## CRIMINAL PROCEDURE

### CS/SB 1328 — Capital Collateral Proceedings

by Criminal Justice Committee and Senator Burt

The Division of Statutory Revision is directed to designate ch. 27, part IV, F.S., as "Capital Collateral Representation."

The statutory section dealing with the recently restructured Capital Collateral Regional Counsel is amended to create a statewide registry of attorneys who will be eligible and available to represent death row inmates in capital collateral proceedings. The executive director of the Commission on Justice in Capital Cases will compile and maintain the registry. The bill sets forth the procedure to be used by the executive director for maintaining the registry. The registry must have at least 50 qualified names on it and, if that number drops below 50, the executive director must notify the chief judge of each judicial circuit by letter and request the prompt submission of the names of at least three private attorneys. The executive director must then send an application to those attorneys so that the attorney may register for appointment. If necessary, the executive director is authorized to advertise in legal publications and other appropriate media. By September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of the registry.

To be eligible for the registry, an attorney must meet the qualifications specified in s. 27.704(2), F.S., for private counsel who represent death-sentenced defendants in capital collateral proceedings. That is, the attorney must have at least 3 years' experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings. The judge who appoints private counsel must make specific findings that the attorney "has high ethical standards."

Furthermore, the attorney who applies for inclusion on the registry must certify that he is currently counsel of record in not more that four such proceedings and that he "intends to continue such representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out."

Immediately after appointment by the trial court that sentenced the defendant to death, the attorney must file a notice of appearance with the trial court indicating acceptance of the appointment. Additionally, the attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings or until released by order of the trial court.

Certain limitations are placed on private counsel who are appointed pursuant to this section. An attorney may not represent more than five capital defendants at any one time; an attorney may not file repetitive or frivolous pleadings that are not supported by law or facts; an attorney may not claim ineffective assistance of counsel in these proceedings; an attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, a proceeding commenced under ch. 940, F.S. (executive clemency), a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings.

The attorney will be paid by the Justice Administrative Commission in stages upon full performance of the duties as follows:

- $100 per hour, up to a maximum of $2,500, upon accepting the appointment and filing the notice of appearance;
- $100 per hour, up to a maximum of $20,000, after timely filing in the trial court the capital defendant's complete original motion for postconviction relief and upon submitting to the Justice Administrative Commission an affidavit stating that such a motion fully raises all issues to be addressed by the trial court;
- $100 per hour, up to a maximum of $10,000, after the trial court issues a final order granting or denying the defendant's motion for postconviction relief;
- $100 per hour, up to a maximum of $4,000, after timely filing in the Supreme Court the defendant's brief(s) that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus;
- $100 per hour, up to a maximum of $20,000, after the appeal of the trial court's denial of the defendant's motion for postconviction relief and the defendant's state petition for writ of habeas corpus become final in the Supreme Court;
- $100 per hour, up to a maximum $2,500, at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court; and
- $100 per hour, up to a maximum $5,000, if the U.S. Supreme Court accepts for review the defendant's collateral challenge of the conviction and sentence of death. This payment shall be full compensation for representing the defendant throughout the certiorari proceedings before the U.S. Supreme Court.

The attorney may hire an investigator for $40 per hour, up a maximum of $15,000 to assist in the appeal.

Additionally, the attorney is entitled to a maximum of $5,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copying.

It is the intent of this legislation to alleviate the backload of the CCRC's capital cases which are ripe for the appellate process to begin yet do not have an attorney assigned to them. A private attorney will be appointed by the trial court that sentenced the defendant if the Attorney General notifies the executive director of the Commission on the Administration of Justice in Capital Cases of one of the following events:

- 91 days have lapsed since the Supreme Court issued a mandate on a direct appeal;

- The U.S. Supreme Court has denied a petition for certiorari (whichever of these two is later); *or*

- A person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding.

If approved by the Governor, these provisions take effect July 1, 1998.
*Vote: Senate 39-0; House 115-0*

## DEATH PENALTY

### CS/SB 1330 — Capital Postconviction Public Records Proceedings

by Criminal Justice Committee and Senator Burt

The bill requires the Secretary of State to establish and maintain a records repository for the purpose of archiving capital postconviction records. The bill requires the state attorney, local law enforcement agencies, and the Department of Corrections to submit to the repository all relevant public records produced in a death penalty case. Other agencies are to submit records to the repository when they have public records relevant to the case. Agencies are to submit records upon notification that a death sentence has been affirmed on direct appeal. The intended effect is to collect all relevant records while the case is "fresh" in everyone's mind.

The bill requires postconviction counsel to review the records in the repository and file a written demand for additional agency records within 90 days of appointment. If the agency objects to the demand, the trial court must resolve the dispute within 30 days. The trial court may only order

additional records production if it makes specific findings. After that one request, postconviction counsel is prohibited from making any further public records requests. However, in the event postconviction counsel can, through an affidavit, establish that the agency still possesses relevant public records, the trial court may order them produced upon specific findings.

