

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 Criminal Justice

BILL: SB 628

INTRODUCER: Senators Garcia and Campbell

SUBJECT: Transmission of Disease Through Bodily Fluids

DATE: March 20, 2017 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	Pre-meeting
2.	_____	_____	HP	_____
3.	_____	_____	JU	_____
4.	_____	_____	RC	_____

I. Summary:

SB 628 makes numerous changes in the criminal law and public health law related to the transmission or potential transmission of disease through the exchange of bodily fluids. For example, the bill:

- Reclassifies felony offenses to misdemeanor offenses for crimes involving:
 - Donating blood, plasma, organs, skin, or other human tissue by a person who knows he or she is infected with human immunodeficiency virus (HIV);
 - Engaging in sexual intercourse, without a partner’s informed consent, when a person knows he or she is infected with HIV and may communicate HIV through sexual intercourse;
 - Criminal transmission of HIV for a second or subsequent violation of the offenses in s. 775.0877(1), F.S., and adding an element to the offense that HIV must actually be transmitted; and
 - Malicious dissemination of any false information or report concerning the existence of a sexually transmissible disease.
- Eliminates crimes relating to prostitution:
 - Committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for a sexually transmissible disease other than HIV; and
 - Committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for HIV.
- Substantially rewrites s. 960.003, F.S., relating to hepatitis and HIV testing of persons charged with or alleged by petition for delinquency to have committed certain sexual and nonsexual crimes, and disclosure of test results to victims, to create a new focus, requiring the Department of Health to:
 - Refer for service, including postexposure prophylaxis, any person who alleges he or she has been the victim of sexual assault, and
 - Limit the out-of-pocket cost for the postexposure prophylaxis.

- Protects a person who is charged with committing a prostitution crime from compulsory sexually transmissible disease treatment if he or she tests positive.

The bill was estimated by the Criminal Justice Impact Conference to likely result in a decrease of ten or fewer prison beds. The bill will have costs on the Department of Health, but the extent of such costs is indeterminate. See Section V. Fiscal Impact Statement.

II. Present Situation:

Chapter 384, F.S., the “Control of Sexually Transmissible Disease Act,” was created in 1986, during the time the general population was becoming increasingly aware of the existence of acquired immune deficiency syndrome (AIDS)/HIV.¹

In the early 1990’s, reacting to concerns that victims of crimes involving the exchange of bodily fluids might become infected with HIV, the Florida Legislature enacted laws to require HIV testing of persons accused of these crimes and providing for test result reporting to the victims.²

Current law and the amendments made to current law by the bill are discussed below in the “Effect of Proposed Changes” section of this bill analysis.

III. Effect of Proposed Changes:

The bill amends current public health and criminal law relating to the transmission of disease through the exchange of bodily fluids by:

- Reclassifying and eliminating certain crimes;
- Deleting certain required testing for sexually transmissible diseases, including HIV, and amending the law related to reporting the results of tests to crime victims;
- Creating and amending definitions relating to sex acts; and
- Requiring that the Department of Health (DOH) refer certain victims of sexual assault to medical treatment and services.

Section 1 – Testing of Human Tissue

Section 381.0041, F.S., sets forth requirements for the testing of every donation of blood, plasma, organs, skin, or other human tissue for HIV and other communicable diseases, prior to transfusion or transplantation.

Subsection (11) of s. 381.0041, F.S., prohibits a person who is HIV-positive, who knows he or she is infected with HIV, and who has been informed that the virus may be communicated by donating blood, plasma, organs, skin, or other human tissue from making such a donation.

¹ See U.S. Department of Health and Human Services, Aids.gov, “A Timeline of HIV/AIDS,” available at <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited March 15, 2016). HIV is the Human Immunodeficiency Virus.

² These laws include s. 960.003, F.S. (1990), and s. 775.0877, F.S. (1993).

Currently, violating the prohibition subjects the person who commits this crime to 3rd degree felony penalties.³ The bill amends this provision to make the crime a 1st degree misdemeanor offense and permits such a donation if it is deemed medically necessary by a licensed physician.⁴

Section 2 – Definitions of ch. 384, F.S., the “Control of Sexually Transmissible Disease Act”

Section 324.23, F.S., currently contains three definitions:

- “Department” means the Department of Health.
- “County health department” means agencies and entities designated in ch. 154, F.S.
- “Sexually transmissible disease” means “a bacterial, viral, fungal, or parasitic disease determined by rule of the department to be sexually transmissible, to be a threat to the public health and welfare, and to be a disease for which a legitimate public interest will be served by providing for prevention, elimination, control, and treatment.”

