SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary

BILL: CS/CS/SB's 114 & 444

INTRODUCER: Judiciary Committee, Children and Families Committee, and Senators Lynn, Campbell, and Miller

SUBJECT: Drug Court Programs

DATE: January 13, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Goltry	Whiddon	CF	**Fav/Combined CS**
2.	Luczynski	Maclure	JU	**Fav/CS**
3.			CJ	
4.			JA	
5.				
6.				

I. Summary:

This bill modifies laws regarding treatment-based drug court[1] programs in dependency, criminal, and delinquency proceedings. The bill authorizes a court, in a dependency case, to order a child or a person who has custody or is requesting custody of the child to be evaluated for drug or alcohol problems at any time after a shelter petition or petition for dependency is filed. Additionally, it allows the court, after an adjudication of dependency or a finding of dependency where adjudication is withheld, to require participation in and compliance with treatment-based drug court programs. Individuals involved in a dependency case may voluntarily enter drug court prior to an adjudication of dependency or a finding of dependency where adjudication is withheld.

In adult criminal and juvenile delinquency courts, treatment-based drug court programs have traditionally been structured as pretrial intervention programs. This bill requires that entry into any pretrial treatment-based drug court program must be voluntary. Additionally, voluntary participants must acknowledge in writing that they understand the requirements of the program and the potential sanctions for noncompliance. This bill also provides that counties with treatment-based drug court programs may adopt a protocol of sanctions for noncompliance with program rules. If a protocol of sanctions is adopted, it may include, but is not limited to: (a) placement in a substance abuse treatment program offered by a licensed service provider; (b) placement in a jail-based treatment program; or (c) serving a period of secure detention if a child or a period of incarceration within the time limits established for contempt of court if an adult.

[1] The term "drug court" refers to a process by which substance abusers entering the court system are placed into treatment and proactively monitored by the judge and a team of justice-system and treatment professionals.

These provisions of the bill address recent case law holding that incarceration or a licensed substance abuse treatment program may not be imposed for noncompliance with pretrial drug court programs as such sanctions are not authorized by current law.[2]

The fiscal impact to state and local governments of this is bill is indeterminate. The language of the bill is permissive (i.e., creation of a treatment-based drug court program is at the counties' discretion). However, should a county choose to create such a program, an individual participating in the program will be subject to a coordinated strategy developed by a drug court team which may include a protocol of sanctions that may have some fiscal impact.

The bill substantially amends the following sections of the Florida Statutes: 39.001, 39.407, 39.507, 39.521, 397.334, 910.035, 948.08, 948.16, and 985.306.

II. Present Situation:

Proceedings Related to Children (Chapter 39, F.S.)

Chapter 39, F.S., governs proceedings relating to children, including those for dependency, protective investigations, custody, permanency (such as adoption), appointment of guardian advocates, and termination of parental rights. Chapter 39, F.S., incorporates the due process provisions contained in the Florida Rules of Juvenile Procedure (F.R.J.P.), such as those requiring a hearing for children and parents, the opportunity to be heard, and the right to counsel, including appointed counsel.[3]

Current law authorizes the court to order a physical or mental examination by a qualified professional, upon good cause and in accordance with Rule 8.675, F.R.J.P., whenever the mental or physical condition of a parent or legal custodian is controverted (s. 39.407(15), F.S.). No requirement exists in ch. 39, F.S., for a child or the child's parent, caregiver, legal custodian, or other person requesting custody of the child to be evaluated for substance abuse problems.

In January 1999, the National Center on Addiction and Substance Abuse at Columbia University (CASA) published a report detailing its two-year analysis of the connection between substance abuse and child maltreatment.[4] The Center estimates that substance abuse causes or contributes to seven out of 10 cases of child maltreatment and accounts for nearly $10 billion in federal, state, and local spending, exclusive of costs relating to healthcare, operating judicial systems, law enforcement, special education, lost productivity, and privately incurred costs.

In April 1999, the Department of Health and Human Services issued a report to Congress that highlighted the necessity of prioritizing the identification and treatment of parental substance abuse and its relationship to children in foster care.[5] It stated that children in substance-abusing

[2] *Diaz v. State*, 884 So. 2d 299, 300 (Fla. 2d DCA 2004); *T.N. v. Portesy*, 30 FLW D2369 (Fla. 2d DCA Oct. 7, 2005).
[3] See Rules 8.290 – 8.695, F.R.J.P.
[4] National Center on Addiction and Substance Abuse, *No Safe Haven: Children of Substance Abusing Parents*, Columbia University, New York, January 1999.
[5] U.S. Department of Health and Human Services, *Blending Perspectives and Building Common Ground: A Report to Congress on Substance Abuse and Child Protection*, U.S. Government Printing Office, Washington, D.C., April 1999.

households were more likely than others to be served in foster care, spent longer periods in foster care than other children, and were less likely to have left foster care within a year.