The bill provides that postconviction counsel must give written notification of each pleading filed and the name of the person filing the pleading to the Commission on the Administration of Justice in Capital Cases and to the trial court assigned to the case. It also provides that a notice of hearing must be filed with each pleading with the court in a capital case.

If approved by the Governor, these provisions take effect October 1, 1998.
*Vote: Senate 37-0; House 109-0*

### CS/HB 3033 — Execution by Lethal Injection

by Crime & Punishment Committee, Rep. Stafford and others (CS/SBs 360 & 350 by Criminal Justice Committee and Senators Burt, Klein, Bronson, Campbell, Crist, Gutman, Horne, Turner and Silver)

This act (Chapter 98-3) creates s. 922.105, F.S. This section provides that a death sentence shall be executed by electrocution pursuant to s. 922.10, F.S. If electrocution is held to be unconstitutional by the Florida Supreme Court under the State Constitution, or held to be unconstitutional by the United States Supreme Court under the United States Constitution, or if the United States Supreme Court declines to review any such judgment holding electrocution to be unconstitutional under the United States Constitution made by the Florida Supreme Court or the United States Court of Appeals that has jurisdiction over Florida, all persons sentenced to death for a capital crime shall be executed by lethal injection.

The Legislature adopts as statutory law of this state a specified decision of the United States Supreme Court finding that the federal ex post facto is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders.

A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder does not violate s. 10, Art. I or s. 9, Art. X, State Constitution, relating respectively to the prohibition of ex post facto laws and application of the repeal or amendment of a criminal statute that affects prosecution or punishment for any crime previously committed.

Prescribing, preparing, compounding, dispensing, or administering, a lethal injection does not constitute the practice of medicine, nursing, or pharmacy. A physician, nurse, pharmacist, or DOC employee, or any other person, is not required to assist in any aspect of an execution which is contrary to the person's moral or ethical beliefs.

The DOC's execution protocol are exempt from ch. 120, F.S., rulemaking procedures.

Notwithstanding any other law, no sentence of death shall be reduced as a result of a court's determination that a method of execution is unconstitutional under the state or federal constitutions. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

These provisions were approved by the Governor and take effect March 26, 1998.
*Vote: Senate 38-0; House 109-1*

### HJR 3505 — Death Penalty/Execution Method

by Reps. Crist, Feeney and others (CS/SJR 964 by Criminal Justice Committee and Senator Lee)

This joint resolution provides for a proposed constitutional amendment to s. 17, Art. I, State Constitution, which prohibits cruel or unusual punishment.

The proposed constitutional amendment provides that the death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel and/or unusual punishment shall be construed in conformity with U.S. Supreme Court decisions interpreting the cruel and unusual prohibition of the Eighth Amendment. Any method of execution is allowed, unless prohibited by the U.S. Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid and, in any case in which a method of execution is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

The proposed amendment shall be submitted to the Florida electors at the general election to be held in November 1998.
*Vote: Senate 40-0; House 115-0*

# JUVENILE JUSTICE

## CS/CS/SB 2288 — Juvenile Justice

by Children, Families & Seniors Committee; Criminal Justice Committee; and Senator Gutman

This legislation makes the following changes to the juvenile justice system:

- Permits the Department of Juvenile Justice (DJJ) to provide Florida criminal history records checks to its providers;
- Renames " intake counselors" and "case managers" to "juvenile probation officers";
- Codifies the current practices of juvenile assessment centers (JACs) and more clearly defines their role;
- Provides guidelines for the operation of JACs by authorizing participating agencies to govern JACs through an advisory committee and interagency agreements;
- Reinserts the provision that was inadvertently deleted last session which expressly provides that the escape statute applies to maximum-risk programs;
- Removes the option of placing youths held in contempt in secure residential commitment facilities;
- Clarifies that a youth sentenced to detention post-commitment must meet detention screening criteria;
- Increases the time period that a board member can serve on a district juvenile justice board from two consecutive 2-year terms to three consecutive 2-year terms;
- Requires the agencies applying for a juvenile justice partnership grant to enter into a written interagency agreement only with the agencies that are needed to implement the project for which the applicant is applying;
- Provides procedural requirements and further defines the roles of the court, the DJJ, and the Department of Children and Family Services in evaluating, placing, and discharging youth determined to be mentally incompetent to proceed in the judicial system;
- Extends the sunset date for assignment centers for 2 years and requires that the centers have the capacity to perform pre-disposition assessments within one year of the effective date;
- Provides for the quality assurance review to be performed on department operated programs, as well as on contracted programs;
- Provides that the statutorily authorized $3 assessment against specified civil traffic violators and criminal defendants can continue to be collected for the purpose of funding local teen courts, if the county has approved the assessment by ordinance; and
- Requires the Juvenile Justice Advisory Board (JJAB), in consultation with the DJJ, the Division of Economic and Demographic Research, and providers, to develop standard methodology for interpreting its outcome-evaluation report;
- Requires a report to the Legislature by the board which specifies this standard methodology;

- Provides that the standard methodology be integrated into the currently required cost-effectiveness model which is applied to each commitment program;
- Provides that the DJJ can terminate a program operated by a provider or by the department if the program has failed to achieve a minimum threshold of program effectiveness, based on required JJAB reports and on the cost-effectiveness rankings; and
- Requires contracted juvenile justice providers as well as the DJJ to request a determination from local governments as to whether a proposed site for a facility is appropriate for public use under local government plans and ordinances.

