The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 844
INTRODUCER:	Senator Benacquisto
SUBJECT:	Violations/Probation/Community Control/Widman Act
DATE:	March 14, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 844 provides that when the person before a circuit court for First Appearance on a new law violation is under community supervision, the court may issue an arrest warrant for the violation if the court finds reasonable grounds to believe that a community supervision violation has occurred.

At a First Appearance hearing on a violation of community supervision, if the offender admits the violation, the court may order that the offender be taken before the court that granted the probation or community control.

If the offender does not admit the violation, the First Appearance court may commit the offender or may release the offender with or without bail to await further hearing. In deciding whether or not to set bail, the court may consider the likelihood of a prison sanction on the violation of community supervision based on the new law violation arrest. The bill also provides that the court may order the return of the person under community supervision to the court that originally granted the community supervision for further proceedings.

The bill does not apply in cases where the offender is subject to the special requirements for hearings as to his or her dangerousness to the community under s. 948.06(4) and (8)(e), F.S.

The bill is named in honor of Officer Andrew Widman, a Fort Myers police officer who was killed during the exchange of gunfire with an offender who had not yet been arrested on a violation of community supervision warrant issued after his First Appearance on a new law violation in Lee County.

The bill would become effective October 1, 2011.

This bill substantially amends the following section of the Florida Statutes: 948.06.

II. Present Situation:

Section 948.01, F.S., provides the circumstances under which the trial court can place a person on probation[1] or community control[2] (community supervision). 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.[3]

The Department of Corrections supervises all probationers sentenced in circuit court.[4] 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.[5] The condition requiring the probationer to not commit any new criminal offenses is a standard condition.[6]

If a person who has been sentenced to probation commits a new criminal offense, that person thereby commits a violation of the terms of probation. In such instances, upon being informed of the new law violation, generally the probation officer files an affidavit with the sentencing court alleging a violation of probation based upon the existence of the new law violation.[7] The court evaluates the facts as alleged in the affidavit to determine if sufficient probable cause of a violation exists and may then issue a warrant for the probationer's arrest.[8]

It is not uncommon for the sentencing court to set a condition of "no bond" in the case until the probationer has appeared before that particular judge who has jurisdiction over the probationer's case. If a different judge sees the probationer at First Appearance on the violation case, he or she generally honors the trial court judge's "no bond" requirement. This is the common course of local practice.

Under limited circumstances listed in s. 903.0351, F.S., the First Appearance judge *must* order pretrial detention without bail until the resolution of the probation violation or community control violation hearing. These violators fall into certain categories:

- Violent felony offenders of special concern as defined in s. 948.06, F.S.

[1] "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.

[2] "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 sanctions are imposed and enforced. Section 948.001(3), F.S.

[3] Section 948.01(1), F.S.

[4] *Id*.

[5] Section 948.03(2), F.S.

[6] Fl. R. Crim. Pro. 3.790 (2010).

[7] Section 948.06(1)(b), F.S.

[8] *Id*.

- A violator arrested for committing a qualifying offense set forth in s. 948.06(8)(c), F.S.
- A violator who has previously been found to be a habitual violent felony offender, a three-time violent felony offender, or a sexual predator, and who has been arrested for committing one of the qualifying offenses set forth in s. 948.06(8)(c), F.S.

In addition to the "normal" channels through which an alleged violation progresses, s. 948.06(1)(b), F.S., provides for the warrantless arrest of an offender reasonably believed by a law enforcement officer to have violated his or her community supervision in a material respect. It states:

> Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect, any law enforcement officer who is aware of the probationary or community control status of the probationer or offender in community control or any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and return him or her to the court granting such probation or community control.[9]

Section 903.046, F.S., provides that the court may consider the defendant's past or present conduct and record of convictions in determining the bail amount for a new criminal offense. A defendant before the court for First Appearance on a new criminal law violation whose criminal history reflects his or her community supervision status should have that current status weighed as a bond-related factor by the First Appearance judge according to s. 903.046, F.S., and Rule 3.131(3)(b), Florida Rules of Criminal Procedure, even though a violation may not yet have been filed, warrant issued, or warrantless arrest made.

The Case of Abel Arango and the Death of Officer Andrew Widman[10]

In 1999, Abel Arango (A/K/A Abel Arrango) was sentenced on a split-sentence to 5 years in prison with 15 years of probation following his release for convictions of grand theft, burglary of an unoccupied structure or conveyance, carrying a concealed firearm, and armed robbery. The offenses occurred in Collier County, he was sentenced by the Circuit Court in and for Collier County, therefore the Collier court had continuing jurisdiction over the case (the successful completion of 15 years probation) upon Arango's release from prison in 2004.[11]

Arango reported to the probation office as required by the sentencing court until his arrest on Friday, May 16, 2008, in Lee County. On that day he was arrested on five felony cocaine-related

[9] Section 948.06(1)(a), F.S.

