

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 963 Probation Violations  
**SPONSOR(S):** Criminal Justice Subcommittee, Fernandez-Barquin  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Bruno	Hall
2) Justice Appropriations Subcommittee	9 Y, 0 N	Smith	Gusky
3) Judiciary Committee			

### SUMMARY ANALYSIS

An alternative sanctioning program (ASP) allows a probation officer to enforce a sanction for a minor technical violation of probation (VOP), with court approval. This process ensures a swift and certain response to a VOP without initiating the court resolution process or arresting and booking the offender. The chief judge of a judicial circuit may establish an ASP by administrative order, in consultation with the state attorney, public defender, and the Department of Corrections. Common ASP sanctions include increased reporting requirements, imposing or modifying a curfew, drug evaluation and treatment, and classes on topics including anger management, values, and parenting. The terms of each ASP vary across the judicial circuits.

CS/HB 963 requires each judicial circuit to establish an ASP, specifying eligible offenders and violations, and permissible sanctions. Eligible violations are classified as either low- or moderate-risk and include minor technical violations. Permissible sanctions correspond to the violation risk level and may include a short jail sentence, additional community service hours, house arrest, or loss of certain privileges. Certain offenders and violations are disqualified, such as violent offenders of special concern, a violation of a stay-away or no-contact order, an absconding violation, or those with multiple prior violations of probation.

The bill allows an eligible offender to participate in the ASP or waive participation and proceed to a court resolution of the VOP. If the offender elects to participate, he or she must admit the technical violation, agree to comply with the probation officer's recommended sanction, and agree to waive certain rights. The ASP is voluntary, and the offender may withdraw from participation at any time. If the offender withdraws or fails to successfully complete the sanction within either 90 days or a timeframe determined in the agreed-upon sanction, the original VOP proceeds to the court resolution process.

The bill also requires a court to modify or continue, rather than revoke, a probationary term for a first-time, low-risk technical violation. An eligible probationer who has successfully completed an alternative sanction through the ASP is entitled to mandatory modification or continuation of probation upon his or her first referral to the court for resolution of a filed VOP affidavit. When modifying the terms of probation, a court may include a term of up to 90 days of incarceration as a special condition of probation.

The Criminal Justice Impact Conference considered a bill containing similar language on February 19, 2018, and determined the bill would significantly reduce the need for prison beds (decrease of more than 25 prison beds).

The bill provides an effective date of July 1, 2019.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Probation and Community Control

At sentencing for a criminal conviction, a judge may place an offender on probation or community control in lieu of or in addition to incarceration.<sup>1</sup> Probation is a form of community supervision requiring specified contacts with probation officers and other terms and conditions.<sup>2</sup> Community control is a more intensive form of supervision involving an individualized program which restricts the offender's movement within the community, home, or residential placement.<sup>3</sup> Several standard conditions of probation or community control apply automatically, including requirements to report to a probation officer as directed and to live without violating any law.<sup>4</sup> The court may also impose special conditions, such as community service hours, regular drug or alcohol testing, no contact orders, and treatment programs.<sup>5</sup> Failure to meet any condition of supervision is a violation of probation or community control (VOP).

##### *Court Resolutions to VOPs*

A VOP may come before the court for resolution either by:

- Affidavit and issuance of a warrant or notice to appear,<sup>6</sup> or
- A warrantless arrest by a law enforcement officer with knowledge that the offender is on supervision.<sup>7</sup>

Generally, upon a finding that an offender violated probation or community control, the court may revoke, modify, or continue the supervision.<sup>8</sup> If the court chooses to revoke, it may impose any sentence that was permissible at the offender's initial sentencing.<sup>9</sup> Upon revocation of supervision, the court is bound by the sentencing guidelines under the Criminal Punishment Code.<sup>10</sup> The sentencing guidelines provide a formula for computation of the lowest permissible prison sentence, based on a number of factors such as the offender's current and prior offenses. The court must make written findings, contemporaneous with sentencing for the revocation of supervision, to justify a downward departure and sentence an offender to less than the lowest permissible sentence.<sup>11</sup>

If an offender qualifies as a violent felony offender of special concern (VFOSC), the court must revoke supervision, unless it makes written findings that the VFOSC does not pose a danger to the community.<sup>12</sup> A VFOSC is a person who is on felony supervision:

- Related to a qualifying offense<sup>13</sup> committed on or after March 12, 2007.