If approved by the Governor, these provisions take effect upon becoming law.
*Vote: Senate 39-0; House 117-0*

## SENTENCING

### CS/SB 1522 — Sentencing/Criminal Punishment Code
by Criminal Justice Committee

**Section 1** clarifies that capital felonies are excluded from the Criminal Punishment Code.

**Section 2**
- Clarifies that the code applies to all felony offenses, except capital felonies, committed on or after October 1, 1998.

- Clarifies the actual time to be served by an offender may not be less than 85 percent of the offender's court-imposed sentence as provided in s. 944.275(4)(b)3., F.S.

- Provides technical changes by deleting references to "sentencing range" which was terminology used in the "former" sentencing guidelines and replaces those references with "lowest permissible sentence."

- Clarifies that departures below the lowest permissible sentence must be provided in writing by the trial court judge.

- Deletes unnecessary references to aggravating factors as a reason for departure sentences because the code gives sentencing judges the discretion to sentence any convicted felony offender up to the maximum statutory penalty under s. 775.082, F.S.

- Clarifies that a trial court judge may sentence an offender up to the statutory maximum for any offense before the court for sentencing, including an offense that is before the court because of a violation of community control.

- Beginning in 1999, requires the Department of Corrections to report by October 1 of each year on trends in sentencing practices and sentencing score thresholds and provide analyses on sentencing factors considered by courts.

- Requires the Criminal Justice Estimating Conference, with the aid of the Department of Corrections, to estimate the impact of any proposed change to the Criminal Punishment Code on future rates of incarceration and on the prison population. The Conference would be required to base its projections on historical data concerning sentencing practices which have been accumulated by the Department of Corrections and on records of the department that reflect the average time served for offenses that are changed by the Criminal Punishment Code and provide its projections by October 1 of each year.

- Authorizes the Department of Corrections to collect and evaluate code scoresheets generated from each judicial circuit to produce projections that would assist in making future modifications to the Criminal Punishment Code.

- Beginning in 1999, requires the Department of Corrections to provide an annual report by October 1 of each year to the Legislature showing the rate of compliance in the provision and completeness of scoresheets by each judicial circuit.

**Section 3** clarifies that the definitions that apply to the code apply to any felony offense, except capital felonies, committed on or after October 1, 1998.

**Section 4**

- Clarifies that s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, applies to offenses committed on or after October 1, 1998.

- Clarifies that the least severe ranking of an offense is in level 1 of the offense severity ranking chart and the most severe ranking of an offense is in level 10 of the offense severity ranking chart.

- Clarifies that the reclassification of any other law that provides an enhanced penalty for a felony offense to any offense listed in the offense severity ranking chart does not cause the offense to become unlisted and is not subject to the provisions of s. 921.0023, F.S., which pertains to the default ranking of unranked offenses.

- Provides that the following changes are proposed to the offense severity ranking chart of the Criminal Punishment Code:

***Level 1***
- Adds the description of possession of simulated identification under s. 322.212(1), F.S.
- Adds the description of supplying or aiding in supplying an unauthorized identification card under s. 322.212(4), F.S.
- Adds the description and the clarification of paragraph (a) for false application for an identification card.

***Level 3***
- Deletes escapes from juvenile facility under s. 39.061, F.S.
- Adds the description of possession of instruments for counterfeiting identification cards under s. 831.29, F.S.
- Adds escapes from a juvenile facility under s. 944.401, F.S.

***Level 5***
- Adds the description of selling, manufacturing, or delivering cannabis within 1,000 feet of a child care facility under s. 893.13(1)(c)2., F.S.
- Adds selling, manufacturing, or delivering cannabis or other drugs prohibited under specified sections, within 1,000 feet of property used for religious services or a specified business site under s. 893.13(1)(e), F.S.

***Level 6***
- Adds failure to register or failure to renew driver's license or identification card by sexual predators under s. 775.21(9), F.S.
- Adds felony battery under s. 784.041, F.S.
- Adds aggravated stalking of a person under 16 years of age under s. 784.048(5), F.S.
- Deletes reference to the property-value qualification of $100 or more for exploiting an elderly person or disabled adult under s. 825.103(2)(c), F.S.
- Adds solicitation of a child, via computer service, to commit an illegal sex act under s. 847.0135 (3), F.S.
- Adds failure to comply with the reporting requirements of sex offenders under s. 943.0435(6), F.S.

