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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS**

BILL #: HB 389
RELATING TO: Pretrial Detention
SPONSOR(S): Rep. Cantens
COMPANION BILL(S): SB 748

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
 - (2) JUDICIARY
 - (3) CRIMINAL JUSTICE APPROPRIATIONS
 - (4)
 - (5)
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I. SUMMARY:

The bill creates the "Trooper Robert Smith Act."

The bill amends s. 907.041 to broaden court authority to order pretrial detention without bond, particularly for DUI manslaughter, violations of supervision and for persons who may not appear for trial or for persons who pose a risk of physical harm to the community.

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

The bill eliminates the requirement that pretrial detention orders may be issued, only, pursuant to motion by the state attorney. Consequently, pretrial detention orders may issue after any bail hearing, so long as the court makes the required findings of fact.

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

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Constitutional Right To Bail

Article I, Section 14 of the Florida Constitution provides for two exceptions for the right to bail. The first exception applies to persons charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great. The second exception provided by the Florida Constitution states:

If 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 first exception is defined and regulated by case law. See, State v. Arthur, 390 So. 2d 717 (Fla. 1980). The second exception is defined and regulated by ss. 903.046 and 907.041, F.S.

Statutory Right To Bail

Section 907.041, F.S. (Pretrial Detention and Release), lists four criteria for denying bail to defendants:

(b) 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 (for setting bond), 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; **(or)**

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; **(or)**

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 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.

Dangerous Crimes Enumerated

To deny bail 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.”** Section 907.041 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. Kidnaping;
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;
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.

Procedural Requirements of 907.046, F.S.

In addition to establishing criteria for denying bail, s. 907.041 includes several procedural requirements, as follows:

- ▶ Arresting agency must notify state attorney of arrest of qualified defendants.
- ▶ Arresting agency may hold the defendant up to 24 hours pending the filing of a motion for pretrial detention by the state attorney.
- ▶ A hearing on the motion for pretrial detention must be held within 5 days, but a state attorney is allowed one continuance for good cause. A defendant may be held in jail until the hearing.
- ▶ The state attorney has the burden of showing the need for pretrial detention.
- ▶ The defendant may present witnesses and evidence and may cross-examine the state's witnesses.
- ▶ The court may admit relevant evidence, but the Florida Evidence Code does not apply, except that no evidence will be admitted which was procured in violation of the state or federal constitutions.
- ▶ The defendant's testimony may not be used as evidence of guilt at any other proceeding, other than a perjury proceeding, or for impeachment.
- ▶ The court will prepare a pretrial detention order based on the evidence produced at the hearing within 24 hours of the hearing.
- ▶ If bail is denied, any failure to bring the defendant to trial within 90 days results in the defendant's release.

Legislative Intent Regarding Bail

Section 903.046, F.S., sets forth the Legislatures "**purpose of and criteria for bail determination**":

(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, 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 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.

B. EFFECT OF PROPOSED CHANGES:

The bill creates the "Trooper Robert Smith Act."

Pretrial Detention for DUI Manslaughter

In addition to current authority for a court to hold a person without bond, the bill creates a new subsection in section 907.041, F.S., that authorizes the pretrial detention (without bond) of a person charged with DUI manslaughter if there is a substantial probability that the defendant committed the crime and that the defendant poses a threat of harm to the community. The bill provides that the following conditions that would support a finding by the court that the defendant poses a threat of harm to the community:

- a. The defendant has previously been convicted of a DUI.
- b. The defendant was driving with a suspended license when the offense was committed.
- c. The defendant's driver's license has been suspended at least two times prior to the commission of the charged crime.

These conditions do not exclude the consideration of any other factors that demonstrate a threat of harm to the community.

Elimination Of Certain Statutory Requirements For Pretrial Detention

Under current law, s. 907.041, F.S., places restrictions on the courts' constitutional authority to deny bail for any "dangerous crime" when the court determines that no condition of release can reasonably **protect the community from risk of physical harm** to persons by imposing the three following conditions:

- 1) the defendant is presently accused of a dangerous crime;
- 2) there is a substantial probability the defendant committed the crime; and
- 3) the circumstances of the crime indicate a disregard for safety of the community;

AND, the defendant,

- a) has previously been convicted of a crime punishable by death or life imprisonment, **OR**
- b) has been convicted of an enumerated dangerous crime within 10-years, **OR**
- c) 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 eliminates restrictions a), b), & c), above. Thus, the bill expands courts' ability to deny bail for dangerous crimes by only requiring that the court find the existence of 1), 2), and 3) above.