The bill creates definitions for the terms “sexual conduct” and “substantial risk of transmission”:

- “Sexual conduct” means any sexual activity involving the physical contact of the sexual organs of a person with the genitals, mouth, or anus of another person, whether such persons are of the same or opposite sex.
- “Substantial risk of transmission” means a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence.

Section 3 – Unlawful Acts

This section of the bill replaces current law references to “sexual intercourse” with the newly created term “sexual conduct” in subsections (1) and (2) of s. 384.24, F.S.

As amended, s. 384.24, F.S., prohibits “sexual conduct,” without the partner’s informed consent, when a person knows he or she is infected with one or more of the listed diseases:

- Subsection (1) lists chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis (NGU), pelvic inflammatory disease (PID)/acute salpingitis, and syphilis.
- Subsection (2) lists HIV.

Not limiting the application of s. 384.24, F.S., to only acts of “intercourse” could result in greater informed consent between partners who engage in other sexual activities.⁵

³ A 3rd degree felony is punishable by up to 5 years’ imprisonment and up to a \$5,000 fine pursuant to ss. 775.082 and 775.083, F.S. A habitual offender who commits a 3rd degree felony is punishable by up to 10 years’ imprisonment pursuant to s. 775.084, F.S.

⁴ A 1st degree misdemeanor is punishable by up to 1 year imprisonment and up to a \$1,000 fine pursuant to ss. 775.082 and 775.083, F.S.

⁵ It should be noted that the Florida Supreme Court determined in *Debaun v. State*, No. SC13-2336, March 16, 2017, that the term “sexual intercourse” in s. 384.24(2), F.S., “denotes sexual conduct that includes acts of oral and anal intercourse.” Thus, it appears this definitional change by the bill may not be necessary due to the court ruling, but it does not seem to run afoul of the court’s decision.

Section 4 – Penalties

Section 384.34, F.S., sets forth the penalties related to s. 384.24, F.S., which contains unlawful conduct or actions related to sexually transmissible diseases and a partner’s informed consent:

- Violation of s. 384.24(1), F.S., is a 1st degree misdemeanor.
- The first violation of s. 384.24(2), F.S., is a 3rd degree felony, while subsequent violations are 1st degree felonies.⁶

The bill eliminates the current felony penalties associated with the act proscribed in s. 384.24(2), F.S. Instead, under the bill it is a 1st degree misdemeanor for engaging in “sexual conduct,” where the person is infected with HIV, knows the disease is communicable, and fails to inform his or her consenting partner.

A person who maliciously disseminates any false information or report concerning the existence of a sexually transmissible disease is currently subject to prosecution for a 3rd degree felony under s. 384.34(3), F.S. The bill changes the penalty to a 1st degree misdemeanor.

Additionally, the bill deletes the current prohibition of any person violating a DOH rule relating to sexually transmissible diseases, which subjects a person to a fine of up to \$500 and any other applicable penalties found in ch. 384, F.S.

A person who obtains the identifying information of an individual who has a sexually transmissible disease and who knows or should have known the nature of the information and maliciously, or for monetary gain, disseminates the information to an unauthorized person is currently subject to prosecution for a 3rd degree felony under s. 384.34(6), F.S. The bill changes the penalty to a 1st degree misdemeanor.

Section 5 – Criminal Transmission of HIV

Section 775.0877(1), F.S., currently requires the court to order a person who has pled guilty or no contest, or who is convicted of a crime in the list of offenses or the attempt to commit one of the listed offenses, which involves the transmission of “body” fluids from one person to another, to undergo HIV testing.

The crimes listed in s. 775.0877(1), F.S., are:

- Section 794.011, F.S., relating to sexual battery;
- Section 826.04, F.S., relating to incest;
- Section 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age;
- Sections 784.011, 784.07(2)(a), and 784.08(2)(d), F.S., relating to assault;
- Sections 784.021, 784.07(2)(c), and 784.08(2)(b), F.S., relating to aggravated assault;
- Sections 784.03, 784.07(2)(b), and 784.08(2)(c), F.S., relating to battery;
- Sections 784.045, 784.07(2)(d), and 784.08(2)(a), F.S., relating to aggravated battery;

⁶ A 1st degree felony is punishable by up to 30 years’ imprisonment and up to a \$10,000 fine pursuant to ss. 775.082 and 775.083, F.S. A habitual offender who commits a 1st degree felony is punishable by life imprisonment pursuant to s. 775.084, F.S.

