

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 115 Sentencing  
**SPONSOR(S):** Gaetz  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 732

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N	Cox	Cunningham
2) Justice Appropriations Subcommittee	11 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee	17 Y, 0 N	Cox	Havlicak

### SUMMARY ANALYSIS

Section 775.089, F.S., requires a judge to order a defendant convicted of any criminal offense to make restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense, and damage or loss related to the defendant's criminal episode. The statute currently defines the term "victim," in part, as:

- Each *person* who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

While the definition of "victim" does not currently define the word "person," s. 1.01(3), F.S., defines the word "person" to "include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Read in conjunction, it appears that governmental entities and political subdivisions (governmental entities) can be "victims" for purposes of restitution. However, some Florida District Courts have held that governmental entities are barred from obtaining an order of restitution because they are not considered "victims" for purposes of restitution.

The bill amends the definition of "victim" in s. 775.089(1)(c), F.S., to clarify that the term includes governmental entities and political subdivisions when such entities are a direct victim of the defendant's offense or criminal episode and not merely providing public services in response to the offense or criminal episode.

The bill also creates ss. 838.23 and 839.27, F.S., to require a judge to order a person convicted of any offense in chs. 838 (entitled "Bribery; Misuse of Public Office") and 839, F.S., (entitled "Offenses by Public Officers and Employees") to:

- Make restitution to the victim of the offense if, after conducting a hearing, the judge finds that the victim suffered an actual financial loss caused directly or indirectly by the person's offense or an actual financial loss related to the person's criminal episode; and
- Perform 250 hours of community service work.

This bill may have a positive fiscal impact on governmental entities to the extent that governmental entities will be eligible for restitution for violations of chs. 838 and 839, F.S. This bill's restitution and community service requirements may have a negative fiscal impact on local governments and the Department of Corrections who may be required to supervise the community service hours and restitution payments. However, due to the low volume of offenders this impact will likely be insignificant. See Fiscal Impact Section.

The bill is effective on October 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Restitution**

Section 775.089, F.S., requires a judge to order a defendant convicted of any criminal offense to make monetary or non-monetary restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense and damage or loss related to the defendant's criminal episode. Restitution must be ordered unless the judge finds clear and compelling reasons not to do so.<sup>1</sup> To enter an order of restitution, a trial court must first conduct a restitution hearing to determine by competent evidence the amount owed to the victim and the defendant's ability to pay.<sup>2</sup>

The purpose of restitution is two-fold: (1) it acts to compensate the victim; and (2) serves the rehabilitative, deterrent, and retributive goals of the criminal justice system.<sup>3</sup> Thus, the prime rationale underlying restitution are to give the perpetrator of a crime an opportunity to make amends, and to make the victim whole again, to the extent it is possible to do so.<sup>4</sup>

Currently, s. 775.089(1)(c), F.S., defines "victim," in part, as:

- Each *person* who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.<sup>5</sup>

The restitution section does not currently define the word "person." However, s. 1.01(3), F.S., defines the word "person" to "*include* individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Read in conjunction, it appears that governmental entities and political subdivisions (governmental entities) can be "victims" for purposes of restitution. However, Florida's District Courts of Appeal (DCAs) are somewhat divided on the subject.

Some DCAs have held that governmental entities are always barred from obtaining an order of restitution because they are not considered "victims" for purposes of restitution.<sup>6</sup> It appears that these holdings resulted from restitution being ordered in favor of these entities for conducting investigations or performing other public services that are within the normal scope of their duties as an entity, agency, or subdivision, rather than for actual damages suffered.<sup>7</sup> Other DCAs have held that governmental entities are "victims" for losses other than investigative costs, such as travel expenses incurred for trial, when the losses are a direct result of the defendant's criminal episode.<sup>8</sup> In *Childers v. State*, the First District Court held that because of the definition of the term "person" *included* a list of individuals and entities, the Legislature did not intend such a list to be limiting and exhaustive, but rather illustrative.<sup>9</sup>

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<sup>1</sup> s. 775.089, F.S.

<sup>2</sup> *Exilorme v. State*, 857 So. 2d 339 (Fla. 2d DCA 2003) and *Graham v. State*, 720 So. 2d 294 (Fla. 5th DCA 1998).

