

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 Committee on Criminal Justice

BILL: SB 182

INTRODUCER: Senator Stargel

SUBJECT: Sexual Offenders

DATE: November 22, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CF</u>	_____
3.	_____	_____	<u>JU</u>	_____

I. Summary:

SB 182 amends s. 948.30(7)(g), F.S., which is a standard condition of community supervision prohibiting certain sex offenders from viewing, accessing, owning, or possessing obscene, pornographic, or sexually stimulating material. The bill removes a phrase that prohibits the material only if it is relevant to the offender’s deviant behavior pattern.

The bill is likely to result in an increase in the number of alleged violations of community supervision for possessing prohibited materials, but the potential fiscal impact of the bill has not been determined.

II. Present Situation:

Probation¹ and community control² are forms of community supervision that may be imposed as a sentence for a person who is found guilty or who enters a plea of guilty or nolo contendere to a criminal offense. Community supervision may be ordered either as an alternative to prison or following a period of incarceration as part of a split sentence.

The Department of Corrections supervises all persons who are sentenced to community supervision by the circuit court. Section 948.03, F.S., provides a list of standard conditions of probation and s. 948.101, F.S, provides a list of standard conditions of community control. The court also has the discretion to order special conditions in particular cases.

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.

Section 948.30, F.S., sets forth additional standard conditions of probation and community control that must be ordered for any offender who is sentenced to community supervision for designated sexual offenses.³ Section 948.30(1)(g), F.S., prohibits the offender from “viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender’s deviant behavior pattern.”⁴

In *Kasischke v. State*, 991 So.2d 803 (Fla. 2008), the Florida Supreme Court held that viewing, owning, or possessing any type of obscene, pornographic, or sexually stimulating visual or auditory material is not a violation of probation unless the state establishes that the material is “relevant to the offender’s deviant behavior pattern.” This resolved a conflict among lower appellate courts as to whether the relevance requirement applies to all materials or only certain types of materials. In reaching its decision, the Supreme Court found that the wording of the statute is ambiguous and that the Legislature’s intent could not be determined by examining the statute’s history. Therefore, the Court applied the rule of lenity to interpret the statute in favor of offenders who are subject to the prohibition.

The *Kasischke* decision creates uniformity in the courts’ interpretation of the requirement to prove relevance when a violation of s. 948.30(1)(g), F.S., is alleged. However, the Court’s application of the rule of lenity due to the statute’s ambiguity may not reflect the Legislature’s intent. This intent could be clarified by an amendment to the statute.

III. Effect of Proposed Changes:

The bill amends s. 948.30(7)(g), F.S., to remove the phrase “that are relevant to the offender’s deviant behavior pattern.” This would clarify that the standard condition of community supervision prohibits viewing, owning, or possessing any type of obscene, pornographic, or sexually stimulating visual or auditory material.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

³ The designated offenses are: chapter 794, F.S. (sexual battery); s. 800.04, F.S., (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age); s. 827.071, F.S., (using a child in a sexual performance or promoting sexual performance by a child); s. 847.0135(5), F.S., (computer pornography, computer offenses against children, and traveling to meet a minor for sexual purposes); and s. 847.0145, F.S., (selling or buying of minors for sexual purposes).

⁴ The statute includes an exception for the prohibited materials if “otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program.” There are no reported opinions of cases in which this exception was raised as a defense.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The prohibition against viewing, accessing, owning, or possessing pornography is susceptible to constitutional challenge. Federal courts and courts in other states are split on whether the term “pornography” is too vague to give notice of what is prohibited.⁵ Even though the reference to pornography was in the statute even before the relevance clause was added in 1997, Florida courts have not been properly presented with the question of whether it is impermissibly vague.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Depending upon the compliance of offenders with the expanded prohibition, the bill could result in more prosecutions for violations of this condition of community supervision. However, removing the requirement for the state to prove that the material is “relevant to the offender’s deviant behavior pattern” would also relieve the need to present expert testimony on that element. The Criminal Justice Impact Conference has not yet determined the bill’s potential fiscal impact on the prison population.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The standard condition of conditional release in s. 947.1405(7)(a)7., F.S., includes the same “relevant to the offender’s deviant behavior pattern” language that the court found to be ambiguous in the statute amended by this bill.

VIII. Statutes Affected:

This bill substantially amends section 948.30 of the Florida Statutes.

⁵ See discussion in *Hostetter v. State*, 82 So.3d 1217 (Fla. 1st Dist. 2012), footnote 2.

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
