

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 177 Inmate Reentry

SPONSOR(S): Judiciary Committee; Rulemaking & Regulation Subcommittee; Criminal Justice Subcommittee; Porth and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 448

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 3 N, As CS	Krol	Cunningham
2) Rulemaking & Regulation Subcommittee	14 Y, 1 N, As CS	Rubottom	Rubottom
3) Justice Appropriations Subcommittee	13 Y, 1 N	McAuliffe	Jones Darity
4) Judiciary Committee	15 Y, 3 N, As CS	Krol	Havlicak

SUMMARY ANALYSIS

This bill creates a new law requiring the Department of Corrections (DOC) to develop and administer a nonviolent offender reentry program designed to divert nonviolent offenders from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same deterrent effect, rehabilitate the offender, and reduce recidivism.

The reentry program must include:

- Prison-based substance abuse treatment,
- General education development and adult basic education courses,
- Vocational training,
- Training in decision-making and personal development, and
- Other rehabilitation programs.

The bill requires DOC to screen offenders committed to the department for eligibility criteria to participate in the program. In order to be eligible, an offender must:

- Be a nonviolent offender, which the bill defines as an offender who has been convicted of a third-degree felony offense that is not a forcible felony and has not been convicted of any of a number of specified offenses;
- Have served at least one-half of his or her original sentence; and
- Be identified as having a need for substance abuse treatment.

When selecting an offender for the reentry program, the bill requires DOC to consider the offender's criminal history, public safety and cost implications, and the possible rehabilitative benefits that substance abuse treatment, educational programming, vocational training, and other rehabilitative programming might have on the offender.

If a nonviolent offender meets the eligibility criteria, is selected by DOC, and if space is available in the reentry program, DOC then requests the sentencing court to approve the offender's participation in the reentry program. The state attorney is notified of the request and may file written objections or provide supplemental information to assist the court. The court must explain in writing the factors it considered in approving the offender's participation.

If approved for participation in the program, the bill requires that the offender serve at least six months in the reentry program. If the performance is satisfactory, the bill authorizes the court to issue an order modifying the sentence imposed and place the offender on drug offender probation. However, the court may schedule a hearing to consider any modification of an offender's current sentence. If the offender violates the conditions of drug offender probation, the bill authorizes the court to revoke probation and impose any sentence that it might have originally imposed.

The Criminal Justice Impact Conference met on February 9, 2012, and found the bill to have an indeterminate fiscal impact because the impact of this bill is dependent upon judicial discretion and the varied costs of different levels of incarceration and substance abuse treatment. See "Fiscal Comments." The bill provides an effective date of October 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0177g.JDC

DATE: 2/24/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Department of Corrections Reentry Programming

Currently, the Department of Corrections (DOC), subject to available funding, provides the following reentry programming to inmates:

- Substance abuse treatment;
- Educational and academic programs;
- Career and technical education; and
- Faith and character-based programs.¹

Also, DOC is statutorily mandated² to provide inmates who are within 12 months of their release with the 100-Hour Transition Training Program. This program offers inmates training in the following:

- Job readiness and life management skills, including goal setting;
- Problem solving and decision making;
- Communication;
- Values clarification;
- Living a healthy lifestyle;
- Family issues;
- Seeking and keeping a job;
- Continuing education;
- Community reentry; and
- Legal responsibilities.³

Drug Offender Probation

DOC is required to develop and administer a drug offender probation program which emphasizes a combination of treatment and intensive community supervision approaches and which provides for supervision of offenders in accordance with a specific treatment plan.⁴ To be eligible, a defendant must:

- Be a chronic substance abuser;
- Have committed a violation of s. 893.13(2)(a)⁵ or (6)(a),⁶ F.S., or other nonviolent felony;^{7,8} and
- Have a Criminal Punishment Code score sheet total of 60 sentence points or fewer.⁹

The program may include the use of graduated sanctions consistent with the conditions imposed by the court, such as random drug testing.¹⁰ Probationers in this program are subject to probation revocation if

¹ "Recidivism Reduction Strategic Plan." Fiscal Year 2009-2014. Department of Corrections.