<sup>3</sup> 15B Fla. Jur 2d Criminal Law s. 2886 (citing *Kirby v. State*, 863 So. 2d 238 (Fla. 2003)).

<sup>4</sup> *Id.* (citing *L.O. v. State*, 718 So. 2d 155 (Fla. 1998)).

<sup>5</sup> The definition also includes the victim's estate if the victim is deceased, the victim's next of kin if the victim is deceased as a result of the offense, as well as the victim's trade association if the offense is a violation of s. 540.11(3)(a)3., F.S., involving the sale, or possession for purposes of sale, of physical articles and the victim has granted the trade association written authorization to represent the victim's interests in criminal legal proceedings and to collect restitution on the victim's behalf.

<sup>6</sup> *See Sims v. State*, 746 So. 2d 546 (Fla. 2d DCA 1999); *Rodriguez v. State*, 691 So. 2d 568 (Fla. 2d DCA 1997); *T.H. Taylor v. State*, 672 So. 2d 605 (Fla. 4th DCA 1996); and *Bain v. State*, 559 So. 2d 106 (Fla. 4th DCA 1990).

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

<sup>8</sup> *Smith v. State*, 801 So. 2d 1043 (Fla. 5th DCA 2001); *Childers v. State*, 936 So. 2d 585 (Fla. 1st DCA 2006).

<sup>9</sup> *Childers*, 936 So. 2d at 597.

### Effect of the Bill

The bill amends the definition of “victim” in s. 775.089(1)(c), F.S., to clarify that the term includes governmental entities and political subdivisions when such entities are a direct victim of the defendant’s offense or criminal episode and not merely providing public services in response to the offense or criminal episode.

The bill defines “governmental entities” and “political subdivisions” as these terms are defined in s. 11.45, F.S.

### **Offenses by Public Officials**

Chapters 838 (entitled “Bribery; Misuse of Public Office”) and 839, F.S., (entitled “Offenses by Public Officers and Employees”) create a variety of offenses related to public officials or employees and the performance of their official duties. For example, ch. 838, F.S., provides felony criminal penalties for the following offenses:

- Bribery involving a public servant;<sup>10</sup>
- Unlawful compensation or reward for official behavior;<sup>11</sup>
- Corruption by threat against public servant;<sup>12</sup>
- Official misconduct;<sup>13</sup>
- Bribery in athletic contests;<sup>14</sup>
- Soliciting, accepting, or agreeing to accept a commercial bribe;<sup>15</sup>
- Conferring, offering to confer, or agreeing to offer a commercial bribe;<sup>16</sup>
- Disclosure or use of confidential criminal justice information;<sup>17</sup> and
- Bid tampering.<sup>18</sup>

Chapter 839, F.S., provides misdemeanor and felony criminal penalties for the following offenses:

- County officers buying at discount or speculating specified certificates or warrants;<sup>19</sup>
- Municipal officers buying at discount or speculating in any scrip or other evidence of indebtedness issued by such officer’s municipal corporation;<sup>20</sup>
- Tax collectors purchasing or receiving in exchange a lesser than face value amount specified certificates or orders;<sup>21</sup>
- Extortion by officers of the state;<sup>22</sup>
- Clerk of Court, Sheriff, or County Judge failing to keep records of costs;<sup>23</sup>
- Public Official or Employee falsifying records;<sup>24</sup>
- Officer withholding records from successor after the time officer’s appointment or election has expired;<sup>25</sup>
- Judicial officer withholding records;<sup>26</sup>
- Fraud of clerk in drawing a jury;<sup>27</sup>
- Misappropriation of moneys by commissioners to make sales;<sup>28</sup>

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<sup>10</sup> s. 838.015, F.S.

<sup>11</sup> s. 838.016, F.S.

<sup>12</sup> s. 838.021, F.S.

<sup>13</sup> s. 838.022, F.S.

<sup>14</sup> s. 838.12, F.S.

<sup>15</sup> s. 838.15, F.S.

<sup>16</sup> s. 838.16, F.S.

<sup>17</sup> s. 838.21, F.S.

<sup>18</sup> s. 838.22, F.S.

<sup>19</sup> s. 839.04, F.S.

<sup>20</sup> s. 839.05, F.S.

<sup>21</sup> s. 839.06, F.S.

<sup>22</sup> s. 839.11, F.S.

<sup>23</sup> s. 839.12, F.S.

<sup>24</sup> s. 839.13, F.S.