- Section 827.03(2)(c), F.S., relating to child abuse;
- Section 827.03(2)(a), F.S., relating to aggravated child abuse;
- Section 825.102(1), F.S., relating to abuse of an elderly person or disabled adult;
- Section 825.102(2), F.S., relating to aggravated abuse of an elderly person or disabled adult;
- Section 827.071, F.S., relating to sexual performance by a person less than 18 years of age;
- Sections 796.07 and 796.08, F.S., relating to prostitution;
- Section 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue; or
- Sections 787.06(3)(b), (d), (f), and (g), F.S., relating to human trafficking.

The court ordered HIV test is not required if the offender has been tested voluntarily or pursuant to procedures set forth in s. 381.004(2)(h)6., F.S., s. 951.27, F.S., or other applicable law.

Section 381.004(2)(h)6., F.S., provides that the person to be tested does not have the right to decline testing under the following HIV testing circumstances:

- For the performance of an HIV test upon a defendant pursuant to the victim's request in a prosecution for any type of sexual battery⁷ where a blood sample is taken from the defendant voluntarily;
- Pursuant to court order for any purpose; or
- Pursuant to s. 775.0877, s. 951.27, or s. 960.003, F.S.

However, the results of an HIV test performed under s. 381.004(2)(h)6., F.S., shall be disclosed solely to the victim and the defendant, except as provided in ss. 775.0877, 951.27, and 960.003, F.S.

Section 951.27, F.S., currently provides for local (city or county) inmates to be tested for HIV and other infectious diseases. Test results may be divulged in accordance with s. 775.0877, F.S., and s. 960.003, F.S.

Additionally, s. 951.27, F.S., specifically provides that:

...upon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the results of any HIV test performed on an inmate who has been arrested for any sexual offense involving oral, anal, or vaginal penetration by, or union with, the sexual organ of another, shall be disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor. In such cases, the county or municipal detention facility shall furnish the test results to the Department of Health, which is responsible for disclosing the results to public health agencies as provided in s. 775.0877 and to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, as provided in s. 960.003(3).

⁷ "Sexual battery" is defined in s. 794.011(1)(h), F.S., as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."

The bill amends s. 775.0877, F.S., by:

- Changing the term “body fluids” to “semen or vaginal secretions”;
- Eliminating court ordered HIV testing for attempts to commit the listed crimes;
- Deleting ss. 790.07 and 796.08, F.S., relating to prostitution and s. 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue from the list of crimes for which a court must order HIV testing of the offender;
- Reducing the penalty in s. 775.0877(3), F.S., for criminal transmission of HIV for a second or subsequent violation of the offenses in s. 775.0877(1), F.S., from a 3rd degree felony to a 1st degree misdemeanor and adding that HIV actually be transmitted to the victim as an element of the crime; and
- Deleting the reference to s. 960.003, F.S., in s. 775.0877(2), F.S., related to disclosure of HIV test results to the victim or other family members; test results will no longer be disclosed to the victim upon the victim’s request under this section.⁸

Section 6 – Screening for Sexually Transmissible Diseases for Prostitution

Section 796.07, F.S., prohibits prostitution and prostitution-related activities.⁹ Under s. 796.07(2), F.S., it is unlawful:

- To own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution;
- To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act;
- To receive, or to offer or agree to receive, any person into any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignation, or to permit any person to remain there for such purpose;
- To direct, take, or transport, or to offer or agree to direct, take, or transport, any person to any place, structure, or building, or to any other person, with knowledge or reasonable cause to believe that the purpose of such directing, taking, or transporting is prostitution, lewdness, or assignation;
- For a person 18 years of age or older to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation;
- To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation;
- To reside in, enter, or remain in, any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution, lewdness, or assignation;
- To aid, abet, or participate in any of the acts or things enumerated in s. 796.07(2), F.S.; or
- To purchase the services of any person engaged in prostitution.

Section 796.08(2), F.S., currently provides that a person arrested under s. 796.07, F.S., may request screening for a sexually transmissible disease, as defined in s. 796.08(1), F.S., and pay any associated costs. If the person tests positive, he or she is required to submit to appropriate treatment and counseling.

⁸ Disclosure of testing to a victim under s. 960.003, F.S., is repealed by the bill in Section 7, therefore this cross-reference would no longer apply.

⁹ “Prostitution” means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses. s. 796.07(1)(a), F.S.

The bill amends s. 796.08(2), F.S., to give the person the option of pursuing treatment and counseling. The bill also requires that the DOH pay costs associated with the screening.