<http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf> (last visited on October 10, 2011).

² Section 944.7065, F.S.

³ *Supra* "Recidivism Reduction Strategic Plan."

⁴ Section 948.20(2), F.S.

⁵ Section 893.13(2)(a), F.S., states that it is unlawful for any person to purchase, possess with intent to purchase, a controlled substance and provides varying penalties based on the type and quantity of such controlled substance.

⁶ Section 893.13(6)(a), F.S., states that it is unlawful for any person to be in actual or constructive possession of a controlled substance if such controlled substance was unlawfully obtained from a practitioner or pursuant to an invalid prescription or order of a practitioner. Any person who violates this provision commits a felony of the third degree, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.

⁷ As used in this section, the term "nonviolent felony" means a third degree felony violation under ch. 810, F.S., or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.

⁸ If such nonviolent felony is committed on or after July 1, 2009.

⁹ Section 948.20(1), F.S.

they violate any conditions of their probation.¹¹ This can result in an imposition of any sentence that may have originally been imposed before the offender was placed on probation.¹² In Fiscal Year 2010-11, 10,099 offenders were on drug offender probation.¹³

Effect of the Bill

The bill requires DOC to develop and administer a nonviolent offender reentry program in a secure area within an adult institution or adjacent to an adult institution. This program is intended to divert nonviolent offenders from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same deterrent effect, rehabilitate the offender, and reduce recidivism.

The reentry program must include:

- Prison-based substance abuse treatment,
- General education development and adult basic education courses,
- Vocational training,
- Training in decision-making and personal development, and
- Other rehabilitation programs.

Eligibility

The bill requires DOC to screen offenders committed to the department for eligibility criteria to participate in the program. In order to be eligible, an offender must:

- Be a nonviolent offender, which the bill defines as an offender who has been convicted of a third-degree felony offense that is not a forcible felony¹⁴ and is not the subject of an active domestic violence injunction and has never been convicted of:
 - any forcible felony;
 - any offense that requires a person to register as a sexual offender;¹⁵
 - any violation listed in s. 775.082(9)(a)1.r., F.S.;¹⁶
 - any obscenity offense involving a minor or depiction of a minor;¹⁷
 - any child abuse or neglect offense in ch. 827, F.S.;
 - any capital, first or second degree felony;
- Have served at least one-half of his or her original sentence; and
- Be identified as having a need for substance abuse treatment.

DOC Screening and Selection of Participants

When selecting an offender for the reentry program, the bill requires DOC to consider:

- The offender's history of disciplinary reports;
- The offender's criminal history, with particular scrutiny of any charges for offenses for which a conviction would exclude the offender from eligibility;
- The severity of the offender's addiction;
- The offender's history of criminal behavior related to substance abuse;

¹⁰ Section 948.20(2), F.S.

¹¹ Section 948.06(2)(a), F.S.

¹² Section 948.06(2)(e), F.S.

¹³ Department of Corrections, Community Supervision Admissions, 2010-2011 Agency Statistics, http://www.dc.state.fl.us/pub/annual/1011/stats/csa_prior.html (last visited on October 10, 2011).

¹⁴ As defined in s. 776.08, F.S.

¹⁵ Pursuant to s. 943.0435, F.S.

¹⁶ These include any violation of s. 790.07, F.S., (criminal offenses involving possession of weapons), s. 800.04, F.S., (lewd and lascivious offenses against children under 16), s. 827.03, F.S., (child abuse and neglect), s. 827.071, F.S., (sexual performance by a child), or s. 847.0135(5), F.S., (exposing minors to lewd and lascivious conduct online)..

¹⁷ Specifically, offenses in chapter 847, F.S.