Drug Court

In Florida, in 2002, approximately 10,200 offenders were referred to drug court. Studies show that drug court graduates experience a significantly reduced rate of recidivism, and that drug courts are a cost-effective alternative to incarceration of drug offenders.[6] Section 397.334, F.S., authorizes counties to fund treatment-based drug court programs. The intent of the Legislature, as stated in s. 397.334(1), F.S., is to encourage other state agencies to support the creation and establishment of drug court programs. These programs attempt to integrate judicial supervision, treatment, accountability, and sanctions to reduce recidivism in drug-related crimes. As originally enacted in 2001, s. 397.334, F.S., directed each judicial circuit to establish a model of a drug court program, and currently each of the 20 judicial circuits has a drug court program in place. Section 397.334, F.S., authorized the establishment of drug court programs in misdemeanor, felony, family, or other court divisions. There are dependency drug courts operating in 12 of the 20 judicial circuits. Treatment-based drug court programs may include pre-trial intervention programs as provided for in ss. 948.08, 948.16, and 985.306, F.S.

Recently, two District Courts of Appeal have ruled that because there is no statutory authorization for the imposition of incarceration or a licensed substance abuse treatment program (specifically an Addiction Receiving Facility) upon violation of a drug court program, such sanctions may not be imposed.[7]

Pretrial Intervention Programs

Section 948.08(6), F.S., allows defendants charged with certain drug purchase or possession felonies, prostitution, or tampering with evidence to be admitted into a pretrial substance abuse education and treatment intervention program if the defendant has not previously been convicted of a felony and has not previously been referred to pretrial intervention. If the state attorney establishes, by a preponderance of the evidence, that the defendant was involved in dealing or selling drugs, the court must deny admission into the pretrial intervention program. If the defendant successfully completes the program, the case is dismissed. If the defendant does not complete the program, the prosecution proceeds.

Section 910.035, F.S., relates to transfer orders for a defendant out of county. This section provides for transfer to a drug court program in another county where the defendant is eligible for participation in a drug court program under s. 948.08(6), F.S., and certain conditions have been met.[8]

Under s. 948.16, F.S., a defendant charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who has not previously been convicted of a felony and who has not previously been admitted to a pretrial program is eligible for

[6] *Id.*
[7] *Diaz v. State*, 884 So. 2d 299 (Fla. 2d DCA 2004); *T.N. v. Portesy*, 30 FLW D2369 (Fla. 2d DCA Oct. 7, 2005).
[8] Section 910.035(5), F.S.

admission into a misdemeanor pretrial substance abuse education and treatment program. If the defendant successfully completes the program, the charges will be dismissed. If the defendant does not complete the program, the prosecution proceeds.

Delinquency Pretrial Intervention

Section 985.306, F.S., provides for a pretrial intervention program in the juvenile justice system. To the extent that funds are available, a child who is charged under ch. 893, F.S., with a felony of the second or third degree for purchase or possession of a controlled substance and who has not previously been adjudicated for a felony nor been admitted to a delinquency pretrial intervention program is eligible for admission into a delinquency pretrial substance abuse education and treatment intervention program for at least a year when approved by the chief judge or alternative sanctions coordinator of the circuit. If the child successfully completes the program, the court may dismiss the charges.

III. Effect of Proposed Changes:

This bill creates the "Robert J. Koch Drug Court Intervention Act" and amends several sections of statute that relate to the dependency system, referral to treatment-based drug courts, and referral for pretrial intervention.

Dependency Court – Referrals to Drug Court

The bill amends s. 39.001, F.S., adding legislative intent to encourage the use of the drug court program model and to authorize courts to assess children and persons who have custody or are requesting custody of children for substance abuse problems and to address those problems at every stage of the dependency process. It establishes the following legislative goals for the state regarding substance abuse treatment in the dependency system:

- ensure the safety of children;
- prevent and remediate the consequences of substance abuse;
- expedite permanency for children and reunify healthy, intact families when appropriate; and
- support families in recovery.