[10] The facts relayed in this Staff Analysis have been gathered from a Memo prepared by FDLE Commissioner Gerald Bailey at the request of the Governor's office, telephone conversations with FDLE personnel, Arango's Department of Corrections Release Information posted on the Department's website, a telephone conversation with a gentleman with the South Florida Detention and Removal Office of U.S. Immigration and Customs Enforcement, as well as newspaper accounts of the death of Officer Widman. The referenced information is on file with the Senate Committee on Criminal Justice.

[11] Although there was a federal detainer for Arrango and he spent several months after his prison release at the Krome's Detention Center, ICE was unable to deport him to Cuba because the U.S. has no formal diplomatic ties or agreement for repatriation with Cuba, so Arrango was released in July, 2008.

charges: two possession charges, two sale charges, and one trafficking of more than 28 grams but less than 150 kilograms.

By the time Arango appeared at First Appearance in Lee County the next day his criminal history, probationary status, and wants and warrants (of which there were none) were made available to the court by court services personnel. The First Appearance judge set a total of $100,000 bond in the Lee County (new law violation) cases which Arango was able to make, therefore he was released from the Lee County jail.

It should be noted that in setting the bond at $100,000, the First Appearance judge set the bond at more than double the amount on the standard bond schedule, therefore although there was no active warrant for a violation of probation, it appears that Arango's probation status was taken into account by the judge.[12]

In the meantime, Arango's probation officer received a message on Monday, May 19, sent by FDLE on Friday night. This "Florida Administrative Message" informed the probation officer that law enforcement had arrested Arango on Friday. She attempted to contact Arango by telephone and when he did not answer the probation officer left a message for him to call her immediately. The call was not returned.

On Friday, May 23, the probation officer delivered a sworn affidavit to the Collier County Circuit Court (the sentencing court in the probation cases) alleging the violation of probation in the Collier County cases, based upon the new arrest, and requesting a warrant be issued for Arango's arrest. The warrant was issued with a "no bond" provision and was entered into the Florida Crime Information Center (FCIC) on Monday, June 2, 2008.

Arango appeared at the Lee County Circuit Court for arraignment on the cocaine charges on Monday, June 16. Although the violation of probation warrant was active and in the FCIC system, no system queries were made on Arango prior to or during the time of his arraignment.

It is unknown whether court personnel or the bailiffs had knowledge of the warrant at that time. Presumably they did not as it is unlikely that an updated criminal history would be run on a defendant between First Appearance and the arraignment a month later. Arango came to and left arraignments without being arrested on the active violation of probation warrant.

On June 23, Arango's probation officer again attempted to contact him by going to his house but was unable to locate anyone at the residence. The Collier County Sheriff's Office ran warrant queries in the FCIC system twice in July, both of which showed the active warrant. It is unknown why this was done.

On Friday, July 18, 2008, Fort Myers Police officers responded to a reported domestic dispute between Arango and his girlfriend. Gunshots were exchanged between Arango and the officers. Officer Andrew Widman and Arango were killed during the gunfire.

[12] See the Presentment by the Fall Term 2008 Lee County Grand Jury, In re: Death of Fort Myers Police Officer Andrew Widman on July 18, 2008, filed with the Circuit Court of the Twentieth Judicial Circuit on September 11, 2008.

Section 1 of the bill names the bill "The Officer Andrew Widman Act" in his honor.

III. Effect of Proposed Changes:

The bill provides that a First Appearance court may reach beyond the matter of pretrial release or detention on a new law violation arrest under certain circumstances.

If the court has reasonable grounds to believe that the offender appearing before the court at First Appearance on the new law violation is under community supervision and has violated the terms of supervision in a material respect by committing the new law violation, the court may order the arrest of the offender for the violation at that time.

The bill, therefore, should allow the court to expedite the arrest of an offender whose terms of community supervision have been violated due to the alleged new law violation, if he or she has not already been arrested on the violation by law enforcement under the provisions of s. 948.06(1)(a), F.S.

The court must inform the offender of the violation of community supervision. If he or she admits the violation, the court may order that the offender be brought before the court that granted the community supervision.

If the offender does not admit the violation of community supervision, the court may either commit the offender or release him or her with or without bail to await further hearing on the matter, or simply order that the offender be brought before the court that granted the community supervision.

Should the court reach the question of releasing the offender on the violation of community supervision, the court may consider, specifically, whether it is more likely than not that a prison sanction would be handed down by the original sentencing court for a violation of community supervision based upon the new arrest.

The bill does not apply to those offenders who are subject to the "danger to the community" hearings required by s. 948.06(4), F.S., or the "violent felony offender of special concern" hearings required by s. 948.06(8)(e), F.S.