***Level 7***
- Adds attempted felony murder of a person, by a person other than the perpetrator or the perpetrator of an attempted felony, under s. 782.051(3), F.S.
- Adds giving false information about an alleged capital felony to a law enforcement officer under s. 837.05(2), F.S.

- Adds the description of selling, manufacturing, or delivering cocaine or other drugs prohibited under the specified sections within 1,000 feet of a child care facility under s. 893.13(1)(e), F.S.
- Adds selling, manufacturing, or delivering cocaine or other drugs prohibited under specified sections within 1,000 feet of property used for religious services or a specified business site.
- Adds trafficking in flunitrazepam (roofies) of the amount of 4 grams or more but less than 14 grams under s. 893.135(1)(g)1.a., F.S.

***Level 8***

- Adds attempted felony murder while perpetrating or attempting to perpetrate a felony other than a felony enumerated in s. 782.04(3), F.S., under s. 782.051(2), F.S.
- Adds perjury in official proceedings relating to prosecution of a capital felony under s. 837.02(2), F.S.
- Adds making contradictory statements in official proceedings relating to prosecution of a capital felony under s. 837.021(2), F.S.
- Adds trafficking in flunitrazepam (roofies) of the amount of 14 grams or more but less than 28 grams under s. 893.135(1)(g)1.b., F.S.

***Level 9***

- Adds attempted felony murder while perpetrating or attempting to perpetrate a felony enumerated in s. 82.04(3), F.S., under s. 782.051(1), F.S.

**Section 5**

- Clarifies that s. 921.0023, F.S., pertaining to unranked offenses, would apply to offenses committed on or after October 1, 1998.

- Deletes redundant language that is contained in s. 921.0022(2), F.S.

**Section 6**

- Modifies the code's worksheet by moving the entries "moderate" and "slight" and places them underneath the entries of "death" and "severe" relating to victim injury rather than sexual penetration or sexual contact.

- Provides a line entry on the worksheet to indicate whether an offender being sentenced is a "prison releasee reoffender."

- Switches the order of words on the line for violent habitual offender to read "habitual violent offender."

- Provides a line entry on the worksheet and a description in the worksheet key for the multiplier of crimes of domestic violence in the presence of a child under 16 years of age who is a "household member" as defined in s. 741.28(2), F.S., of the victim or the perpetrator to multiply subtotal sentence points by 1.5, which is consistent with the changes made to the sentencing guidelines in 1997.

- Clarifies in the worksheet key that prior capital felonies are those that are indicated in an offender's prior record, which include those capital felonies for which the offender has entered a plea of nolo contendere or guilty to or has been found guilty of.

- Clarifies that the lowest permissible sentence is the minimum sentence that a trial court may impose upon a defendant if no valid reasons to depart are found by the court.

- Provides for the method of calculating an offender's lowest permissible sentence is by first totaling the points of the scoresheet.

- Provides that if an offender's total sentence points are equal to or less than 44 points, the lowest permissible sentence for that offender is a non-state prison sanction, unless that court decides within its discretion that a prison sentence, up to the statutory maximum for all of the offenses the offender committed, is appropriate.

- Provides that if an offender's total sentence points are more than 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing that sum by 25 percent.

- Clarifies that the permissible "range" for sentencing an offender is between the lowest permissible sentence calculated by utilizing the scoresheet to calculate the total sentence points, subtracting 28 points, then decreasing that sum by 25 percent, and up to and including the statutory maximum for the primary offense and any additional offenses that are before the court for sentencing.

- Reiterates current law which authorizes the sentencing court to impose the sentences for each of the offenses before the court on sentencing either concurrently or consecutively, which is stated elsewhere in the code, and in the Florida Statutes, and is also the current practice under the sentencing guidelines.

- Reiterates that any sentence to state prison must be longer than 1 year.

- Requires a scoresheet to be prepared and submitted to the court for every felony defendant to determine the permissible range, which is the lowest permissible sentence up to the statutory

maximums for the offenses committed, for the sentence the court is authorized to impose pursuant to the code.

- Clarifies that if the lowest permissible sentence under the code exceeds the statutory maximum sentence for the offenses committed, the sentence under the code must be imposed.

- Provides that if the total sentence points are equal to or more than 363 points, an offender may be sentenced to life imprisonment, and prohibits any form of early release for such offenders except clemency or conditional medical release.

- Requires the Department of Corrections to consult with the Office of the State Courts Administrator, the state attorneys, and the public defenders, to develop and submit the revised Criminal Punishment Code scoresheet to the Supreme Court for approval by June 15 of each year, as deemed necessary.

- Requires the Department of Corrections to produce and provide enough copies of the revised scoresheets by September 30 of each year upon the approval of the Supreme Court of the revised scoresheet.

- Deletes involvement of the clerks of the circuit courts in the provision and distribution of sufficient copies of the scoresheet.