This bill authorizes a dependency court, upon a showing of good cause, to order a child, or person who has custody or is requesting custody of the child, to submit to substance abuse assessment or evaluation at any time after a shelter petition or petition for dependency has been filed. The assessment or evaluation must be made by a qualified professional, as defined by s. 397.311, F.S.[9]

[9] Section 397.311(25), F.S., defines "qualified professional" to mean "a physician licensed under chapter 458 or chapter 459; a professional licensed under chapter 490 or chapter 491; or a person who is certified through a department-recognized certification process for substance abuse treatment services and who holds, at a minimum, a bachelor's degree. A person who is certified in substance abuse treatment services by a state-recognized certification process in another state at the time of employment with a licensed substance abuse provider in this state may perform the functions of a qualified professional as defined in this chapter but must meet certification requirements contained in this subsection no later than 1 year after his or her date of employment."

After an adjudication of dependency, or finding of dependency where adjudication is withheld, the court may require a child or a person who has custody or is requesting custody of the child to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a treatment-based drug court program established under s. 397.334, F.S. The bill includes similar authority in ss. 39.507 and 39.521, F.S.

A legislative intent provision of the bill provides that prior to adjudication participation in treatment is voluntary. Although, the language does not specifically provide that voluntary participation in treatment includes a treatment-based drug court program, it is implied by language in the intent provision related to court-ordered participation in a treatment-based drug court program following adjudication. The bill does not require a written agreement for voluntary or court-ordered participation in a treatment-based drug court program. This raises due process concerns related to the voluntary participation. To address the due process concerns, the Legislature may wish to consider adding a provision for voluntary participation that requires a written agreement by the individual, which includes a statement that the individual understands the requirements of the program and the potential sanctions for noncompliance.

The court, in conjunction with other public agencies, may oversee progress and compliance with treatment and may impose appropriate available sanctions for noncompliance. The court may also make a finding of noncompliance for consideration in determining whether an alternate placement of the child is in the child's best interests.

A person enrolled in a treatment-based drug court program established under s. 397.334. F.S., is subject to a coordinated strategy developed by the drug court team that may include a protocol of sanctions for noncompliance with dependency drug court program rules. If a protocol of sanctions is adopted, it may include, but is not limited to: (a) placement in a substance abuse treatment program offered by a licensed service provider; (b) placement in a jail-based treatment program; or (c) serving a period of secure detention if a child or a period of incarceration within the time limits established for contempt of court if an adult.

Criminal and Juvenile Delinquency Proceedings

Drug court programs typically provide services and monitoring in the pretrial stage of a criminal case. This bill provides that pretrial treatment-based drug court programs may include certain pretrial intervention programs, treatment-based drug court programs authorized under ch. 39, F.S., postadjudicatory programs, and the monitoring of sentenced offenders through a treatment-based drug court program. Entry into any pretrial treatment-based drug court program is voluntary and requires a written agreement by the individual, which includes a statement that the individual understands the requirements of the program and the potential sanctions for noncompliance. A recent court ruling indicates that a participating individual may be allowed to "opt out" of the program if there is an administrative order stating that *participation* in the program is voluntary.[10]

[10] Subsection 948.08(6), F.S., (and ss. 948.16 and 985.06 F.S.) requires that pretrial substance abuse education and treatment intervention programs be approved by the chief judge of the circuit. The court in *Mullin v. Jenne*, 890 So. 2d 543 (Fla. 4th

As with chapter 39 (dependency) authorized treatment-based drug court programs, a person enrolled in a treatment-based drug court program established under s. 397.334, F.S., as authorized by a criminal or juvenile delinquency statute[11] is subject to a coordinated strategy developed by the drug court team that may include a protocol of sanctions for noncompliance with the drug court program rules. If a protocol of sanctions is adopted, it may include, but is not limited to: (a) placement in a substance abuse treatment program offered by a licensed service provider; (b) placement in a jail-based treatment program; or (c) serving a period of secure detention if a child or a period of incarceration within the time limits established for contempt of court if an adult. The bill also provides that any person whose charges are dismissed after successfully completing a drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged.

This bill requires, contingent upon an annual appropriation, each judicial circuit to establish at least one coordinator position for the treatment-based drug court program.[12]

Current law provides that any person eligible for participation in a drug court treatment program pursuant to s. 948.08(6), F.S., may be eligible to have his or her case transferred to a county other than that in which the charge arose if the drug court program agrees and specific conditions are met.[13] The bill specifies that if approval for transfer is received from all parties, the trial court must accept a plea of nolo contendere. The bill further specifies that the jurisdiction to which a case has been transferred is responsible for disposition of the case.

This bill amends ss. 948.08(6), 948.16, and 985.306, F.S., to specify that pretrial intervention programs must require that each participant who is enrolled in a felony, misdemeanor, or delinquency pretrial intervention program be subject to a coordinated strategy developed by a drug court team under s. 397.334(3), F.S. The bill also provides that the coordinated strategy may include a protocol of sanctions that may be imposed on the participant and specifies that the coordinated strategy must be provided in writing to the participant at the time the individual enters into a pretrial drug court program.

