

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 10, 1998 Revised: \_\_\_\_\_

Subject: Pretrial Detention

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Gomez</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>_____</u>	<u>_____</u>	<u>JU</u>	<u>_____</u>
3.	<u>_____</u>	<u>_____</u>	<u>WM</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

The bill allows a judge to deny bail if no condition of release can reasonably protect the community from risk of physical harm and the offender is charged with a dangerous crime as specified by s 907.041, F.S. Current law requires additional proof of one of the following: a prior conviction of a crime punishable by death or life, or prior conviction for a dangerous crime within the past 10 years, or that a showing that at the time of the new crime, the defendant was on probation or a similar legal restraint. The bill deletes the requirement of finding one of these additional conditions.

The bill creates two new conditions, which will allow a court to deny bail prior to trial.

The bill eliminates a 90-day cap placed on pretrial detention for defendants who are found to pose a danger to the community.

The bill specifies that nothing in s. 907.041, F.S., shall be construed to require the filing of a pretrial detention motion before a court may deny bail. It further specifies that the state may move for pretrial detention any time a defendant is in court for a bail hearing without the necessity of filing a written motion.

The bill repeals Rules 3.131 and 3.132 of the Florida Rules of Criminal Procedure relating to pretrial release and pretrial detention to the extent they are inconsistent with the provisions in the bill.

This bill substantially amends section 907.041 of the Florida Statutes.

## II. Present Situation:

### A. Constitutional Pretrial Releases

The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required.”

Prior to January 1, 1983, Florida courts could deny bail for offenses which were punishable by death or by life in prison, only. Article I, s. 14 of the State Constitution guaranteed the right to bail for all other offenses. *See State v. Arthur*, 390 So.2d 717 (Fla. 1980). However, Art. I, s. 14, State Constitution was amended effective January 1, 1983. The amendment gave Florida courts constitutional authority to detain an accused as described below.

Article I, s. 14 of the State Constitution now provides that “unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime shall be entitled to pretrial release on reasonable conditions.” This constitutional provision further states, “[i]f no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.”

The effect of the 1982 amendment was to allow courts to deny bail, in certain situations, to persons accused of offenses other than capital offenses or offenses punishable by life imprisonment. Section 907.041, F.S. (1983), provides an elaborate statutory scheme to implement Art. I, s. 14, State Constitution, as amended. *Gomez v. Hinkley*, 473 So.2d 809, 810 (Fla. 4th DCA 1985).

### B. Statutory Right to Pretrial Release

Paragraph (4)(b) of s. 907.041, F.S. (Pretrial Detention and Release), lists four criteria for denying bail to defendants:

The court may order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in s. 903.046, and any other relevant facts, that:

1. The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure the defendant's appearance at subsequent proceedings;
2. The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, juror, or judicial officer, or has attempted or conspired to do so, and that no condition of release will reasonably prevent the obstruction of the judicial process;

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3. The defendant is charged with trafficking in controlled substances as defined by s. 893.135, that there is a substantial probability that the defendant has committed the offense, and that no conditions of release will reasonably assure the defendant's appearance at subsequent criminal proceedings; or
  4. The defendant poses the threat of harm to the community. The court may so conclude if it finds that the defendant is presently charged with a *dangerous crime*, that there is a substantial probability that the defendant committed such crime, that the factual circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons. In addition, the court must find that at least one of the following conditions is present:
    - a. The defendant has previously been convicted of a crime punishable by death or life imprisonment.
    - b. The defendant has been convicted of a dangerous crime within the 10 years immediately preceding the date of his or her arrest for the crime presently charged.
    - c. The defendant is on probation, parole, or other release pending completion of sentence or on pretrial release for a dangerous crime at the time of the current arrest.

To deny pretrial release on the basis that the defendant poses a threat of physical harm to persons in the community (4 above), the defendant must be charged with a "*dangerous crime*."

Paragraph (4)(a) of s. 907.041, F.S., enumerates these crimes, as follows:

1. Arson;
2. Aggravated assault;
3. Aggravated battery;
4. Illegal use of explosives;
5. Child abuse or aggravated child abuse;
6. Abuse of an elderly person or disabled adult, or aggravated abuse of an elderly person or disabled adult;
7. Hijacking;
8. Kidnapping;
9. Homicide;
10. Manslaughter;
11. Sexual battery;
12. Robbery;
13. Carjacking;
14. Lewd, lascivious, or indecent assault or act upon or in presence of a child under the age of 16 years;

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15. Sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority;
  16. Burglary of a dwelling;
  17. Stalking and aggravated stalking;
  18. Act of domestic violence as defined in s. 741.28; and
  19. Attempting or conspiring to commit any such crime; and home-invasion robbery.