- Requires scoresheets to include item entries for whether any prison sentence imposed includes a mandatory minimum sentence or the sentence imposed was a downward departure from the lowest permissible sentence under the Criminal Punishment Code.

- Requires the Department of Corrections to collect and evaluate data on sentencing practices in the state from each of the judicial circuits and provide technical assistance to the Legislature.

- Requires the Department of Corrections to provide an annual report to the Legislature by October 1 of each year, beginning in 1999, which shows the rate of compliance of each judicial circuit in providing scoresheets to the department.

- Requires a sentencing scoresheet to be prepared for every felony defendant who is sentenced except for offenders who score 44 points or less.

- Provides references to Rules 3.702 and 3.703, or any other rule pertaining to the preparation and submission of felony sentencing scoresheets.

**Section 7**

- Adopts and implements, in accordance with ch. 921, F.S., Rules 3.701, 3.702, 3.703, and 3.988, Florida Rules of Criminal Procedure, and any other rules adopted by the Supreme Court pertaining to the preparation and submission of scoresheets for application to the Criminal Punishment Code.

**Section 8**

- Clarifies that mitigating circumstances under s. 921.0026, F.S., apply to felony offenses, other than capital felonies, committed on or after October 1, 1998.

- Prohibits expressly, rather than "discourages," a court to impose a sentence that is less than an offender's lowest permissible sentence, as calculated pursuant to s. 921.0024, F.S., unless there are factors or circumstances present, as provided in s. 921.0026, F.S., which would reasonably justify a downward departure.

**Section 9**

- Clarifies that the code applies to non-capital felony offenses committed on or after October 1, 1998.

- Provides the assumption that an offender's lowest appropriate sentence is the lowest permissible sentence that is calculated from the total sentence points pursuant to s. 921.0024(2), F.S.

- Prohibits departures from the lowest permissible sentence unless there are mitigating circumstances as provided in s. 921.0026, F.S., that reasonably justify a departure below the lowest permissible sentence.

- Requires departure sentences below the lowest permissible sentences be accompanied by a written statement by the sentencing court providing the reasons for departure within 7 days after the date of sentencing.

- Authorizes a written transcription of orally stated reasons for departure from the lowest permissible sentence within 7 days after the date of sentencing in lieu of a written statement of the court.

- Requires all departure sentences and minimum mandatory sentences to be provided on the sentencing scoresheets that are submitted to the court and ultimately the Department of Corrections.

**Section 10**

- Provides express guidelines for the applicability of the appropriate sentencing structure depending on the date the offense was committed by the defendant.

- Clarifies that all felonies with continuing dates of enterprise are to be sentenced under the version of the sentencing guidelines or Criminal Punishment Code in effect on the date the criminal activity began.

**Section 11**

- Clarifies that the habitual felony offender and the habitual violent felony offender statutes may be applied to offenders who were placed on community control without an adjudication of guilt to count as a "prior conviction" if the subsequent offense for which the offender is to be sentenced for was committed during the period of community control and the offender otherwise qualifies to have penalties enhanced under these statutes.

- Requires the court, on a monthly basis, to submit to the Office of Economic and Demographic Research the written reasons or transcripts in each case in which the court did not sentence a defendant as a habitual felony offender or a habitual violent felony offender.

- Requires the court, on a monthly basis, to submit to the Office of Economic and Demographic Research the written reasons or transcripts in each case in which the court did not sentence a defendant as a violent career criminal.

**Section 12**

- Creates the offense of attempted felony murder under s. 782.051, F.S., to narrowly provide instances in which a person can be held responsible for attempted murder where the offender committed an intentional act that is not an essential element of the underlying felony and that intentional act could, but does not, cause the death of another person and provides for the ranking of the offense in levels 7, 8, or 9, depending on the circumstances of the offense.

**Section 13**

- Provides for an appeal by a defendant of a sentence imposed under the Criminal Punishment Code that exceeds the consecutive statutory maximum penalty permitted for the offenses committed as provided under s. 775.082, F.S., or the consecutive statutory maximums for offenses at conviction, unless it is otherwise provided by law that a sentencing court may exceed the statutory maximum, which is consistent with current law under the guidelines.

**Section 14**

- Provides that the state may appeal a sentence where the sentence imposed by the court is below the lowest permissible sentence and no mitigating factors or circumstances existed and the court did not provide those factors in writing within 7 days after the date of sentencing.

**Section 15**

- Authorizes the Department of Corrections to refuse to accept offenders into the state correctional system unless provided a copy of the code scoresheet and any attachments pursuant to Rules 3.702 and 3.703, as well as Rule 3.701, or any other rule pertaining to the preparation and submission of felony sentencing scoresheets.

**Section 16**

- Reiterates current law pertaining to the conditions or circumstances in which an offender can be released from incarceration by resurrecting language that was codified in former s. 921.001(10), F.S., which would otherwise be repealed effective October 1, 1998, but this bill would move the language to ch. 944, F.S.