Upon a finding that a person has not successfully completed the pretrial program, ss. 948.08(6)(c), 948.16(2), and 985.306(3), F.S., currently permit the court to order (i) a person to

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DCA 2005), referenced s. 948.08(6), F.S., and held that where a chief judge's administrative order defining the parameters of the program stated that *participation* (rather than *entry*) in the program was voluntary, a court could not require a defendant to remain in a drug court treatment program. The court noted that had the administrative order stated that "entry" into the program was voluntary, a different result may have occurred. Although this bill provides that entry, rather than participation, is voluntary, pretrial substance abuse intervention programs are still, by statute, subject to approval by the chief judge of the circuit. Thus, should a chief judge issue an administrative order stating that participation in a program is voluntary, participating individuals may opt out of the program. Furthermore, s. 948.08(2), F.S., currently provides that a defendant may not be released to the pretrial intervention program unless he or she has voluntarily agreed to such a program. Therefore, even if a chief judge issues an administrative order stating that participation in a program is voluntary, there is still the potential for a court to hold that by statute all participants in a pretrial intervention program under s. 948.08, F.S., have voluntarily agreed to participate and may opt out of the program.

[11] This refers to the criminal authorized treatment-based drug court programs authorized under ss. 948.08(6) and 948.16, F.S., and the juvenile delinquency authorized treatment-based drug court program authorized under 985.306, F.S.

[12] These positions were established in prior budgets and are currently staffed and funded.

[13] Section 910.035(5), F.S.

continue in education and treatment or (ii) the charges to revert to normal channels for prosecution. However, in s. 948.08(6)(c), F.S., the bill provides that continuing in education and treatment may include secure licensed clinical or jail-based treatment programs, which are very similar to two of the three sanctions provided for by the bill. If the Legislature intended to add an option permitting the court to impose sanctions for the unsuccessful completion of a pretrial intervention program, the Legislature may wish to provide for the imposition of sanctions as an option and delete the language that appears to equate sanctions with extension of the program. Moreover, in this case, the Legislature may also wish to provide for the imposition of sanctions as an option for the unsuccessful completion of a program under the same circumstances in ss. 948.16(2) and 985.306(3), F.S.

The bill provides that under s. 985.306, F.S., the protocol of sanctions for noncompliance may include, but is not limited to, placement in a substance abuse treatment program or serving a period of secure detention. These sanctions are similar to some of the sanctions already provided for contempt for interfering with the court or with court administration, or for violating any provision of ch. 985, F.S., or order of the court relative thereto; however, they appear to conflict with the intent of the Legislature that the court restrict and limit the use of contempt powers with respect to commitment of a child to a secure facility.[14] Although, imposition of the protocol of sanctions is permissive, they nevertheless authorize the court to order a sanction that conflicts with the requirement of s. 985.216(4)(c), F.S., providing that the "court may not order that a child be placed in a secure facility for punishment for contempt unless the court determines that an alternative sanction is inappropriate or unavailable or that the child was initially ordered to an alternative sanction and did not comply with the alternative sanction." It is not clear whether the Legislature intended to supersede the expressed intent and existing statutory scheme of s. 985.216, F.S., for addressing contempt in delinquency proceedings.

Finally, the bill adds tampering with evidence, solicitation for purchase of a controlled substance, and obtaining a prescription by fraud to the list of offenses that make a child eligible for admission into a delinquency pretrial substance abuse education and treatment intervention program.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[14] Section 985.216(1), F.S.

D. Other Constitutional Issues:

Legal staff in the Department of Children and Families has expressed concern relating to utilizing potentially criminal sanctions in dependency proceedings, which are civil proceedings. This could occur when a civil proceeding results in incarceration, albeit through contempt findings, and otherwise raises questions of whether certain due process rights pertaining to criminal matters were afforded in the civil proceeding. Additionally, they note that the bill proposes to subject nonparties in the dependency proceeding to the jurisdiction of the drug court established by the bill (for dependency matters).

Other constitutional concerns expressed by the department include subjecting a nonparty to contempt sanctions, failure to distinguish whether the contempt is civil or criminal, and failure to define which juvenile procedural rule applies.

Proposed s. 397.334(4), F.S., provides that treatment-based drug court programs may include postadjudicatory programs and the monitoring of sentenced offenders. Although the precise meaning of "postadjudicatory programs" and "the monitoring of sentenced offenders" is not clear from the bill, the ex post facto and double jeopardy clauses may prohibit a court from compelling such a referral for an offender whose offense was committed prior to the effective date of this bill.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a fiscal impact on children and their families for whom the court orders substance abuse assessment and treatment services, in that they are required to contribute pursuant to s. 397.431(2), F.S.

