

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 675 Exposure of Sexual Organs

SPONSOR(S): Judiciary Committee, Mercado

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 1 N	Frost	Hall
2) Justice Appropriations Subcommittee	9 Y, 0 N	Smith	Gusky
3) Judiciary Committee	16 Y, 0 N, As CS	Frost	Luczynski

SUMMARY ANALYSIS

Florida criminalizes unlawfully exposing or exhibiting one's sexual organs in the following manner:

- Lewd or lascivious exhibition, a second or third degree felony, means performing any of the following acts in the presence of a person younger than 16:
 - Intentionally masturbating;
 - Intentionally exposing the genitals in a lewd or lascivious manner; or
 - Intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.
- Indecent exposure, a first degree misdemeanor, means:
 - Exposing or exhibiting the sexual organs in a vulgar or indecent manner in public or on another person's private premises, or so close to another person's private premises that the sexual organs may be seen from the private premises; or
 - Being naked in public, unless in a public place intended for nudity.

In Florida, a law enforcement officer may arrest a person without a warrant only under certain circumstances, such as when:

- An officer reasonably believes a person committed a felony;
- A person commits a misdemeanor in an officer's presence; or
- There is probable cause to believe a person has committed certain misdemeanor offenses, such as a battery, criminal mischief or graffiti, an act of domestic violence, an injunction violation, or sexual cyberharassment.

While an officer may make a warrantless arrest of a person who commits felony lewd or lascivious exhibition, an officer must seek a warrant to arrest a person who commits indecent exposure, unless the officer is present at the time the indecent exposure occurs.

CS/HB 675 allows an officer to conduct a warrantless arrest of a person the officer reasonably believes to have unlawfully exposed his or her sexual organs. The bill makes a second or subsequent unlawful exposure of sexual organs a third degree felony. By expediting the arrest process for unlawful exposure of sexual organs, the bill may prevent additional offenses and prevent an offender from fleeing, going into hiding, or becoming hostile when law enforcement returns to execute an arrest warrant.

The bill also clarifies that public nudity is unlawful only when it is vulgar or indecent and that nudity at any place provided or set apart for that purpose is lawful.

The Criminal Justice Impact Conference considered a prior version of the bill on January 27, 2020, and determined the bill may increase the prison population by an indeterminate amount by creating a new third degree felony offense.

The bill provides an effective date of October 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Exposure of Sexual Organs

Florida criminalizes unlawfully exposing or exhibiting one's sexual organs: at any time in the presence of a person younger than 16; in public; or on or near a private residence. Under s. 800.04, F.S.,¹ a person commits lewd or lascivious exhibition when he or she performs any of the following acts in the presence of a person younger than 16:²

- Intentionally masturbating;
- Intentionally exposing the genitals in a lewd or lascivious manner; or
- Intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.

Lewd or lascivious exhibition is either a second or third degree felony,³ depending on the offender's age when the offense is committed.⁴ The Florida Supreme Court has held that "lewd" and "lascivious" carry the same meaning, which is a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.⁵

Because the victim must be younger than 16 for an offense of lewd or lascivious exhibition, an offender who performs the acts described under s. 800.04, F.S., in the presence of a person age 16 years or older may only be charged with indecent exposure, a misdemeanor offense.

Under s. 800.03, F.S., a person commits indecent exposure when he or she:

- Exposes or exhibits his or her sexual organs in a vulgar or indecent manner:⁶
 - In public;
 - On another person's private premises; or
 - Near enough to another person's private premises that the sexual organs may be seen from such private premises.
- Is naked in public, unless the particular public place is intended for nudity.⁷

Indecent exposure is a first degree misdemeanor.⁸ Florida's indecent exposure law has been interpreted by courts to include a distinction between conduct that occurs in a public place and conduct that occurs in a private place. Generally, if the vulgar or indecent exposure occurs in a public place it is viewed as objectively offensive, and therefore, criminal. On the other hand, if the vulgar or indecent conduct takes place in a private place, evidence that someone was offended by the alleged conduct is required.⁹ Florida courts have also clarified that an indecent exposure offense requires lascivious

¹ Section 800.04, F.S., also criminalizes lewd or lascivious battery, lewd or lascivious molestation, and lewd or lascivious conduct when committed on or in the presence of a person less than 16 years of age.

² S. 800.04(7), F.S.

³ A second degree felony is punishable by up to 15 years in prison and a \$10,000 fine. A third degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁴ If an offender is: younger than 18, the offense is a third degree felony; 18 or older, the offense is a second degree felony, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.

⁵ *Chesebrough v. State*, 255 So.2d 675, 677 (Fla. 1971).

⁶ A vulgar or indecent manner means in a manner related to lascivious exhibition of private parts, which exhibition must be lewd, meaning involving an unlawful indulgence in lust, eager for sexual indulgence. *Duvallon v. State*, 404 So.2d 196, 197 (Fla. 1st DCA 1981) citing *Chesebrough* 255 So. 2d at 677, 678. "'Lewd', 'lascivious' and 'indecent' are synonymous and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator." *Wonyetye v. State*, 648 So. 2d 797, 799 (Fla. 1st DCA 1994) citing *Boles v. State*, 158 Fla. 220, 221, 27 So.2d 293, 294 (Fla.1946).

⁷ Such as a nude beach.

⁸ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 or 775.083, F.S.