**Section 17**

- Makes technical changes to correct statutory cross-references.

**Section 18**

- Makes a technical change to use the terminology associated with the Criminal Punishment Code, such as "lowest permissible sentence" instead of "recommended sentence."

**Section 19**

- Deletes obsolete chapter references to ch. 396, F.S., and changes references to the Department of Health and Rehabilitative Services to the Department of Children and Family Services, relating to terms and conditions of probation and residential drug punishment centers.

**Section 20**

- Corrects cross-references relating to juveniles from ch. 39, F.S., to ch. 985, F.S., and deletes reference to the sentencing guidelines discretionary range of 40 to 52 points with regard to the Community Corrections Partnership Act.

**Section 21**

- Makes a technical change to use the terminology associated with the Criminal Punishment Code, such as "permissible sentence range," which is the lowest permissible sentence up to the statutory maximum for each offense committed, instead of "maximum recommended sentence range," which is used under the sentencing guidelines.

- Provides a statutory cross-reference to a defendant's right to appeal a sentence under the Criminal Punishment Code relating to the judicial disposition of youthful offenders.

**Section 22**
If approved by the Governor, these provisions take effect October 1, 1998.
*Vote: Senate 38-0; House 94-1*

## SEXUAL OFFENDERS/PREDATORS

### CS/HB 3327 — Sexually Violent Predators

by Family Law & Children Committee, Reps. Villalobos, Murman and others (CS/CS/SB 646 by Children, Families & Seniors Committee; Criminal Justice Committee; and Senators Gutman, Horne, Klein, Diaz-Balart and Cowin)

This act directs that the name of ch. 916, F.S., shall be changed to "Mentally Deficient and Mentally Ill Defendants; Civil Confinement of Sexually Violent Predators." Sections 916.10-916.20, F.S., may be cited as the "Forensic Client Services Act." Sections 916.30-916.40, F.S., which are new sections created by this bill, may be cited as "The Jimmy Ryce Act of 1998."

Section 916.33, F.S., is created. This section provides that the agency with jurisdiction over a person who has been convicted of a sexually violent offense shall give written notice to the multidisciplinary team, and a copy to the state attorney of the circuit where that person was last convicted of a sexually violent offense, 180 days or, in the case of an adjudicated committed delinquent, 90 days before: the anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who have been returned to confinement for no more than 90 days, written notice must be given as soon as practicable following the person's return to confinement; or the anticipated hearing regarding the possible release of a person who has been found not guilty by reason of insanity or mental incapacity of a sexually violent offense.

The secretary of the Department of Children and Family Services (DCFS) is required to establish a multidisciplinary team, which shall include two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist, designated by the secretary of the DCFS. The Attorney General's Office shall serve as legal counsel to the multidisciplinary team. The team, within 45 days after receiving notice, shall assess whether the person meets the definition of a sexually violent predator and provide the state attorney with its written assessment and recommendation.

Section 916.34, F.S., is created. This section provides that, following receipt of the written assessment and recommendation from the multidisciplinary team, the state attorney in the judicial circuit where the person committed the sexually violent offense may file a petition with the circuit court alleging that the person is a sexually violent predator and stating facts sufficient to support this allegation.

Section 916.35, F.S., is created. This section provides that, when the petition for civil commitment is filed, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the judge makes a determination of probable cause, the judge shall direct that the person be taken into custody and held in an appropriate secure facility.

Before the release from custody of a person whom the multidisciplinary team recommends for civil confinement, but after the state attorney files a civil commitment petition, the state attorney may further petition the court for an adversarial probable cause hearing. The person shall be provided with notice of, and an opportunity to appear in person at, an adversary hearing. At this hearing, the judge shall receive evidence and hear arguments from the person and the state attorney, and determine whether probable cause exists to believe that the person is a sexually violent predator.

At the adversary probable cause hearing, the person shall have the right to be represented by counsel, to present evidence, to cross-examine any witness testifying against the person, and to view and copy all petitions and reports in the court file. If the court again concludes that there is probable cause, the court shall direct that the person be held in an appropriate secure facility in the county where the petition was filed for an evaluation by a mental health professional. The person so held does not have the opportunity for pretrial release or release during the trial proceedings.

Section 916.36, F.S., is created. This section provides that, within 30 days after the determination of probable cause, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the interests of justice, when the person will not be substantially prejudiced. The person is entitled to assistance of counsel at all adversarial proceedings and, if the respondent is indigent, the court shall appoint the public defender or, if a conflict exists, other counsel to assist the person. If the person is subjected to a mental health examination, the person also may retain experts or mental health professionals to perform an examination. If a person wishes to be examined by a professional of the person’s own choice, the examiner must be provided reasonable access to the person, as well as to all relevant medical and mental health records and reports. If the respondent is indigent, the court, upon the persons

request, shall determine if an examination is necessary; if the court determines an examination is necessary, the court shall appoint a mental health professional and determine reasonable compensation for the professional's services. The person or the state attorney has the right to demand that the trial be before a jury. A demand for a jury trial must be filed, in writing, at least 5 days before the trial. If no demand is made, the trial shall be to the court.