The bill repeals the remaining provisions in s. 796.08(3), (4), and (5), F.S. These provisions include:

- Required screening and treatment for persons convicted of prostitution or procuring another to commit prostitution, under s. 796.08(3), F.S.;
- A 1st degree misdemeanor of committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for a sexually transmissible disease other than HIV, under s. 796.08(4), F.S.;
- A 3rd degree felony of committing prostitution or procuring another to commit prostitution knowing he or she had previously tested positive for HIV, under s. 796.08(5), F.S.; and
- Allowing for dissemination of test results beyond the offender pursuant to s. 796.08(3), F.S., to include state attorneys and courts for the purposes of future charges and sentences under ss. 796.08(4) and (5), F.S. (the repealed crimes).

Section 7 – Victims

The bill substantially amends current s. 960.003, F.S., effectively changing the focus of this statute.

Section 960.003, F.S., requires AIDS/HIV and hepatitis testing of persons accused of committing sexual offenses proscribed in ch. 794, F.S. (sexual battery), s. 800.04, F.S. (lewd or lascivious offenses), and the crimes listed in s. 775.0877(1), F.S.¹⁰ This includes the testing of juvenile offenders. This section of the law also provides for disclosure of the test results to the crime victim, and includes legislative intent language.

The bill amends s. 960.003, F.S., by eliminating the focus on prompt testing of persons being prosecuted for alleged violations of the crimes listed in ss. 775.0877(1)¹¹ or 825.1025, F.S.,¹² and equally prompt reporting of test results to the victim.

With some variation as to timing, and with some limitations not existing in s. 960.003, F.S., the provisions remaining in ss. 775.0877, 381.004(2)(h)6., and 951.27, F.S., appear to protect a victim's right to be informed of HIV test results in cases where the offender has pled guilty to the listed crime or been convicted of committing the crime.

For example, although ss. 775.0877, 381.004(2)(h)6., and 951.27, F.S., provide for certain testing and reporting of the results to a crime victim, there is no remaining provision addressing testing and reporting for persons charged and prosecuted as juveniles for the related crimes in current law.

¹⁰ Chapter 90-201, L.O.F. (see also HB 1115, SB 914 (1990)). For a good historical perspective see Michael Bruyere, "Damage Control for Victims of Physical Assault – Testing the Innocent for AIDS," 21 Fla.St.U.L.Rev. 945 (Winter 1994). See also, chs. 1993-230 and 2011-220, L.O.F.

¹¹ See the discussion above relating to Section 5 of the bill which lists these crimes.

¹² The crimes listed in s. 825.1025, F.S., pertain to victims who are disabled adults or the elderly. The crimes are: lewd or lascivious battery upon an elderly person or disabled person; lewd or lascivious molestation of an elderly person or disabled person; and lewd or lascivious exhibition in the presence of an elderly person or disabled person.

Because the bill repeals the provisions that specifically apply to juvenile defendants, it appears that unless a juvenile is charged as an adult, testing and reporting may not occur at all because ss. 775.0877, 381.004(2)(h)6., and 951.27, F.S., do not address juvenile offenders.

Additionally, it should be noted that the requirement for testing for hepatitis provided for in current s. 960.003, F.S., does not exist in ss. 775.0877, 381.004(2)(h)6., and 951.27, F.S.

As amended by the bill, s. 960.003, F.S., provides legislative findings related to victims of “sexual assault” having access to medical care and affordable postexposure prophylaxis, and also:

- Requires the DOH to refer for medical services any person who alleges he or she has been the victim of a “sexual assault”¹³ involving an exchange of bodily fluids which presents a “substantial risk of transmission” of HIV¹⁴; and
- Specifies that services must include the offer of postexposure prophylaxis to prevent the acquisition of HIV, which the DOH must ensure does not cost the person more than \$30 in out-of-pocket expenses.

Conforming Changes

Section 8 – HIV Testing

Section 381.004, F.S., provides a statutory guide for HIV testing and the confidentiality or limited release of test results as part of the Public Health chapter, ch. 381, F.S.

The bill amends s. 381.004, F.S., to conform to other changes made by the bill. References to s. 960.003, F.S.,¹⁵ are deleted, as is the reference to the testing of persons convicted of prostitution or procuring another to commit prostitution pursuant to s. 796.08, F.S.¹⁶

Section 9 – Offense Severity Ranking Chart

The bill amends s. 921.0022, F.S., the Criminal Punishment Code Offense Severity Ranking Chart, to delete the 3rd degree felony, Level 5 offense, because Section 1 of the bill made the crime a misdemeanor offense.