⁹ *State v. Kees*, 919 So.2d 504, 506-507 (Fla. 5th 2005).

exposure of a sexual organ, meaning the exposition or exhibition involves an “unlawful indulgence in lust, eager for sexual indulgence.”¹⁰ Therefore, public nudity alone or an act such as urinating in public does not, by itself, constitute a lewd or lascivious act and is not indecent exposure,¹¹ whereas other types of nudity may be considered lewd or lascivious.¹²

Recent indecent exposure cases in Florida¹³ range in severity from an offender who targeted crowded parking lots where he intentionally exposed his genitals to passersby to an offender who exposed his genitals to a University of Central Florida student and ejaculated onto the female victim’s body.¹⁴ In FY 2018-19 indecent exposure arrests in Florida under s. 800.03, F.S., totaled 720, with 283 of those arrests resulting in a conviction with adjudication of guilt and 76 resulting in a conviction with adjudication withheld. However, it is not known how many of the arrests or convictions were based on a person exhibiting sexual organs in a vulgar or indecent manner versus being naked in public.”¹⁵

Arrest Authority

A judge may issue a warrant authorizing a person’s arrest for a felony or misdemeanor crime upon finding probable cause that the person committed a crime in the judge’s jurisdiction.¹⁶ However, the United States Supreme Court has held that the Fourth Amendment to the United States Constitution does not forbid warrantless arrest, even for a misdemeanor offense.¹⁷

In Florida, a law enforcement officer may arrest a person without a warrant under certain statutorily enumerated circumstances,¹⁸ such as when:

- An officer reasonably believes a person committed a felony;
- There is probable cause to believe a person has committed certain enumerated misdemeanor offenses, such as a battery, criminal mischief or graffiti, an act of domestic violence, an injunction violation, or sexual cyberharassment; or
- A person commits a misdemeanor in an officer’s presence.
 - In this circumstance, the officer must arrest the person immediately or in fresh pursuit after observing the offense.

While an officer may make a warrantless arrest of a person who commits lewd or lascivious exhibition because it is a felony offense, an officer must first seek a warrant to arrest a person who commits indecent exposure, unless the misdemeanor exception for an offense committed in the officer’s presence applies.

By providing a misdemeanor exception only for an offense occurring in an officer’s presence, Florida prohibits a warrantless arrest for indecent exposure based only on a victim or civilian witness report. For example, if a victim or witness contacts police about an indecent exposure, the offense is likely to end before police respond and obtaining an arrest warrant to timely address the complaint may be impractical. During the time it takes an officer to obtain a warrant, an offender may:

- Commit additional acts of indecent exposure;
- Flee or go into hiding; or
- Become hostile when law enforcement returns to execute an arrest warrant.

¹⁰ *Chesebrough*, 255 So. 2d at 677.

¹¹ *See Payne v. State*, 463 So. 2d 271 (Fla. 2d DCA 1984); *Duvallon v. State*, 404 So. 2d 196 (Fla. 1st DCA 1981) (“In order for nudity to be prosecutable under statute prohibiting exposing or exhibiting sexual organs in public places, there must be lewd or lascivious exhibition or exposure of sexual organs.”)

¹² *See Egal v. State*, 469 So. 2d 196 (1985) (“conduct which in some circumstances might be purely innocent, such as nudity, can be found to be lewd and lascivious if accompanied by requisite improper intent”).

¹³ Handout from the Orange County Sheriff’s Office, RE: Chapter 800, Lewdness; Indecent Exposure (received Dec. 4, 2019).

¹⁴ Under Florida law, such an offense does not qualify as sexual battery and is not considered lewd or lascivious molestation when the victim is 16 years or older. Ss. 794.011 and 800.04, F.S.

¹⁵ Criminal Justice Impact Conference, *SB 1018 – Exposure of Sexual Organs (Identical HB 675)*, January 27, 2020

¹⁶ S. 901.02, F.S.

¹⁷ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

¹⁸ S. 901.15, F.S.

Effect of Proposed Changes

CS/HB 675 allows an officer to conduct a warrantless arrest of a person the officer reasonably believes to have unlawfully exposed his or her sexual organs. The bill makes a second or subsequent unlawful exposure of sexual organs a third degree felony. By expediting the arrest process for unlawful exposure of sexual organs, the bill may reduce the time an offender remains out of custody after committing an offense, which may prevent the offender from:

- Committing additional indecent exposures or another sexually-based offense;
- Fleeing or going into hiding; or
- Becoming hostile when law enforcement returns to execute an arrest warrant

The bill also clarifies that public nudity is unlawful only when it is vulgar or indecent and that nudity at any place provided or set apart for that purpose is lawful.

The bill provides an effective date of October 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 800.03, F.S., relating to exposure of sexual organs.

Section 2: Amends s. 901.15, F.S., relating to when arrest by officer without warrant is lawful.

Section 3: Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) considered a prior version of the bill on January 27, 2020, and determined the bill may increase the prison population by an indeterminate amount by creating a new third degree felony offense for indecent exposure.¹⁹

“Per FDLE, in FY 2018-19, 720 people were arrested under s. 800.03, F.S., with 283 guilty/convicted and 76 having adjudication withheld. It is not known how many of these people were exhibiting sexual organs in a vulgar or indecent manner, nor is it known how many were naked in public.”²⁰

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

¹⁹ The bill was in a different posture when analyzed by CJIC, but the bill's fiscal impact does not appear to be different based on the new posture of the bill.

²⁰ Criminal Justice Impact Conference, *SB 1018 – Exposure of Sexual Organs (Identical HB 675)*, Jan. 27, 2020

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The 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:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 12, 2020, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably. The amendment:

- Made a second or subsequent unlawful exposure of sexual organs a third degree felony.
- Allowed an officer to conduct a warrantless arrest of a person who unlawfully exposes his or her sexual organs.
- Clarified that public nudity is unlawful only when it is vulgar or indecent, but is lawful at any place provided or set apart for that purpose.

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