

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 333 Bail Pending Appellate Review

SPONSOR(S): Judiciary Committee, Leek and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 510

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	Jones	Hall
2) Justice Appropriations Subcommittee	9 Y, 0 N	Smith	Gusky
3) Judiciary Committee	13 Y, 0 N, As CS	Jones	Luczynski

SUMMARY ANALYSIS

Pretrial release, or bail, allows an arrested defendant to be released from jail while he or she awaits disposition of the criminal charges. The Florida Constitution generally provides a right to pretrial release to persons charged with a non-capital offense not punishable by life imprisonment, subject to exceptions. Generally, pretrial release is granted by releasing a defendant on his or her own recognizance, by requiring the defendant to post bail, or by requiring participation in a pretrial release program. Bail requires an accused defendant to pay a set amount of money to secure release. If a defendant released on bail fails to appear before the court at the appointed place and time, the bail amount is forfeited.

Once a defendant is convicted, he or she may be remanded to custody and no longer has a constitutional right to release or bail. However, under certain circumstances, a court may release a convicted defendant on bail pending the outcome of his or her good faith criminal appeal. To be eligible, the defendant must not have been convicted of a previous felony or have other felony charges pending, if probable cause has been shown that he or she committed the felony. A court may not grant bail pending appellate review if the conviction is for:

- A capital offense;
- A specified life felony sexual battery offense; or
- A first degree felony for:
 - Second degree murder;
 - Second degree felony murder;
 - Specified sexual battery offenses;
 - Kidnapping;
 - Arson; or
 - Specified drug offenses, including drug trafficking.

CS/HB 333 expands the list of offenses for which a conviction prohibits a court from granting bail to a defendant pending appeal to include any offense requiring registration as a sexual offender or sexual predator, if, at the time of the offense:

- The defendant was 18 or older; and
- The victim was a minor.

The Criminal Justice Impact Conference considered the bill on January 27, 2020, and determined it would have no impact on the prison population.

The bill has an effective date of October 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Pretrial Release

Pretrial release or bail¹ is an alternative to incarceration that allows an arrested defendant to be released from jail while he or she awaits disposition of the criminal charges. The Florida Constitution generally provides a right to pretrial release on reasonable conditions to persons charged with a non-capital offense not punishable by life imprisonment.² However, if no conditions of release can reasonably protect the community from harm, assure that the defendant will attend trial, or ensure judicial integrity, the defendant may be detained.³

Generally, pretrial release is granted by releasing a defendant on his or her own recognizance, requiring the defendant to post bail, or requiring the defendant to participate in a pretrial release program. The purpose of a bail determination in a criminal proceeding is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.⁴ Bail requires an accused defendant to pay the sheriff a set amount of money to secure release. If a released defendant fails to appear before the court at the appointed place and time, the bail amount is forfeited.

When determining whether to release a defendant on bail, and what the bail amount should be, a court must consider, in addition to any other factors it deems relevant:

- The nature and circumstances of the offense charged.
- The weight of the evidence against the defendant.
- The danger that the defendant would pose to the community if released.
- The source of funds used to post bail.
- Whether the defendant is already on release pending a criminal proceeding.
- The street value of any drug or controlled substance connected to the criminal charge.
- Potential intimidation and danger to victims.
- Whether there is probable cause to believe the defendant committed a new crime while on pretrial release.
- The defendant's:
 - Family ties;
 - Length of residence in the community;
 - Employment history;
 - Financial resources;
 - Mental condition; and
 - Past and present conduct.⁵

If the alleged crime is gang-related, the defendant must be held without bail until his or her first appearance to ensure the full participation of the prosecutor and the protection of the public.⁶ Similarly, a sexual offender or sexual predator is not eligible for release on bail or surety bond until first appearance, unless the charge is a misdemeanor offense under ch. 316, F.S. (relating to traffic offenses).⁷

¹ See s. 903.011(1), F.S. (defining "bail" and "bond" to include "any and all forms of pretrial release").

² Art. I, s. 14, Fla. Const.

³ *Id.*

⁴ S. 903.046, F.S.

⁵ *Id.*

⁶ See s. 903.046(2)(f), F.S.

⁷ S. 903.046(2)(m), F.S.

Bail Pending Appellate Review

Once a defendant is convicted, he or she may be remanded to custody and no longer has a constitutional right to release or bail.⁸ The defendant may appeal his or her conviction and sentence within 30 days of rendition of the sentence.⁹

Although there is no right to bail after conviction, the court may release the defendant on bail while his or her appeal is pending under certain circumstances.¹⁰ The defendant must demonstrate that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous.¹¹ To determine whether bail pending appellate review should be granted, the court should consider various factors, including:

- The defendant's habits and community ties;
- The severity of the punishment and temptation to flee;
- Any term of imprisonment imposed; and
- Any other factors indicating whether the defendant is a flight risk.¹²

If the court grants bail pending appellate review, the terms of bail must include that the defendant will:

- Duly prosecute the appeal;
- Surrender himself or herself if the conviction is affirmed on appeal; and
- Appear in court if the conviction is reversed and a new trial is ordered.¹³

A court is prohibited from granting bail pending appellate review if:

- The defendant was convicted of a previous felony and his or her rights have not been restored;
- Other felony charges are pending against the defendant and a court has found probable cause that the defendant committed the felony; or
- The conviction is for:
 - A capital offense;¹⁴
 - A specified life felony sexual battery offense;¹⁵ or
 - A first degree felony for:
 - Second degree murder;
 - Second degree felony murder;
 - A sexual battery offense under s. 794.011(4), F.S.;¹⁶
 - Kidnapping;
 - Arson; or
 - Specified drug offenses, including drug trafficking.¹⁷

⁸ Fla. R. Crim. P. 3.550; *Younghans v. State*, 90 So. 2d 308, 309 (Fla. 1956).

