); *Barnes v. U.S.*, 93 S.Ct. 2357, 2362 (1793).
{ "pageset": "S72
[52] *Allen*, 99 S.Ct. at 2225.
[53] *Id*.
[54] *Id*.; *See also Marcolini v. State*, 673 So.2d 3 (Fla. 1996).
[55] *State v. Brake*, 796 So.2d 522 (Fla. 2001).

less than two years, which did not result in receipt of reciprocal value in goods or services. To the extent that the bill relieves the State of their obligation to prove the elements of a specified instance of exploitation of an elderly person beyond a reasonable doubt, the presumption could be challenged as being unconstitutional.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 5, 2014, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Correct terminology to provide consistency;
- Clarify that exploitation of the vulnerable person results from a fiduciary violating specified duties, rather than the vulnerable adult;
- Clarify terminology; and
- Provide enhanced penalties for stealing the personal identification information of those 60 or older.

On March 21, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified the definition of "exploitation of an elderly person or disabled adult" and clarified that the trustees referenced in the bill are only those trustees who are individuals.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.