Section 916.37, F.S., is created. This section provides that the court or jury shall determine, by clear and convincing evidence, that the person is a sexually violent predator. If the jury determines the person is a sexually violent predator, the decision must be unanimous. If a majority of the jury finds the person is a sexually violent predator, but the decision is not unanimous, the state attorney may refile the petition and proceed according to the provisions of the act. Any retrial must occur within 90 days after the previous trial, unless the subsequent proceeding is continued. The determination that a person is a sexually violent predator is appealable.

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the DCFS for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that it is safe for the person to be at large. Predators committed for control, care, and treatment by the DCFS shall be kept in a secure facility segregated from patients who are not committed as sexually violent predators.

Section 916.38, FS., is created. This section provides that a person committed as a sexually violent predator shall have an examination of the person's mental condition once every year or more frequently at the court's discretion. The DCFS shall provide the person with annual written notice of the person's right to petition the court for release over the objection of the director of the facility where the person is housed. The notice must contain a waiver of rights. The director of the facility shall forward the notice and waiver form to the court.

The court shall hold a limited hearing to determine whether there is probable cause to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged. The person has the right to be represented by counsel at the hearing, but not to be present. If the court finds that probable cause exists, the court shall set a trial, and the person is entitled to be present and to the benefit of all constitutional protections afforded the person at the initial trial, except trial by jury. The state attorney shall represent the state and has the right to have the person examined by professionals chosen by the state. The state must prove, by clear and convincing evidence, that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence.

Section 916.39, F.S., is created. This section provides that the secretary of the DCFS or the secretary's designee may petition the court for the release of a person committed as a sexually violent predator, if the secretary or the secretary's designee determines that the person is not likely to commit acts of sexual violence if conditionally discharged. The petition shall be served upon the court and the state attorney.

Section 916.40, F.S., is created. This section provides that the act shall not prohibit a person from filing a petition for discharge at any time. However, if the person has previously filed a petition, without approval of the secretary of the DCFS or the secretary's designee and the court determined that the petition was without merit, a subsequent petition shall be denied unless there are new facts warranting a probable cause hearing.

Section 916.41, F.S., is created. This section authorizes the release of relevant information and records that are otherwise confidential or privileged to the agency having jurisdiction or to the state attorney for the purpose of meeting the notice requirements under the act and determining whether a person is or continues to be a sexually violent predator. Psychological or psychiatric reports, drug and alcohol reports, treatment records, medical records, or victim impact statements submitted to the court or admitted into evidence shall be part of the record but sealed and may be opened only pursuant to a court order.

Section 916.45, F.S., is created. This section provides that the act applies to all persons currently in custody who have been convicted of a "sexually violent offense," as that term is defined in the act, as well as to all persons convicted of a sexually violent offense in the future.

Section 916.46, F.S., is created. This section provides that, as soon as practicable, the DCFS shall give written notice of the release of a sexually violent predator to any victim of the predator who is alive and whose address is known by the DCFS or, if the victim is deceased, to the victim's family, if the family's address is known by the DCFS. Failure to notify is not a reason for postponement of release. Further, this section does not create a cause of action against the state or a state employee acting within the scope of the employee's employment as a result of the failure to notify pursuant to this act.

Section 916.47, F.S., is created. This section provides that it is a second-degree felony for a person to escape or attempt to escape from lawful custody pursuant to the act.

Section 916.48, F.S., is created. This section provides that a person committed as a sexually violent predator shall disclose all of the person's revenues and assets to the DCFS. The person shall also pay from such income and assets, except where such income is exempt by state or

federal law, all or a fair portion of the person's daily subsistence and treatment costs, based upon the person's ability to pay, liability or potential liability to the victim or the guardian or the estate of the victim, and the needs of the person's dependents. The person directed to pay subsistence and treatment costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment. An order directing payment of the person's subsistence and treatment costs may survive against the person's estate.

Section 916.49, F.S., is created. This section provides that the DCFS is responsible for all costs relating to the evaluation and treatment of persons committed to the department's custody as sexually violent predators. A county is not obligated to fund costs for psychological evaluations, expert witnesses, court-appointed counsel, or other costs required by the act; those costs shall be paid from state funds appropriated by general law.

The act also provides that the DCFS may contract with a private entity or state agency for use of and operations of facilities to comply with the requirements of the act. The DCFS may also contract with the Correctional Privatization Commission to issue a request for proposals and monitor contract compliance for these services.