Section 903.046, F.S., sets forth the Legislature's "purpose of and criteria for bail determination." This section is cross-referenced in s. 907.041(4)(b), F.S., and thus is inextricably linked. Section 903.046, F.S., provides:

1. The purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.
2. When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court shall consider:
  - a. The nature and circumstances of the offense charged.
  - b. The weight of the evidence against the defendant.
  - c. The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.
  - d. The defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings. However, any defendant who previously had willfully and knowingly failed to appear and breached a bond as specified in s. 903.26, F.S., but who had voluntarily appeared or surrendered, shall not be eligible for a recognizance bond; and any defendant who willfully and knowingly failed to appear and breached a bond as specified in s. 903.26, F.S., and who was arrested at any time following forfeiture shall not be eligible for a recognizance bond or for any form of bond which does not require a monetary undertaking or commitment equal to or greater than \$2,000 or twice the value of the monetary commitment or undertaking of the original bond, whichever is greater.
  - e. The nature and probability of danger which the defendant's release poses to the community.
  - f. The source of funds used to post bail.

- g. Whether the defendant is already on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence.
- h. The street value of any drug or controlled substance connected to or involved in the criminal charge. It is the finding and intent of the Legislature that crimes involving drugs and other controlled substances are of serious social concern, that the flight of defendants to avoid prosecution is of similar serious social concern, and that frequently such defendants are able to post monetary bail using the proceeds of their unlawful enterprises to defeat the social utility of pretrial bail. Therefore, the courts should carefully consider the utility and necessity of substantial bail in relation to the street value of the drugs or controlled substances involved.
- i. The nature and probability of intimidation and danger to victims.
- j. Any other facts that the court considers relevant.

### **C. Procedural Requirements of s. 907.041, F.S.**

In addition to establishing criteria for denying bail, s. 907.041, F.S., includes several procedural requirements, including the following:

- ▶ An arresting agency may hold the defendant up to 24 hours prior to the filing of a motion for pretrial detention by the state attorney.
- ▶ The court shall order detention only after a pretrial hearing.
- ▶ A hearing on the motion for pretrial detention must be held within 5 days, but the state attorney is allowed one continuance for good cause. A defendant may be held in jail until the hearing.
- ▶ If denied bail, failure to bring the defendant to trial within 90 days results in his release subject to any conditions of release, unless the trial delay was requested or caused by the defendant or his or her counsel.

### **D. Florida Rules of Criminal Procedure**

Rule 3.131, Florida Rules of Criminal Procedure, describes the pretrial release procedures. Rule 3.131(a), Fla.R.Crim.P., restates the constitutional provision which provides an entitlement to pretrial release on reasonable condition to non-capital defendants, unless there is a risk of harm to the community or a risk of flight. Rule 3.131(b), Fla.R.Crim.P., provides that unless the state has filed a motion for pretrial detention, the court shall conduct a hearing to determine pretrial release. Rule 3.131(b), Fla.R.Crim.P., sets out the conditions and criteria which the court is to consider, most of which track ss. 903.046 and 907.041, F.S.

Rule 3.132, Fla.R.Crim.P., describes the procedures for the pretrial detention hearing. Rule 3.132(a), Fla.R.Crim.P., requires that a person arrested shall be provided a “first appearance

hearing” within 24 hours of arrest. Rule 3.132(a), Fla.R.Crim.P., provides that the state may file a motion seeking pretrial detention at the first appearance hearing. If the court determines that the motion is facially insufficient or no motion is filed, the court proceeds to determine the conditions of release pursuant to the provisions of Rule 3.131(b), Fla.R.Crim.P. If the court finds the state attorney’s motion facially sufficient, the court determines whether there is probable cause for the offense and if such a finding is made, the court may detain the defendant pending a final hearing on pretrial detention.

### **III. Effect of Proposed Changes:**

#### **A. Elimination of Certain Requirements for Court Finding that Defendant Poses a Threat of Harm to the Community**

Current law allows a court to order pretrial detention when certain conditions are met. A condition authorizing pretrial detention is a finding by the court that “[t]he defendant poses a threat of harm to the community.” A court may so conclude when it finds:

- ▶ The defendant is presently accused of a dangerous crime;
- ▶ There is a substantial probability the defendant committed the crime; and
- ▶ The circumstances of the crime indicate a disregard for safety of the community.

*In addition, the court must also find one of the following:*

- a) The defendant has previously been convicted of a crime punishable by death or life imprisonment, *OR*
- b) The defendant has been convicted of an enumerated dangerous crime within 10 years, *OR*
- c) The defendant is on probation, parole, or other release pending completion of sentence or on pretrial release for a dangerous crime at the time of the current arrest.

The bill deletes the requirement of finding either a), b), or c), above, in order to deny pretrial release. The effect is to expand the courts’ ability to order pretrial detention and to deny bail for persons accused of dangerous crimes.