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<sup>1</sup> S. 948.01, F.S.

<sup>2</sup> S. 948.001(8), F.S.

<sup>3</sup> S. 948.001(3), F.S.

<sup>4</sup> S. 948.03(1), F.S.

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

<sup>6</sup> S. 948.06(1)(b), F.S.

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

<sup>8</sup> S. 948.06(2)(b), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> S. 921.0022, F.S.

<sup>11</sup> *State v. Roman*, 634 So.2d 291 (Fla. 1st DCA 1994).

<sup>12</sup> S. 948.06(8)(e)2.b., F.S.

<sup>13</sup> Section 948.06(8)(c), F.S., defines qualifying offense to include any of the following: kidnapping or attempted kidnapping, s. 787.01, F.S.; false imprisonment of a child under the age of 13, s. 787.02(3), F.S.; luring or enticing a child, s. 787.025(2)(b) or (b), F.S.; murder or attempted murder, s. 782.04, F.S.; attempted felony murder, s. 782.051, F.S.; manslaughter, s. 782.07, F.S.; aggravated battery or attempt, s. 784.045, F.S.; sexual battery or attempt; s. 794.011(2), (3), (4), or (8)(b) or (c), F.S.; lewd and lascivious battery or attempt,

- For any offense committed on or after March 12, 2007, and has previously been convicted of a qualifying offense.
- For any offense committed on or after March 12, 2007, and is found to have violated that supervision by committing a qualifying offense.
- And has previously been found by a court to be a habitual violent felony offender,<sup>14</sup> three-time violent offender,<sup>15</sup> or sexual predator,<sup>16</sup> and has committed a qualifying offense on or after March 12, 2007.<sup>17</sup>

VFOSC status also increases an offender's score under the sentencing guidelines, leading to a higher minimum permissible prison sentence.<sup>18</sup>

### *Release Pending Disposition of a VOP*

When a person is arrested for committing a crime, he or she is generally entitled to pretrial release on reasonable conditions under the Florida Constitution.<sup>19</sup> However, a person taken into custody for a VOP does not have a constitutional right to release pending the disposition of the VOP.<sup>20</sup> If the offender qualifies as a VFOSC, the court is prohibited from granting pretrial release.<sup>21</sup> For other offenders, the court has discretion to grant or deny bail.<sup>22</sup> A court must exercise this discretion on a case-by-case basis and may not adopt a policy of never granting pretrial release on a VOP; however, this discretionary power leads to many offenders being detained in county jail during the pendency of their VOP cases.

### Alternative Sanctioning Programs

Section 948.06(1)(h), F.S., authorizes the chief judge of each judicial circuit to establish an alternative sanctioning program (ASP), which allows the Department of Corrections (DOC) to enforce technical violations with court approval. A technical violation is any alleged VOP that is not a new felony offense, misdemeanor offense, or criminal traffic offense.<sup>23</sup> In fiscal year 2017-18, DOC investigated 47,693 technical violations and 25,301 substantive violations.<sup>24</sup> Many of these violations resulted in the offender returning to some form of supervision or serving a county jail sentence.<sup>25</sup>

The ASP allows for alternative resolution of technical violations, ensuring a swift and certain response without initiating the court process or arresting and booking the offender. In establishing an ASP, the chief judge, in consultation with the state attorney, public defender, and DOC, determines which technical violations are eligible for alternative sanctioning, offender eligibility criteria, permissible