- Whether the offender has participated or requested to participate in any General Educational Development or other educational, technical, work, vocational, or self-rehabilitation program;
- The results of any risk assessment of the offender;
- The outcome of all past participation of the offender in substance abuse treatment programs;
- The possible rehabilitative benefits that substance abuse treatment, educational programming, vocational training, and other rehabilitative programming might have on the offender; and
- The likelihood that participation in the program will produce the same deterrent effect, protect the public, save taxpayer dollars and prevent or delay recidivism to an equal or greater extent than completion of the sentence previously imposed.

The bill does not give specific guidance to the DOC as to how to weigh these considerations or how much discretion the DOC may exercise to not select an eligible offender. But the DOC does exercise a degree of discretion regularly in making classifications and assignments of inmates and in authorizing their participation in various voluntary programs. Furthermore, the DOC must summarize its evaluation of the selection considerations in its written request for approval of the sentencing court.

If a nonviolent offender meets the eligibility criteria, is selected by DOC, and if space is available in the reentry program, DOC is authorized to request the sentencing court to approve the offender's participation in the reentry program.

DOC must also notify the state attorney that the offender is being considered for placement in the reentry program. The state attorney has 15 days to file any objection with the sentencing court and may provide supplemental information that may assist the court. The state attorney, however, has no right to a hearing on any objection that may be filed.

Sentencing Court Approval of Placement

The bill requires the sentencing court to notify DOC in writing of the court's decision to approve or disapprove the requested placement of the nonviolent offender into the reentry program within 30 days after the court receives DOC's request to place the offender in the reentry program. The bill provides that the court's failure to notify DOC of the decision within the 30-day period constitutes disapproval of the offender's placement in the reentry program. When approving or disapproving the placement, the bill requires the court to consider any relevant facts, including the factors considered by the DOC in selecting the offender for the program as well as:

- the original sentencing report and any evidence admitted in a previous sentencing proceeding;
- the offender's record of arrests without conviction for crimes;
- any other evidence of allegations of unlawful conduct or the use of violence by the offender;
- the offender's family ties, length of residence in the community, employment history, and mental condition;
- the likelihood that participation in the program will produce the same deterrent effect, rehabilitate the offender, and prevent or delay recidivism to an equal or greater extent than completion of the sentence previously imposed; and
- the likelihood that the offender will engage again in a criminal course of conduct.

The bill also requires the sentencing court to make a record of the factors relied on in making its decisions.

Treatment/Reentry Program Elements

If approved for participation in the program, the bill requires that the nonviolent offender serve at least six months in the reentry program. Any portion of his or her sentence served before placement in the reentry program does not count as progress toward program completion.

The bill requires a nonviolent offender who has been admitted to the reentry program to:

- Undergo a full substance abuse assessment to determine his or her substance abuse treatment needs.
- Have an educational assessment, using the Test of Adult Basic Education or any other testing instrument approved by the Department of Education.
- Enroll in an adult education program to improve academic skills to earn a high school diploma if one has not already been obtained.

The bill requires that assessments of the offender's vocational skills and future career education be provided to the offender as needed and that a periodic reevaluation be made in order to assess the progress of each offender.

Unmanageable Participants, Suspension and Termination

If a nonviolent offender in the program becomes unmanageable, the bill authorizes DOC to revoke the offender's gain-time and place the offender in disciplinary confinement in accordance with DOC rule. The offender must be readmitted to the reentry program after completing the ordered discipline.¹⁸ The bill does not make clear whether the offender must restart the reentry program after discipline, or only complete the remainder of the program from the point at which their participation was suspended. DOC can terminate the offender from the reentry program only if:

- The offender commits or threatens to commit a violent act;
- DOC determines that the offender is unable to participate in the reentry program due to the offender's medical condition;
- The offender's sentence is modified or expires;
- DOC reassigns the offender's classification status; or
- DOC determines that removing the offender from the reentry program is in the best interest of the offender or the security of the institution.