#### **B. Creation of Two New Conditions Which Authorize Denial of Bail**

The bill creates two new conditions, which will allow a court to deny bail prior to trial.

- ▶ The first condition allows pretrial detention when the defendant was on probation, parole, or other release pending completion of sentence or on pretrial release for a dangerous crime at the time the current offense was committed. (This condition was previously one of the additional conditions, see c) above, which factored into a finding that the defendant poses a threat of harm to the community.)

- ▶ The second condition allows pretrial detention when the defendant has violated one or more conditions of pretrial release or bond for the offense before the court which in turn supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.

As to the second condition, current law already provides for denial of bail where “[t]he defendant has previously violated conditions of release” and “no further conditions of release are reasonably likely to assure the defendant’s appearance at subsequent proceedings.” It is not clear what the second condition created by the bill will add to current law. Moreover, the second condition could be viewed as more restrictive since it requires a finding of additional conditions beyond assurances of the defendant’s appearance at subsequent proceedings.

### **C. Elimination of the 90-day Cap**

Under current law, any pretrial detention based upon a defendant’s potential harm to the community is limited to 90 days. If the defendant is not brought to trial in that time, he must be released on bail, subject to any release conditions, unless the trial delay was requested or caused by the defendant or his or her counsel.

The bill repeals this 90-day cap placed on pretrial detention. However, defendants maintain their right to speedy trial. That is, every defendant has the right to trial in 60 days, upon demand. Otherwise, the state must bring misdemeanor defendants to trial in 90 days, and felony defendants within 175 days. *See* Rule 3.191, Fla.R.Crim.P.

### **D. Deletion of Language Requiring Detention Hearing**

The bill deletes the following language in current statute: “[t]he court shall order detention only after a pretrial detention hearing.” Presumably, this deletion is stylistic or technical since the statute and bill contemplate the holding of a hearing and any other construction would violate the due process clause of the federal and state constitutions.

### **E. Pretrial Detention Motion**

The bill specifies that nothing in s. 907.041, F.S., shall be construed to require the filing of a pretrial detention motion before a court may deny bail. It further specifies that the state may move for pretrial detention any time a defendant is in court for a bail hearing, without the necessity of filing a written motion. This contradicts Rule 3.132(a), Fla.R.Crim.P., which contemplates a “signed” state attorney motion “setting forth with particularity the grounds and the essential facts on which pretrial detention is sought and certifying that the state attorney has received testimony under oath supporting the grounds and the essential facts alleged in the motion.”

**F. Repeal of Florida Rules of Criminal Procedure**

The bill repeals Rules 3.131 and 3.132 of the Florida Rules of Criminal Procedure relating to pretrial release and pretrial detention, to the extent they are inconsistent with the bill.

**G. Effective Date**

The bill takes effect upon becoming law, except that the rules of criminal procedure take effect only if this act is passed by two-thirds of the membership of each house of the Legislature.

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

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The bill specifies that nothing in s. 907.041, F.S., shall be construed to require the filing of a pretrial detention motion before a court may deny bail. It further specifies that the state may move for pretrial detention any time a defendant is in court for a bail hearing, without the necessity of filing a written motion. This contradicts Rule 3.132(a), Fla.R.Crim.P., which contemplates a “signed” state attorney motion “setting forth with particularity the grounds and the essential facts on which pretrial detention is sought and certifying that the state attorney has received testimony under oath supporting the grounds and the essential facts alleged in the motion.” The bill repeals Rule 3.132(a), Fla.R.Crim.P., to the extent it is inconsistent with its provisions.

It is a fundamental concept of due process that a defendant be afforded adequate notice and an opportunity to be heard when his or her life or liberty is at stake. “Due process, then, embodies at least two general concepts: the right to adequate advance notice and a meaningful right to be heard before a tribunal takes action.” *State v. Smith*, 547 So.2d 131, 134 (Fla. 1989). To the extent that the repeal of the Rule 3.132(a), Fla.R.Crim.P., requirement of a written motion setting forth particulars may deny some defendants adequate notice and time to prepare a defense, this provision of the bill could be found to violate the



due process clauses of the state and federal constitutions. Art. I, s. 9, Fla. Const.; U.S. Const. amend. V.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill is likely to result in more detainees in county jails; though an accurate prediction of the increase seems impossible. The counties should experience an undetermined negative fiscal impact. Further, according to the Office of the State Courts Administrator, this bill could result in a “significant” impact on judicial resources “if more hearings are necessary to determine the eligibility for pretrial detention.”

**VI. Technical Deficiencies:**

The bill does not move an “or” from existing law (page 3, line 18) to where it should be placed (page 4, line 7) in light of the bill’s new provisions.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.