⁹ Fla. R. Crim. P. 9.140(b)(3).

¹⁰ *Younghans*, 90 So. 2d at 309; Fla. R. Crim. P. 3.691(a).

¹¹ Fla. R. Crim. P. 3.691(a).

¹² *Id.* (requiring a court to consider the principles espoused in *Younghans*); see *Younghans*, 90 So. 2d at 310.

¹³ Fla. R. Crim. P. 3.691(d).

¹⁴ *Id.* (permitting bail pending appeal for a defendant convicted of certain non-capital offenses). A capital offense includes first degree murder and capital sexual battery.

¹⁵ S. 903.133, F.S. (prohibiting bail for a person convicted of violating s. 794.011(2), F.S. (sexual battery on a child under 12) or s. 794.011(3), F.S. (sexual battery on a person 12 or over with the use of deadly weapon or physical force likely to cause serious injury)).

¹⁶ See s. 794.011(4), F.S. (providing that sexual battery accompanied by specified egregious circumstances is a first degree felony).

¹⁷ S. 903.133, F.S.

Sexual Offender and Sexual Predator Classifications

A conviction for specified sexual crimes requires a defendant to register as a sexual offender or sexual predator if statutory criteria are met.¹⁸ The registration laws also require reregistration at designated intervals¹⁹ and provide for public notification of information about sexual predators and sexual offenders. These laws span several chapters²⁰ and are implemented by the:

- Florida Department of Law Enforcement (FDLE);
- Local sheriffs;
- Department of Corrections (DOC);
- Department of Juvenile Justice (DJJ);
- Department of Highway Safety and Motor Vehicles (DHSMV); and
- Department of Children and Families (DCF).

A person is classified as a "sexual offender" if the person:

- Was convicted of a qualifying sexual offense in Florida or a similar offense in another jurisdiction and was released on or after October 1, 1997, from the sanction imposed for that offense;
- Establishes or maintains a Florida residence and is subject to registration or community or public notification in another jurisdiction or is in the custody or control of, or under the supervision of, another jurisdiction as a result of a conviction for a qualifying sexual offense; or
- On or after July 1, 2007, has been adjudicated delinquent of a qualifying sexual battery or lewd or lascivious offense in Florida or a similar offense in another jurisdiction, committed when the person was 14 years of age or older.²¹

A person is designated a "sexual predator" if the person was:

- Convicted of a qualifying capital, life, or first degree felony sexual offense committed on or after October 1, 1993, in Florida, or convicted of a similar offense in another jurisdiction;²²
- Convicted of a qualifying sexual offense committed on or after October 1, 1993, in Florida, or convicted of a similar offense in another jurisdiction, and has a prior conviction for a qualifying sexual offense or a violation of a similar law of another jurisdiction; or
- Found to be a sexually violent predator in a civil commitment proceeding.²³

Qualifying convictions triggering registration requirements as a sexual offender or sexual predator include:²⁴

- Sexual misconduct with a person having a developmental disability;²⁵
- Sexual misconduct with a mental health patient by an employee;²⁶
- Specified violations of kidnapping or falsely imprisoning a minor;²⁷
- Luring or enticing a child, by a person with a prior sexual conviction;²⁸
- Human trafficking for commercial sexual activity;²⁹
- Sexual battery;³⁰
- Unlawful sexual activity with a minor;³¹
- Lewd or lascivious battery, molestation, conduct, or exhibition;³²

¹⁸ Ss. 775.21 and 943.0435, F.S.

¹⁹ See, e.g., s. 775.21(7)(a), F.S.

²⁰ Ss. 775.21 – 775.25, 943.043 – 943.0437, 944.606, 944.607, and 985.481 – 985.4815, F.S.

²¹ Ss. 943.0435(1)(h) and 985.4815(1)(h), F.S. Sections 944.606(1)(f) and 944.607(1)(f), F.S., which address sexual offenders in the custody of or under DOC's supervision, also define the term "sexual offender."

²² Examples include sexual battery by an adult on a child under 12 (s. 794.011(2)(a), F.S.) and lewd or lascivious battery by an adult on a child 12 years or older but under 16 (s. 800.04(4)(a), F.S.).

²³ S. 775.21, F.S.

²⁴ See *id.*; s. 943.0435, F.S.

²⁵ S. 393.135(2), F.S.

²⁶ S. 394.4593(2), F.S.