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s. 800.04(4); lewd and lascivious molestation, s. 800.04(5)(b) or (c), F.S.; lewd and lascivious conduct, s. 800.04(6)(b), F.S.; lewd and lascivious exhibition, s. 800.04(7)(b); lewd and lascivious exhibition on computer, s. 847.0135(5)(b); robbery or attempt, s. 812.13, F.S.; carjacking or attempt, s. 812.133, F.S.; home invasion robbery or attempt, s. 812.135, F.S.; lewd and lascivious offense upon or in the presence of an elderly person or attempt, s. 825.1025, F.S.; sexual performance by a child or attempt, s. 827.071, F.S.; computer pornography, s. 847.0135(2) or (3), F.S.; transmission of child pornography, s. 847.0137, F.S.; selling or buying of minors, s. 847.0145, F.S.; poisoning food or water, s. 859.01, F.S.; abuse of a dead human body, s. 872.06, F.S.; any burglary offense that is a first or second degree felony, s. 810.02(2) or (3), F.S.; arson or attempt, s. 806.01(1), F.S.; aggravated assault, s. 784.021, F.S.; aggravated stalking, s. 784.048(3), (4), (5), or (7), F.S.; aircraft piracy, s. 860.16, F.S.; throwing a deadly missile, s. 790.161(2), (3), or (4), F.S.; and treason, s. 876.32, F.S.

<sup>14</sup> S. 775.084(1)(b), F.S.

<sup>15</sup> S. 775.084(1)(c), F.S.

<sup>16</sup> S. 775.21, F.S.

<sup>17</sup> S. 946.06(8)(b), F.S.

<sup>18</sup> S. 921.0024, F.S.

<sup>19</sup> Art. I, s. 14, Fla. Const. Exceptions include when a person is charged with a capital offense or offense punishable by life and the proof of guilt is evident or the presumption is great, or if no conditions can reasonably protect the community from risk of physical harm.

<sup>20</sup> *Bernhardt v. State*, 288 So.2d 490, 497 (Fla. 1974).

<sup>21</sup> S. 903.0351, F.S.

<sup>22</sup> S. 948.06(2)(c), F.S.; Fla. R. Crim. P. 3.790(b).

<sup>23</sup> S. 946.08(2)(h)1., F.S.

<sup>24</sup> Florida Department of Corrections, *Number of Violations by Type, Violation Completed FY 2017-2018*, (Jan. 2, 2019).

<sup>25</sup> *Id.*

sanctions, and the process for reporting technical violations through the ASP.<sup>26</sup> Common ASP sanctions include increased reporting requirements, imposition or modification of a curfew, drug evaluation and treatment, and classes on topics including anger management, values, and parenting.<sup>27</sup> As of December 2018, two circuits had included short jail sentences<sup>28</sup> as a possible ASP sanction through administrative order.<sup>29</sup>

After receiving written notice of an alleged technical violation and disclosure of the evidence supporting the violation, an offender who is eligible for the ASP may either elect to participate in the program or waive participation.<sup>30</sup> If the offender waives participation, the violation proceeds through the court resolution process.<sup>31</sup> If the offender elects to participate, he or she must admit to the technical violation, agree to comply with the probation officer's recommended sanction, and agree to waive the right to:

- Be represented by counsel.
- Require the state to prove his or her guilt.
- Subpoena witnesses and present evidence to a judge in his or her defense.
- Confront and cross-examine witnesses.
- Receive a written statement from a factfinder as to the evidence relied on and the reasons for the sanction imposed.<sup>32</sup>

Prior to 2016, DOC developed and implemented the ASP in 12 counties within six judicial circuits.<sup>33</sup> The Legislature codified the ASP option in 2016.<sup>34</sup> As of November 2018, 49 of 67 counties have implemented an ASP with 3,521 total participants statewide.<sup>35</sup>

## Effect of Proposed Changes

### Alternative Sanctioning Program

CS/HB 963 requires each judicial circuit to establish an ASP, identifying eligible offenders, eligible violations, and permissible sanctions. Eligible violations are classified as either low- or moderate-risk.