<sup>25</sup> s. 839.14, F.S.

<sup>26</sup> s. 839.15, F.S.

<sup>27</sup> s. 839.16, F.S.

<sup>28</sup> s. 839.17, F.S.

- Officer assuming to perform duties of office prior to qualification;<sup>29</sup>
- Sheriff or officer wilfully or corruptly refusing or neglecting to execute process;<sup>30</sup>
- Officer refusing to execute criminal process;<sup>31</sup>
- Jailer or officer refusing to receive prisoner;<sup>32</sup>
- Officer taking insufficient bail;<sup>33</sup>
- Willful failure of officer to perform any duty required under criminal procedure law;<sup>34</sup> and
- Misuse of confidential information.<sup>35</sup>

As noted above, courts generally order restitution pursuant to the provisions in s. 775.089, F.S. However, some criminal statutes include specific restitution and community service provisions that are tailored to that particular offense.<sup>36</sup> These provisions may provide a more tailored definition of restitution or may require a certain amount of community service hours.<sup>37</sup>

Chapters 838 and 839, F.S., do not currently include specific provisions related to restitution or community service.

Effect of the Bill:

The bill creates ss. 838.23 and 839.27, F.S., to require a judge to order a person convicted of any offense in chs. 838 or 839, F.S., to:

- Make restitution to the victim of the offense if, after conducting a hearing, the judge finds that the victim suffered an actual financial loss caused directly or indirectly by the person's offense or an actual financial loss related to the person's criminal episode; and
- Perform 250 hours of community service work.

These conditions of restitution and community service work are in addition to any fine or sentence that may be imposed and are not in lieu thereof.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 775.089, F.S., relating to restitution.

Section 2. Creates s. 838.23, F.S., relating to restitution and community service.

Section 3. Creates s. 839.27, F.S., relating to restitution and community service.

Section 4. Provides an effective date of October 1, 2015.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

1. Revenues:

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<sup>29</sup> s. 839.18, F.S.

<sup>30</sup> s. 839.19, F.S.

<sup>31</sup> s. 839.20, F.S.

<sup>32</sup> s. 839.21, F.S.

<sup>33</sup> s. 839.23, F.S.

<sup>34</sup> s. 839.24, F.S.

<sup>35</sup> s. 839.26, F.S.

<sup>36</sup> Some examples of the statutes which include specified restitution provisions include: s. 267.13, F.S., relating to prohibition on unauthorized archeological excavation (provides a specified definition of restitution); s. 784.08, F.S., relating to assault or battery of a person 65 years or older (defendant shall be fined not more than \$10,000, ordered to pay restitution, and perform up to 500 hours of community service); s. 812.0145, F.S., relating to theft from a person 65 years or older (defendant shall be ordered to pay restitution and perform up to 500 hours of community service); s. 817.568, F.S., relating to criminal use of personal identification (provides a specified definition of restitution).

<sup>37</sup> *Id.*

State governmental entities will now be able to recover restitution when they were previously barred from collection of such restitution.

2. Expenditures:

According to the Department of Corrections (DOC), if an offender is sentenced to serve community supervision with the DOC (In Fiscal Year 2013-14 there were 64 offenders sentenced to community supervision for a violation of chs 838 and 839, F.S.) the new provision for the 250 hours of community service work would be enforced by a DOC probation officer as part of the probationers reporting requirements and therefore no significant additional workload for DOC.

The provisions of this bill could also be enforced on offenders released from prison to post release supervision if the special condition was imposed and the length of supervision was long enough for the offender to complete the hours (In Fiscal Year 2013-14 there were 13 offenders sentenced to state prison for a violation of chs 838 and 839, F.S.); however, it would not be possible for community service work hours to be accomplished by an inmate while incarcerated serving a prison sentence. Because of the low volume of offenders this will have an insignificant impact on DOC.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local governmental entities will now be able to recover restitution when they were previously barred from collection of such restitution.

2. Expenditures:

This bill's restitution and community service requirements may have a negative fiscal impact on local governments who will be required to supervise the community service hours and restitution payments. Because of the low volume of offenders (In Fiscal Year 2013-14 there were 132 offenders sentenced state-wide for a violation of chs 838 and 839, F.S.), and that this type of local supervision is typically administrative, this bill should have an insignificant fiscal impact on local governments.

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:

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**