²⁷ See ss. 787.01 and 787.02, F.S.; *cf. State v. Robinson*, 873 So. 2d 1205 (Fla. 2004) (requiring a sexual element to the crime of kidnapping in order for the defendant to qualify as a sexual predator).

²⁸ S. 787.025(2), F.S.

²⁹ S. 787.06(3)(b), (d), (f), and (g), F.S.

³⁰ See s. 794.011, F.S.

³¹ S. 794.05, F.S.

- Video voyeurism involving a minor victim;³³
- Lewd or lascivious offense on an elderly or disabled person;³⁴
- Sexual performance by a child;³⁵
- Providing obscene materials to a minor;³⁶
- Computer pornography involving a minor;³⁷
- Soliciting a minor over the Internet;³⁸
- Traveling to meet a minor;³⁹
- Lewd or lascivious exhibition over the Internet;⁴⁰
- Transmitting child pornography by electronic device or equipment;⁴¹
- Transmitting material harmful to a minor by electronic device;⁴²
- Selling or buying a minor to engage in sexually explicit conduct;⁴³
- Racketeering involving a sexual offense;⁴⁴
- Sexual misconduct with a forensic client;⁴⁵ and
- Sexual misconduct by an employee with a juvenile offender.⁴⁶

FDLE is the central repository for sexual offender registration information, and Florida sheriffs handle in-person registration and reregistration at various intervals.⁴⁷ FDLE's website provides a searchable database with information about sexual offenders and sexual predators, including place of residence.⁴⁸

State v. Fugler Case

In *State v. Fugler*,⁴⁹ the defendant was convicted of lewd and lascivious exhibition,⁵⁰ lewd and lascivious conduct,⁵¹ and showing obscene material to a minor.⁵² Those crimes, while involving sexual elements, did not prohibit the court from granting bail pending appellate review under current law. In turn, the court granted bail, originally releasing the defendant back into the community to reside while appealing his conviction. However, the State filed a motion for reconsideration, and the court revoked bail, ultimately requiring the defendant to begin serving his sentence while pursuing his appeal.⁵³

³² S. 800.04, F.S.

³³ S. 810.145(8), F.S.

³⁴ S. 825.1025, F.S.

³⁵ S. 827.071, F.S.

³⁶ S. 847.0133, F.S.

³⁷ S. 847.0135(2), F.S.

³⁸ S. 847.0135(3), F.S.

³⁹ S. 847.0135(4), F.S.

⁴⁰ S. 847.0135(5), F.S.

⁴¹ S. 847.0137, F.S.

⁴² S. 847.0138, F.S.

⁴³ S. 847.0145, F.S.

⁴⁴ S. 895.03, F.S.

⁴⁵ S. 916.1075(2), F.S.

⁴⁶ S. 985.701(1), F.S.

⁴⁷ Florida Department of Law Enforcement, *About Us*, <http://offender.fdle.state.fl.us/offender/About.jsp> (last visited Feb. 12, 2020).

⁴⁸ Florida Department of Law Enforcement, *Sexual Offenders and Predators Search*, <http://offender.fdle.state.fl.us/offender/Search.jsp> (last visited Feb. 12, 2020).

⁴⁹ Circuit Court Case No. 2016-305286-CFDB (Volusia Co.).

⁵⁰ Lewd and lascivious exhibition refers to intentional masturbation, exposure of the genitals, or commission of another sexual act without making physical or sexual contact with the victim. When done in the presence of a person less than 16 years of age by a person 18 years or older, it is a second degree felony. S. 800.04(7)(b), F.S.

⁵¹ Lewd and lascivious conduct refers to intentionally touching a person under 16 years of age in a lewd or lascivious manner or soliciting a person under 16 to commit a lewd or lascivious act. When done by a person 18 years or older, it is a second degree felony. S. 800.04(6)(b), F.S.

⁵² Showing obscene material to a minor is a third degree felony. S. 847.0133, F.S.

⁵³ Frank Fernandez, *Mark Fugler Case: Judge Revokes Bond of Convicted Sex Offender who is Back in Jail*, DAYTONA BEACH NEWS-JOURNAL (Oct. 7, 2019), <https://www.news-journalonline.com/news/20191007/mark-fugler-case-judge-revokes-bond-of-convicted-sex-offender-who-is-back-in-jail> (last visited Feb. 12, 2020).

Effect of Proposed Changes

CS/HB 333 expands the list of offenses for which a conviction prohibits a court from granting a defendant bail pending appeal to include any offense requiring registration as a sexual offender or sexual predator, if, at the time of the offense:

- The defendant was 18 or older; and
- The victim was a minor.

As such, a person convicted of an offense requiring sexual offender or sexual predator registration will be sentenced and not allowed to reside in the community pending appeal. By its terms, the bill does not prohibit granting bail pending appeal for a crime if the defendant was a minor or the victim was an adult.

The bill is effective October 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 903.133, F.S., relating to bail on appeal; prohibited for certain felony convictions.

Section 2: Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference considered the bill on January 27, 2020, and determined it would have no impact on the prison population.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 12, 2020, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment made a technical change to conform the bill's structure to bill drafting guidelines.

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