

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 89 Pretrial Proceedings

SPONSOR(S): Thompson and others

TIED BILLS: IDEN./SIM. BILLS: SB 300

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	12 Y, 0 N	Padgett	Cunningham
2)	Policy Council	15 Y, 0 N	Varn	Cicccone
3)	Criminal & Civil Justice Policy Council		Padgett	Havlicak
4)				
5)				

SUMMARY ANALYSIS

If a person sentenced to probation commits a new criminal offense, the person is in violation of the terms of probation. In such instances, the probation officer files an affidavit alleging a violation of probation with the court. The court may then issue a warrant for the probationer's arrest. Their probation is not violated until the probation officer files an affidavit and the judge signs an arrest warrant.

Generally, a judge may set any bond amount on the arrest warrant for a person who violates probation. The amount of the bond depends on the nature of the probation violation and the probationer's past history. Under certain circumstances listed in s. 903.0351, F.S., the judge must order pretrial detention without bail until the resolution of the probation violation or community control violation hearing.

The bill provides that the court may order pretrial detention or pretrial release of any person who is on probation or community control if the person commits a new criminal offense for which the court finds the existence of probable cause. If no affidavit of a violation of probation or community control is filed within 10 days, the order of pretrial detention or pretrial release relating to the violation is dismissed.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Section 948.01, F.S. provides the circumstances for which the court can place a person on probation<sup>1</sup> or community control<sup>2</sup>. Any person who is found guilty by a jury, the court sitting without a jury, or enters a plea of guilty or nolo contendere may be placed on probation or community control; regardless of whether adjudication is withheld.<sup>3</sup> The Department of Corrections (DOC) supervises all probationers sentenced in circuit court.<sup>4</sup> Section 948.03, F.S. provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions to the probation that it deems proper.<sup>5</sup> A condition requiring the probationer to not commit any new criminal offenses is a standard condition.<sup>6</sup>

If a person sentenced to probation commits a new criminal offense, the person is in violation of the terms of probation. In such instances, the probation officer files an affidavit alleging a violation of probation with the court.<sup>7</sup> The court may then issue a warrant for the probationer's arrest.<sup>8</sup> Their probation is not violated until the probation officer files an affidavit and the judge signs an arrest warrant.

Generally, a judge may set any bond amount on the arrest warrant for a person who violates probation. The amount of the bond depends on the nature of the probation violation and the probationer's past history. Under certain circumstances listed in s. 903.0351, F.S.<sup>9</sup>, the judge must order pretrial

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<sup>1</sup> "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

<sup>2</sup> "Community control" is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanction and imposed and enforced. Section 948.001(3), F.S.

<sup>3</sup> Section 948.01(1), F.S.

<sup>4</sup> Id.

<sup>5</sup> Section 948.03(2), F.S.

<sup>6</sup> Fl. R. Crim. Pro. 3.790 (2010).

<sup>7</sup> Section 948.06(1)(b), F.S.

<sup>8</sup> Id.

<sup>9</sup> Circumstances include detention of a person who is a violent felony offender of special concern defined in s. 948.06, F.S.; a person on felony probation who commits a qualifying act defined in s. 948.06(8)(c), F.S.; a person on felony probation that has previously

detention without bail until the resolution of the probation violation or community control violation hearing.

### Proposed Changes

The bill provides that the court may order pretrial detention or pretrial release of any person who is on probation or community control if the person commits a new criminal offense for which the court finds the existence of probable cause. If no affidavit of a violation of probation or community control is filed within 10 days, the order of pretrial detention or pretrial release relating to the violation is dismissed.

Fort Myers Police Officer Andrew Widman was shot and killed in the line of duty on July 18, 2008 by Abel Arango while responding to a domestic dispute. Arango was on felony probation for armed robbery and grand theft at the time of the shooting. Arango was arrested in May 2008 for selling cocaine. Arango subsequently bonded out of jail. A warrant for violation of probation was issued on May 29, 2008, after Arango was out of pretrial detention on bail. In addition, an outstanding warrant from another county was not served on Arango while he was incarcerated on the cocaine charge. Neither warrant had been served on Arango at the time of shooting. Had the warrants been served, Arango would have been incarcerated with no possibility of bonding out of jail.<sup>10</sup>

#### B. SECTION DIRECTORY:

Section 1: Cites the bill as the "Officer Andrew Widman Act."

Section 2: Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

Section 3: Provides an effective date of October 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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been found by the court to be a habitual violent felony offender as defined in s. 775.084(1)(b), F.S., a three-time violent offender as defined in s. 775.084(1)(c), F.S., or a sexual predator under s. 775.21, F.S. who commits a qualifying act defined in s. 948.06(8)(c), F.S.  
<sup>10</sup> <http://www.fmpolice.com/tabId/54/itemId/92/0718-Fort-Myers-Police-Officer-Killed-in-the-Lin.aspx> (Last accessed on February 15, 2010.

#### D. FISCAL COMMENTS:

The bill could potentially increase the length of time a probationer arrested for a new offense must remain in jail. This could result in an increase in the local jail population.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

The idea of setting pretrial detention/release conditions for a potential violation of probation case, before the violation of probation affidavit is actually filed, may raise due process concerns. In the early 1980s, sections 949.10 and 949.11, F.S., contained language that is similar to that of HB 89. These sections provided that the arrest of any person who was on probation was prima facie evidence of a violation of the terms and conditions of such probation. Upon such arrest, probation was immediately temporarily revoked and such person had to remain in custody until a hearing by the Parole and Probation Commission or the court. The statutes required the hearing to be held within 10 days from the date of the arrest, and provided that the failure of the commission or the court to hold the hearing within 10 days from the date of arrest resulted in the immediate release of such person from incarceration on the temporary revocation.

Although these sections of statute were repealed in 1982, they were analyzed by various courts. In *Miller v. Toles*, 442 So.2d 177 (Fla. 1983), an offender alleged that his due process rights were violated because he was not given a hearing until the eleventh day after being placed in custody. The Florida Supreme Court agreed and stated that:

Without provision for expedited final hearings for a parolee or a probationer arrested for alleged commission of a felony, statutes governing subsequent felony arrest of felony parolee or probationer which deny the parolee or probationer arrested a preliminary probable cause hearing would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, not conviction, for a felony.

The Court acknowledged that probationers could be afforded lesser due process rights but stated that the quid pro quo for doing so was the expedited final hearing. The Court stated that without that provision, the statute would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon *arrest*, not *conviction*, for a felony.

Unlike the provisions of ss. 949.10 and 949.11, F.S., HB 89 only requires that a violation affidavit be *filed* within ten days of an offender's arrest (it would follow that the *hearing* would be more than 10 days after the offender's arrest). As such, the bill may raise due process concerns.

Additionally, there may be an issue of separation of powers to the extent that the court is assuming the role of the state (Department) by initiating the violation of probation process. Probation officers may feel obligated to file violation of probation affidavits at the direction of the court or because the court has already made an initial determination by ordering pretrial detention/release conditions.

#### B. RULE-MAKING AUTHORITY:

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Section 903.046, F.S. currently provides that the court may consider the defendant's past or present conduct and record of convictions in determining the bail amount for the new criminal offense.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**