Pretrial Detention for Violating Supervision or Pretrial Release

Violation of Supervision and Pretrial Release for a "Violent Crime"

The bill authorizes pretrial detention when it is determined that the defendant was on supervision or pretrial release for one of the enumerated "dangerous crimes" (See list of enumerated "dangerous crimes" in Present Situation) at the time the current offense was committed. The similar present law authorizes pretrial detention if both the new offense and the offense for which the defendant is on supervision or pretrial release both be a "dangerous crime." Under this new criteria, a person qualifies for pretrial detention without bail for any offense if the person was on supervision or pretrial release for a "violent crime."

Violation of Supervision or Pretrial Release for Any Crime

The bill authorizes pretrial detention without bond for any offense if a defendant has violated one or more conditions of pretrial release or bond for the offense currently before the court which, in the discretion of the court, support the 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.

Elimination Of Need For Motion For Pretrial Detention

Under current law, bail may not be denied (for offenses other than capital or life felonies) except pursuant to a motion for pretrial detention, filed by the state attorney. The bill allows the court to deny bail at any bail hearing, without motion from the state attorney.

Elimination Of the Ninety 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.

The bill repeals the 90-day cap placed on pretrial detention. However, defendants are still protected by the 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, unless the offender waives his or her right to have a speedy trial. See, Rule 3.191, Florida Rules of Criminal Procedure.

Repeal Of Florida Rules Of Criminal Procedure

The bill repeals Rule 3.131 & 3.132 of the Florida Rules of Criminal Procedure relating to pretrial release and pretrial detention to the extent that the rules are inconsistent with the bill. The repeal of the rules of criminal procedure takes effect only if the bill is passed by two-thirds of the Legislature.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

ss. 903.046 & 907.041, F.S., and Rules 3.132 and 3.131, Florida Rules of Criminal Procedure.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Creates the "Trooper Robert Smith Act."

Section 2: Amends s. 907.041 to broaden court authority to order pretrial detention without bond, particularly for DUI manslaughter, violations of supervision and for persons who may not appear for trial or for persons who pose a risk of physical harm to the community.

Section 3: Reenacts Florida Law.

Section 4: Repeals Rules 3.131 & 3.132 of the Florida Rules of Criminal Procedure to the extent they are inconsistent with the bill.

Section 5: Provides an effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

The Criminal Justice Estimating Committee has not met to discuss this bill as of the publishing of this report, however, the bill does not appear to impact the state prison population. The bill will result in more detainees in county jails, and thus there will be some expense to the counties.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because the committee substitute affects a criminal statute, it is exempt from Article VII, Section 18.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The committee substitute does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The committee substitute does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

Constitutional Right To Bail

Prior to January 1, 1983, courts could deny bail only for offenses which were punishable by death or by life in prison. Article 1, Section 14 of the Constitution guaranteed the right to bail for all other offenses. See, State v. Arthur, 390 So. 2d 717 (Fla. 1980). However, Article I, Section 14 was amended by the citizens of Florida in the election of November 2, 1982 (effective January 1, 1983). The amendment gave Florida courts constitutional authority to deny bail for any offense, if no condition of

release could ensure the presence of the defendant at future proceedings, protect the community from harm or ensure the integrity of the judicial process. See, Art. I, Sec. 14.

The effect of the amendment to the Florida Constitution, which was proposed by the legislature, 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, Florida Statutes (1983), provides an elaborate statutory scheme to implement Article I, section 14, as amended.

Gomez v. Hinkley, 473 So. 2d 809, 810 (Fla. 4th DCA 1985).

Page 5, lines 10, and 12 of the bill include the clause “the defendant poses the threat of harm...” This clause would read more clearly if “the” were replaced with an “a.”

The bill [section 907.041(4)(b)4.c.] provides that the fact that a person has previously had his or her license suspended on two or more prior occasions is a factor that the court must consider in determining whether a defendant charged with DUI manslaughter poses a threat of harm to the community. Of course, if a person had a license suspended for failing to pay speeding fines the relevance to whether a person was a risk to the community would be minimal. Florida’s constitution only authorizes consideration of factors relating to the safety of the community, the integrity of the judicial process or the assurance that the defendant will appear in court. However, it would be more relevant to show that in the past a person drove a vehicle while his or her license was suspended, because a prior charge for driving while license suspended or revoked would demonstrate that merely suspending the license of a person arrested for DUI manslaughter may not keep the defendant from driving and may not protect the community.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 17, 1999, the sponsor offered an amendment in the Committee on Crime and Punishment to change the word “the” on page 5, lines 10 and 12 to the word “a”.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Staff Director:

J. Willis Renuart

J. Willis Renuart