As previously stated, the bill is named in honor of Officer Andrew Widman.

The bill would become effective October 1, 2011.

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:

In the early 1980s, ss. 949.10 and 949.11, F.S., contained language that is similar to that of the bill. One clear difference between the bill and those sections of law, however, is that the statutes applied to offenders who were the subject of an active violation warrant and subsequent arrest for which they could not be released until after a violation hearing.

These sections provided that the arrest of any person who was on probation (for committing a new crime) 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, rather than conviction, for a felony.

The bill requires an arrest on a violation of community supervision before the offender's liberty is subject to being taken and it provides a prompt mechanism by which the offender can be released from custody or from any conditions of release.

There may be an issue of separation of powers to the extent that it could be said that the court is assuming the role of the executive branch (Department of Corrections) by initiating the violation of probation process. However, Florida Statutes provide that the community supervision process may be initiated by other means, specifically the warrantless arrest authorized in s. 948.06(1)(a), F.S. Also, the issue of separation of

powers may arise to the extent that the provisions of the bill may be viewed as procedural (the courts' power) rather than substantive (within the prerogative of the Legislature).

It should be noted that in the case of Abel Arango, this was not a person who met the statutory criteria for special scrutiny at First Appearance in existence at the time. He did not qualify as a "violent felony offender of special concern" nor as an offender who required a special hearing as to his potential danger to the community (*see s. 948.06(4) and (8)(e), F.S.).*

However, Arango was not a typical community supervision offender either, due to the fact that *he was on probation following a prison sentence* and therefore was *more likely* than a typical offender *to be sentenced to prison on a violation* of his probation. The fact of the likely prison sentence on the violation is easily discernable by a prosecutor at First Appearance, by the court, or by pretrial services personnel, any of whom have the ability to review an offender's prior criminal history and sentencing scoresheet.

Although human behavior cannot always be predicted, it could be argued that an offender such as Arango who is surely facing a return to prison if found to be in material violation of his probation, could pose an increased danger to society if he is released from custody at First Appearance on a new crime, regardless of whether the violation affidavit had been filed or a warrant secured under the "normal" procedure. Just as in the Arango case, an offender who is facing a return to prison may feel he or she has "nothing to lose" as it relates to future unlawful behavior pending resolution of the violation he or she must know is coming.

Perhaps due process and separation of powers concerns will be eliminated, or at least diminished, if a reviewing court gives great weight to the public safety issue brought to the attention of the Legislature by the Arango case and addressed by this bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the Arango case, subsequent to his arrest on the new law violation (drug charges in Lee County), the Lee County Sheriff's Office ran a warrants check for Arango. Later that night the Lee County Jail ran a second warrants check. Neither query provided probation information on Arango due to inaccurate identifiers having been entered during the queries, such as incorrect spelling of the last name, incorrect race, and the incorrect date of birth.[13]

Had the correct information been entered into the database, it is possible that the Lee County Sheriff's Office could have arrested Arango at that time, prior to First Appearance, for a violation of probation based upon the new law violation. Statutory authority for such an action is found in s. 948.06(1)(a), F.S. (set forth above in the *Present Situation* section).

The correct probation status report was supplied to the First Appearance court the next morning by the Lee County Pretrial Service in Arango's case. Therefore, it appears that an arrest on the violation could have been made by Lee County law enforcement just prior to or soon after the First Appearance proceedings on the drug arrest.

It is equally possible that, if Department of Corrections or law enforcement personnel were assigned specifically to arrest defendants with active warrants at arraignments or other court appearances, Arango may have been arrested on the active violation warrant (at arraignments in Lee County on the drug cases) a full month before Officer Widman's death.

Technology is now available through FDLE to provide rapid identification of persons who come into contact with the criminal justice system. The devices connect through a personal computer to the Florida Criminal Justice Network. The individual places two fingers on a platen and within 35-45 seconds critical information about the individual is transmitted. If the Network indicates a "hit," the database can be queried regarding identification, active warrants, criminal history and whether the individual has previously provided a DNA sample for the DNA database.

The rapid identification devices were in limited use at the time of the Arango case. Currently, however, all probation offices throughout the state utilize this technology to confirm the identity and current status of reporting probationers, some Sheriff's offices use the device, the Pinellas County jail uses it at intake, there are approximately 150 mobile units in patrol cars, and the Collier County Courthouse has a device available in an anteroom should identification become an issue in one of the courtrooms. Lee County has been routinely checking local, state and federal databases for active warrants on every person who has a court appearance since November 2008.[14]

[13] Commissioner Bailey, FDLE, August 11, 2008 Memo to the Governor's Office regarding the events leading up to Officer Widman's death. Memo on file with Senate Criminal Justice Committee.

[14] Warrants Checks Get Results in Lee County, story published February 8, 2010, http//www.news-press.com.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.