Sentence Modification upon Satisfactory Completion of Program

The bill requires DOC to submit a report to the sentencing court at least 30 days before the offender is scheduled to complete the reentry program. The report must describe the offender's performance in the reentry program. If the performance is satisfactory to DOC and the court, the bill requires the court to modify the offender's sentence. The bill also provides that the court may hold a hearing to consider modification of the sentence imposed. The bill authorizes the court to place the offender on drug offender probation¹⁹ subject to the offender's successful completion of the remainder of the reentry program.²⁰ The bill therefore allows the offender be released from custody and placed on drug offender probation, upon a finding that the offender satisfactorily completed the six month program. If the nonviolent offender violates the conditions of drug offender probation, the bill authorizes the court to revoke probation and impose any sentence that it might have originally imposed.²¹

Additional Provisions

The bill also requires DOC to:

¹⁸ The bill specifies that any period of time during which the offender is unable to participate in the reentry program shall be excluded from the specified time requirements in the reentry program.

¹⁹ The bill provides that if an offender being released intends to reside in a county that has established a postadjudicatory drug court program as described in s. 397.334, F.S., the sentencing court may require the offender to successfully complete the postadjudicatory drug court program as a condition of drug offender probation.

²⁰ The bill provides that the term of drug offender probation may include placement in a community residential or nonresidential substance abuse treatment facility under the jurisdiction of the department or the Department of Children and Family Services or any public or private entity providing such services. The bill does not provide for the source of payment for such services.

²¹ See discussion at p. 7 under "Constitutional Issues."

- Implement the reentry program to the fullest extent feasible within available resources.
- Submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives detailing the extent of implementation of the reentry program and outlining future goals and any recommendation DOC has for future legislative action. The reporting provision does not require any particular accounting of participation or success.
- Develop a system for tracking recidivism, including, but not limited to, rearrests and recommitment of nonviolent offenders who successfully complete the reentry program, and report the recidivism rate in its annual report of the program.
- Adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the reentry program.

The bill permits DOC to:

- Enter into performance-based contracts with qualified individuals, agencies, or corporations for the provision of any or all of the services for the reentry program.
- Establish a system of incentives within the reentry program which DOC may use to promote participation in rehabilitative programs and the orderly operation of institutions and facilities.
- Establish rules of conduct to which nonviolent offenders in the reentry program would be subject, including sanctions which DOC may impose for noncompliance.

The bill provides that no nonviolent offender has the right to placement in the reentry program or placement or early release under supervision of any type. The bill denies a nonviolent offender a cause of action against the department, a court, or the state attorney related to the reentry program. The bill further provides that the provision denying a cause of action is non-severable from the rest of the section and if the provision is found to be unenforceable the entire law will stand repealed.

B. SECTION DIRECTORY:

Section 1. Creates the nonviolent reentry program.

Section 2. Provides an effective date of October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference met on February 9, 2012, and found the bill to have an indeterminate fiscal impact. The bill creates a new section of statute requiring the Department of Corrections to develop and administer a nonviolent offender reentry program. This program is intended to divert nonviolent offenders from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same effect, rehabilitate the offender, and reduce recidivism. According to DOC, 337 inmates would be eligible for this program in the 2012-2013 Fiscal Year.

The bill provides that an inmate must serve at least half of his or her original sentence before being eligible for the reentry program. The DOC currently provides reentry programs and the bill specifies that DOC must place eligible inmates into the reentry program if "space is available," and subsection (9) of the bill provides DOC will implement the reentry program within available resources, therefore the reentry program requirement of the bill will not have a fiscal impact on the department.