Section 10 – Blood Tests of Inmates

The bill deletes cross-references to s. 960.003, F.S., in s. 951.27, F.S., which provides for the testing of inmates of local detention facilities for HIV. Section 7 of the bill deleted references to required HIV testing in s. 960.003, F.S., making this cross-reference obsolete.

¹³ “Sexual assault” is not a term used to describe sex crimes defined in the criminal statutes. “Sexual battery” or “Lewd or lascivious molestation or battery” are examples of sex crimes proscribed in the Florida Statutes. See ss. 794.011 and 800.04, F.S. (This is not an exhaustive list.) The term also appears in the Legislative findings in Section 7 of the bill.

¹⁴ The term “substantial risk of transmission” is a new definition provided in s. 384.23, F.S., by the bill. A cross-reference to this definition may help with the use of the newly defined term in a separate chapter of the Florida Statutes.

¹⁵ See Section 7 of the bill which deletes references to required HIV testing in s. 960.003, F.S., making this cross-reference obsolete.

¹⁶ Section 6 of the bill deletes required testing of persons convicted of these prostitution offenses, therefore this cross-reference is obsolete.

Section 11 – Effective Date

The bill is effective July 1, 2017.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

A person arrested of prostitution and prostitution-related activities under s. 796.07, F.S., can request screening, which will now be paid for by the DOH.

A victim of “sexual assault” may be able to get access to postexposure prophylaxis to prevent the acquisition of HIV for no more than \$30 in out-of-pocket expenses.

C. Government Sector Impact:

On March 2, 2017, the Criminal Justice Impact Conference considered the identical House bill (HB 605) and determined that the bill would have a negative insignificant impact on the number of prison beds, meaning the bill would likely result in a decrease of ten or fewer prison beds.

The bill requires the DOH to pay for any costs associated with screening for a sexually transmissible disease for anyone requesting the screening under s. 796.08, F.S. (Section 6) and to ensure that access to postexposure prophylaxis (PEP) to prevent the acquisition of HIV is available for no more than \$30 in out-of-pocket expenses (Section 7). The DOH estimated the following fiscal impacts:¹⁷

¹⁷ Department of Health, *Agency Bill Analysis: SB 628*, March 20, 2017.

- One FTE to manage the PEP and testing program: Sr. Human Services Program Specialist for nPEP coordination \$30,000, standard DOH professional package with limited travel at a cost of \$10,841, and computed with 28 percent fringe at a cost of \$8,400.
- “Cost of PEP medication is given at the 340B price minus the maximum \$30 the [DOH] can charge a victim for the medications. Some victims may have health insurance that will pay for the treatment, or access patient assistance programs, but there is no way to estimate those numbers.”
- “The total expenditures the [DOH] would incur for providing PEP medications are unknown but potentially significant. The [US] Bureau of Justice Statistics estimates that only 35 percent of sexual assaults were reported in 2015. It is indeterminate how many individuals would report a sexual assault and also utilize this program. The cost to the [DOH] for providing PEP medications could be \$1,687 (\$30 deducted for fee paid by victim) for PEP treatment [times] the number of sexual assault victims that utilize this program who do not have insurance or an ability to pay.”

VI. Technical Deficiencies:

None.

VII. Related Issues:

The DOH noted the following issues in its bill analysis:¹⁸

- Because only about 35 percent of victims of sexual assault report the assault, “this behavior complicates where and when sexual assault victims are likely to seek treatment, if at all. The time sensitivity of providing PEP [(postexposure prophylaxis)] for sexual assault victims is crucial, as well as knowing which health care entities are best equipped to timely respond to the situation. In many situations, the [DOH] may not be the entity examining the person or making the referral for medical services. If the medications are not started within 72 hours, it is not effective in preventing the transmission of HIV.”
- “PEP medicine provided to children is determined by the weight of the child and is provided in liquid form. The availability of this medicine outside a licensed pharmacy environment will be extremely limited.”
- So long as the service of providing the PEP is provided at a DOH facility, the DOH will be able to ensure that the out-of-pocket costs are no more than \$30; otherwise, the DOH will not have any authority over the expense of the PEP.
- Limiting “bodily fluids” to semen and vaginal secretions in Section 5 of the bill, relating to screening for sexually transmissible diseases for prostitution, would exclude other fluids, like exposure to blood.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 381.0041, 384.23, 384.24, 384.34, 775.0877, 796.08, 960.003, 381.004, 921.0022, and 951.27.

¹⁸ *Id.*

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