Private insurance companies may be affected if additional persons are referred for treatment for which insurance reimbursement is sought.

Treatment and community providers may experience an increase in the number of persons receiving services if additional persons are referred to treatment and other types of services under this proposal.

C. Government Sector Impact:

Department of Juvenile Justice

The Department of Juvenile Justice indicates that the amendment to s. 985.306, F.S., would allow the court to place youth who do not comply with the conditions and sanction of the drug court program in secure detention up to five days for a first violation and up

to 15 days for subsequent violations, thus increasing the number of youth eligible for placement in secure detention.

According to Office of the State Courts Administrator, there were 1,798 youth placed in drug court programs statewide during calendar year 2004, not including Broward and Seminole counties. Although no data was provided in reference to the number of youth who violated the conditions of the program, the Department of Juvenile Justice used the assumption that the rate of violation for drug court would be similar to that experienced in other departmental diversion programs. Using that estimate, 17 percent of the 1,798 youth would violate, and 306 youth would be eligible for placement in secure detention up to five days due to a first noncompliance. Assuming five percent of the first time violators are noncompliant a second time, 15 youth would be eligible for placement in secure detention up to 15 days due to a second noncompliance.

Using the projections described, the following formula was used to determine projected costs.

1,798 youth X 17% violations =	306 first time violators	
306 1st violators X 5 days =	1,530 resident days at $115/day =	$175,950
306 1st violators X 5% 2nd violations =	15 second time violators	
15 2nd violators X 15 days =	225 resident days X $115/day =	$25,875
Total cost FY 2005-2006 12 months =		$201,825

The actual cost may be higher, as the data provided did not include Broward and Seminole counties, and no assumption was made about how many youth participate in the program in those counties.

It is assumed all of these youth would be post-disposition, as they would be placed in detention as contempt of court cases with the placement in detention being the disposition of the contempt case.

However, because the current law already provided for the same sanctions for contempt of court under s. 985.216, F.S., arguably the only increase in costs due to this bill would be attributable to the potential increase in participants from the addition of tampering with evidence, solicitation for purchase of a controlled substance, and obtaining a prescription by fraud to the list of offenses that make a child eligible for admission into a delinquency pretrial substance abuse education and treatment intervention program. The additional cost, if any, is undetermined.

Department of Children and Families

The Department of Children and Families has indicated that the impact of the bill can be absorbed into the current substance abuse system of care that is provided for an estimated 8,602 adults and 2,200 children in the drug court system.

If placement in a secure licensed clinical treatment program is designated as a sanction of pretrial intervention programs, these facilities will need to be identified or developed, which may result in an undetermined fiscal impact on the Department of Children and Families.

Authorizing increased judicial oversight may result in an increase in the number and frequency of substance abuse assessments. It is not possible to determine whether there will be a fiscal impact as the language is permissive, and it is unknown whether additional assessments will be conducted. Therefore, it is unknown whether there will be additional costs to be incurred, as the court will have discretion regarding the assessments and any admissions to the program.

Counties

There may be an undetermined fiscal impact on counties associated with providing court ordered jail or detention-based treatment services to individuals who are noncompliant with the pretrial intervention program. Additionally, there may be an undetermined fiscal impact on counties associated with person participating in a treatment-based drug court program under ch. 39, F.S., for noncompliant participants. However, for pretrial intervention programs and for preadjudication (or prior to a finding of dependency) participation under ch. 39, F.S., this impact is expected to be minimal as the language in the bill is permissive and participation in these contexts is voluntary.

Courts

All 20 judicial circuits have at least one drug court coordinator or a position fulfilling the function of a coordinator, so there should be no fiscal impact based upon this provision. However, the language allows additional coordinators to be requested and funded with legislative approval.

The chief judge in each judicial circuit is currently authorized in statute to appoint an advisory committee. Moving the authorizing language will not result in any additional costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under s. 948.08(6), F.S., the bill provides that in addition to other education and treatment options, the court may order a defendant who has not successfully completed the pretrial intervention program placed into a secure licensed clinical or jail-based treatment program. However, the bill does not identify substance abuse programs that are a "secure licensed clinical program." The Department of Children and Family Services Substance Abuse Program Office indicates that Addictions Receiving Facilities are the only secure substance abuse facilities licensed in Florida, and there are currently fewer than 10 of these facilities in the state. These

facilities are primarily located in larger metropolitan areas and would be unlikely to have the capacity to serve pretrial intervention program participants.

VIII. Summary of Amendments:

None.