The bill further provides that an inmate who satisfactorily completes the reentry program will then be placed on drug offender probation, and provides that the term of drug offender probation may include residential or nonresidential substance abuse treatment. The fiscal impact of this bill is dependent upon the cost of incarcerating inmates if they were not in the program provided in this bill, compared to the cost of probation and substance abuse treatment provided in this bill. Fiscal Year 2010-2011 average adult male per diem is \$42.46, and the average per diem for all types of facilities and inmates is \$53.46. The average per diem for a non-secure residential substance abuse bed is \$48.32, and \$52.41 for a secure residential bed, and outpatient group therapy is approximately \$20.66 per week. DOC reports that the length of time an offender occupies a residential bed could range from 6 to 18 months.²² If offenders are assigned by the court to just drug offender probation or probation and group therapy, this bill will likely have a positive fiscal impact on DOC. However, if the offender is assigned by the court to a residential substance abuse program and that offender would have been housed in an adult male facility, the fiscal impact on DOC could be negative depending on the offender's length of stay in the program.

The fiscal impact of this bill is dependent upon judicial discretion and the varied costs of different levels of incarceration and substance abuse treatment and is therefore indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The bill does not violate the Savings Clause, Art. X, s. 9, Fl. Const., because it does not authorize the imposition of a lower sentence than the minimum sentence required by law at the time of the commission of the offense.

It might create a double jeopardy problem if a new sentence authorized upon revocation of probation under the bill, were to be more severe than the original sentence prior to a modification under the bill.

²² Tommy Maggitas, Department of Corrections. E-mail (On file with the Judiciary Committee staff). The short term residential model is based on a 6 month stay and 18 months for the long term residential model. However, the long term residential model may terminate at about 1 year depending upon the offender's progress.

The provision that no rights or cause of action may arise from the bill might be questioned under some views of Florida's "access to courts" doctrine.

B. RULE-MAKING AUTHORITY:

The bill authorizes DOC to adopt rules pursuant to ch. 120, F.S., to govern operation of the nonviolent offender reentry program. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.²³ Rulemaking authority is delegated by the Legislature²⁴ through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"²⁵ a rule. Agencies do not have discretion whether to engage in rulemaking.²⁶ To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.²⁷ The grant of rulemaking authority itself need not be detailed.²⁸ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.²⁹

The bill makes nonviolent offenders in the reentry program subject to rules of conduct established by DOC. Existing rules govern inmate conduct and sanctions for violations.³⁰ The bill does not state whether these existing rules are sufficient to govern the conduct of nonviolent inmates in the program or whether DOC is to create additional rules governing the conduct of this subset of inmates. If new rulemaking is contemplated, the current language in the bill could provide more specific guidance for DOC to define personal conduct which complies with the statute.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 944.275, F.S., provides that all prisoners sentenced for a crime committed on or after October 1, 1995, must serve a minimum of 85 percent of the sentence imposed. This bill provides a new mechanism for a judge to resentence someone to less than the original sentence.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 18, 2011, the Criminal Justice Subcommittee approved one amendment and reported the bill favorably as a committee substitute. The amendment clarified that in addition to meeting the eligibility criteria, an offender must be selected by the Department of Corrections before being allowed to participate in the reentry program.

On January 24, the Rulemaking & Regulation Subcommittee adopted a strike-all amendment that added significantly to the eligibility criteria, the DOC selection considerations, requires written court approval for participation, leaves participation to the informed judgment of the DOC and the court, and leaves the sentence modification to the judgment of the court. The amendment also provided for the State Attorney to provide additional information to assist the court and it made the "no cause of action" provision non-severable.

On February 22, 2012, the Judiciary Committee approved one amendment and reported the bill favorably as a committee substitute. The amendment provides that a court may schedule a hearing to consider any modifications to an offender's current sentence.

The analysis is drafted to the committee substitute as passed by the Judiciary Committee.

²³ Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So.2d 527, 530 (Fla. 1st DCA 2007).

²⁴ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1st DCA 2000).

²⁵ Section 120.52(17), F.S.

²⁶ Section 120.54(1)(a), F.S.

²⁷ Sections 120.52(8) and 120.536(1), F.S.

²⁸ *Supra Save the Manatee Club, Inc.*, at 599.

²⁹ *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So.2d 696, 704 (Fla. 1st DCA 2001).

³⁰ Rule 33-601.314, F.A.C.