Low-risk violations only apply to probationers, not offenders on community control, and include:

- A positive drug or alcohol test result;
- Failure to report to the probation office;
- Failure to report a change in address or other required information;
- Failure to attend a required class, treatment or counseling session, or meeting;
- Failure to submit to a drug or alcohol test;
- Violation of curfew;
- Failure to meet a monthly quota for any required probation condition, including making restitution payments, paying court costs, and completing community service hours;
- Leaving the county without permission;

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<sup>26</sup> S. 948.06(1)(h)2., F.S.

<sup>27</sup> Eighteenth Judicial Circuit, Administrative Order No. 17-30-S (Jun. 28, 2017); Sixth Judicial Circuit, Administrative Order No. 2016-058 PA/PI-CIR (Sep. 9, 2016); Eighth Judicial Circuit, Administrative Order No. 4.16 (Jun. 10, 2016); Tenth Judicial Circuit, Administrative Order No. 2-79.0 (Jun. 27, 2016); Eighteenth Judicial Circuit, Administrative Order No. 16-17-B (Jun. 7, 2016).

<sup>28</sup> Other states have found that brief periods of incarceration in response to VOPs are as effective at curbing new violations as longer stays, when the sentence is swiftly-imposed and certain. Scott Taylor, President of the American Probation and Parole Association, *Summit on Effective Responses to Violations of Probation and Parole*, at 13-14, (Dec. 11, 2012); National Institute of Justice, "Swift and Certain" Sanction in Probation are Highly Effective: Evaluation of the HOPE Program, <https://www.nij.gov/topics/corrections/community/drug-offenders/pages/hawaii-hope.aspx> (last visited Mar. 1, 2018).

<sup>29</sup> Eighth Judicial Circuit, Administrative Order No. 4.16 (Jun. 10, 2016); Tenth Judicial Circuit, Administrative Order No. 2-79.0 (Jun. 27, 2016).

<sup>30</sup> S. 948.06(1)(h)3., F.S.

<sup>31</sup> S. 948.06(1)(h)3.a., F.S.

<sup>32</sup> S. 948.06(1)(h)3.b., F.S.

<sup>33</sup> Florida Department of Corrections, Agency Analysis of 2016 House Bill 1149, p. 2 (Jan. 20, 2016).

<sup>34</sup> Ch. 2016-100, Laws of Fla.

<sup>35</sup> Email from Jared Torres, Legislative Affairs Director, Department of Corrections, re: ASP updated numbers (Dec. 28, 2018).

- Failure to report a change in employment;
- Associating with people engaged in criminal activity; or
- Any other violation as determined by administrative order of the chief judge of the circuit.

Moderate-risk violations include:

- Any violation classified as low-risk when committed by an offender on community control;
- Failure to remain at an approved residence by an offender on community control;
- A third low-risk violation by a probationer; or
- Any other violation as determined by administrative order of the chief judge of the circuit.

The permissible sanctions correspond to the violation risk level. A probation officer may offer one or more of the following in response to a low-risk violation:

- Up to five days in the county jail;
- Up to 50 additional community service hours;
- Counseling or treatment;
- Support group attendance;
- Drug testing;
- Loss of travel or other privileges;
- Curfew for up to 30 days;
- House arrest for up to 30 days; or
- Any other sanction as determined by administrative order by the chief judge of the circuit.

The permissible sanctions for a moderate-risk violation include all sanctions available for a low-risk violation and:

- Up to 21 days in the county jail;
- Curfew for up to 90 days;
- House arrest for up to 90 days;
- Electronic monitoring for up to 90 days;
- Residential treatment for up to 90 days; or
- Any other sanction as determined by administrative order by the chief judge of the circuit.

The bill disqualifies offenders from alternative sanctioning under any of the following circumstances:

- The offender is a violent felony offender of special concern;
- The violation is a felony, misdemeanor, or criminal traffic offense;
- The violation is absconding;
- The violation is of a stay-away order or no-contact order;
- The violation is not identified as low- or moderate-risk by statute or administrative order;
- The offender has a prior moderate-risk level violation during the same term of supervision;
- The offender has three prior low-risk level violations during the same term of supervision;
- The term of probation is scheduled to terminate in less than 90 days; or
- The terms of the sentence prohibit alternative sanctioning.