The act also provides for an appropriation from the General Revenue Fund in a lump sum to the DCFS the sum of $4.9 million dollars, of which $1.5 million is from nonrecurring funds, and 50 full-time equivalent positions, and from the Grants and Donations Trust Fund, $1.5 million dollars to the DOC for the purpose of carrying out the provisions of this act. From the funds appropriated to the DCFS, the department shall, at the counties' request, reimburse counties for the costs of no more than one examination of each person subject to this act, provided that the department's reimbursement for each examination shall not exceed the costs to the department for examinations it conducts of such persons.

If approved by the Governor, these provisions take effect January 1, 1999.
*Vote: Senate 38-0; House 118-0*

# WEAPONS AND FIREARMS

## CS/CS/HB 679 — Weapons and Firearms/Domestic Violence

by Law Enforcement & Public Safety Committee; Crime & Punishment Committee; Rep. Lynn and others (SB 1582 by Senators Kurth, Grant and Klein)

The bill amends Florida laws to conform to federal law, which prohibits the possession of firearms and ammunition by persons under a domestic violence injunction, or a person who has a conviction, withhold of adjudication of guilt, or suspended sentence for a violent misdemeanor. The bill states "that it is the intent of the Legislature that the disabilities regarding possession of firearms and ammunition are consistent with federal law." As such, state and local law enforcement officers, as defined in s. 943.10(14), F.S., holding an active certification, are exempt from the provisions of the law when the officer's employing agency authorizes the possession for use in the performance of the officer's official duties.

The bill creates a first-degree misdemeanor for a person who is subject to a final injunction that is in force and effect, restraining that person from committing acts of domestic violence, from having in his or her care, custody, possession, or control a firearm or ammunition. The final injunction for protection against domestic violence *must*, on its face, inform the respondent of this law.

This misdemeanor is restated in s. 741.31, F.S., which statutorily lists what constitutes a violation of an injunction for protection against domestic violence and provides for a first-degree misdemeanor for such violation.

Further, the bill specifically states that a person who has been convicted of a misdemeanor crime of domestic violence may not purchase a firearm. Likewise, a person who has had adjudication of guilt withheld or imposition of sentence suspended may not purchase a firearm.

The bill expands the reasons that an application for a license shall be denied or a license revoked to include:

- The applicant or licensee is a respondent of a temporary or final domestic violence injunction or a temporary or final injunction that prohibits acts of repeat violence; or
- The applicant or licensee has been found guilty of, had adjudication of guilt withheld for, or had imposition of sentence suspended for a misdemeanor crime of domestic violence or a crime of violence constituting a misdemeanor. After 3 years have elapsed since probation or any other conditions set by the court have been fulfilled, or the record has been sealed or expunged, the person may be eligible for a concealed weapon or firearm license.

The bill expands the criteria in s. 790.065, F.S., which prohibits the sale or transfer of a firearm to include a person who has had adjudication of guilt withheld or imposition of sentence suspended for a *misdemeanor crime of domestic violence,* unless 3 years have elapsed since the completion of the sentence. A person who is convicted of a *misdemeanor crime of domestic violence* may not currently purchase or transfer a firearm under federal law. Prior to the sale or delivery of a firearm and at the request of a licensed importer, licensed manufacturer, or licensed dealer, the Florida Department of Law Enforcement must review the criminal history of the potential buyer to determine if the buyer has been convicted, had adjudication of guilt withheld, or a suspended sentence imposed for a misdemeanor crime of domestic violence, and 3 years have not elapsed since the fulfillment of all court imposed sanctions.

Generally, an officer may not make a warrantless arrest for a misdemeanor unless the misdemeanor occurs in the officer's presence. s. 901.15, F.S. However, if the officer has probable cause to believe that the person has committed a criminal act which violates an injunction for protection against domestic violence, a warrantless arrest is authorized. Senate Bill 1582 expands this authorization to include an arrest when a officer has probable cause to believe that a person, who is subject to a domestic violence injunction, possesses or did possess a firearm or ammunition.

If approved by the Governor, these provisions take effect July 1, 1998.
*Vote: Senate 32-4; House 78-38*

### HB 909 — Concealed Weapons/Nonresidents

by Rep. Crady and others (CS/SB 366 by Criminal Justice Committee and Senators Williams, Crist and Cowin)

This bill permits a U.S. resident who is a Florida nonresident to carry a concealed weapon or firearm in this state, provided the nonresident:

- Is at least 21 years of age; and
- Has in his or her immediate possession a valid license to carry a concealed weapon or concealed firearm issued to the nonresident in his or her state of residence.

This bill provides that the nonresident's license shall remain in effect in Florida for 90 days following the date on which the license holder establishes legal state residence. Under the bill, a nonresident establishes legal residence in Florida when he or she does one of the following acts:

- Registers to vote;
- Makes a statement of domicile pursuant to s. 222.12, F.S.; or
- Files for homestead tax exemption on Florida property.

This bill contains a provision specifying that it is limited to states which have reciprocity with Florida with respect to the issuance of a concealed weapon or concealed firearm permit.

If approved by the Governor, these provisions take effect July 1, 1998.
*Vote: Senate 32-6; House 77-40*