The bill allows the chief judge of each judicial circuit to add other eligibility criteria or permissible sanctions, and specify the process for reporting technical violations through the ASP. A court may also disqualify a person from the ASP when initially sentencing him or her to probation.

As in current law, the bill allows an eligible offender to participate in the ASP or waive participation and proceed to a court resolution of the VOP. If the offender elects to participate, he or she must admit to the technical violation, agree to comply with the probation officer's recommended sanction, and agree to waive the right to:

- Be represented by counsel.
- Require the state to prove his or her guilt.
- Subpoena witnesses and present evidence to a judge in his or her defense.

- Confront and cross-examine witnesses.
- Receive a written statement from a factfinder as to the evidence relied on and the reasons for the sanction imposed.

The offender's participation in an ASP is voluntary, and the offender may withdraw from participation at any time. If the offender withdraws or fails to successfully complete a sanction within either 90 days or a timeframe determined in the agreed-upon sanction, the original VOP proceeds to the court resolution process.

### Mandatory Modification of Probation and Jail Cap

The bill requires a court to modify or continue, rather than revoke, a probationary term, for a first-time, low-risk technical violation. Subject to an exception for a probationer who has substantially completed his or her probationary term, the bill requires modification of probation under the following circumstances:

- The term of supervision is probation, rather than community control.
- The probationer does not qualify as a violent felony offender of special concern.
- The violation is a low-risk technical violation.
- The court has not previously found the probationer in violation of probation during the current term of supervision.

An eligible probationer who has successfully completed a sanction through the ASP is entitled to mandatory modification or continuation of probation upon his or her first referral to the court for resolution of a filed VOP affidavit.

The bill caps the amount of jail time that a court may order for a first-time, low-risk technical violator. If modifying probation as required by the bill, a court may only impose a term of incarceration of up to 90 days as a special condition of probation. If, however, a first-time, low-risk technical violator has substantially completed his or her term of probation and has 90 days of supervision or fewer remaining on his or her sentence, a court may revoke rather than modify the probationary term. Upon revoking in this circumstance, a court may only sentence the probationer to a maximum of 90 days in county jail. This provision supersedes the sentencing requirements of the Criminal Punishment Code.

The bill allows a court to grant a probationer credit for only time served in the county jail since his or her most recent arrest for a violation of probation when imposing a capped jail sentence. Normally, a court must give a defendant all credit for time served in a case. The bill ensures that a probationer may receive a sentence of up to 90 days in jail upon a first-time, low-risk technical violation, in addition to any previously-served credit. However, the court may not exceed the statutory maximum sentence.

#### B. SECTION DIRECTORY:

**Section 1:** 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 2:** Provides an effective date of July 1, 2019.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

None.

##### 2. Expenditures:

The Criminal Justice Impact Conference (CJIC) considered a bill containing similar language on February 19, 2018, and determined that creating a statewide ASP would significantly<sup>36</sup> reduce the need for prison beds.<sup>37</sup> In Fiscal Year 2017-18, 6,062 technical violators were sentenced to prison. The alternative sanctioning program would apply to certain technical violators and result in greater non-prison sanctions for these violators. It is unknown how many of these technical violators would be eligible for the alternative sanctioning program or how many would volunteer for the program.

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

1. Revenues:

None.

2. Expenditures:

The bill may decrease the need for jail beds, as the ASP process resolves more violations without extended jail sentences or incarceration pending court resolution to a VOP.

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

None.

**D. FISCAL COMMENTS:**

None.

### **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

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

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 5, 2019, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment clarified that a court may grant a probationer credit for time served in a county jail only since the most recent arrest for a violation of probation when imposing a capped jail sentence.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

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<sup>36</sup> A significant impact is a change of more than 25 prison beds.

<sup>37</sup> Criminal Justice Impact Conference, *PCB JDC 18-03*, February 19, 2018,

<http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/archives/2018/PCBJDC1803.pdf>, (last accessed March 20, 2019)