

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1118

SPONSOR: Criminal Justice Committee and Senator Cowin

SUBJECT: Aggravated Stalking

DATE: February 18, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates s. 921.244, F.S., requiring that a sentencing court issue an order prohibiting an offender convicted of sexual battery or of a lewd and lascivious offense upon or in the presence of a person under 16 years of age from having contact with the victim of the offense for the duration of the sentence imposed. Violation of such a no-contact order is a criminal offense that is classified as a third degree felony. The court may reconsider the no-contact order upon request of a victim who is at least 18 years old at the time of the request. Before granting such a request, the court must hold an evidentiary hearing to determine whether there has been a change in circumstances and whether modification or rescission of the order is in the best interest of the victim.

The bill also amends s. 748.048, F.S., to provide that an offender commits aggravated stalking, a third degree felony, when the offender stalks the victim after being prohibited from contacting the victim under s. 921.244, F.S.

This bill creates s. 921.244, F.S., and substantially amends s. 748.048, F.S.

II. Present Situation:

Section 784.048, F.S., defines the offense of stalking and associated penalties. There are four types of stalking:

- s. 784.048(2), F.S., provides that any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a first degree misdemeanor, punishable by up to 1 year in a county jail.

- s. 784.08(3), F.S., provides that any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking. This is a third degree felony that is ranked as a Level 6 offense on the Offense Severity Ranking Chart. Conviction of a third degree felony is punishable within a range from any non-state prison sanction up to five years of prison. However, if the offender does not have a prior record, conviction of this offense will not result in a minimum permissible sentence of imprisonment.
- s. 784.08(4), F.S., provides that any person who, after an injunction for protection against repeat violence or dating violence pursuant to s. 784.046, F.S., or an injunction for protection against domestic violence pursuant to s. 741.30, F.S., or after any other court-imposed prohibition of conduct toward a person or a person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks that person commits the offense of aggravated stalking, a third degree felony that is ranked as a Level 7 offense. Absent other factors, a Level 7 offense will result in a minimum permissible sentence of 21 months in prison.
- s. 784.08(5), F.S., provides that any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age commits the offense of aggravated stalking, which is ranked as a Level 6 offense.

In many cases, an offender being placed on community supervision is ordered not to have contact with the victim of the crime. However, there are many ways in which a probationer could violate a no-contact condition of probation without committing the crime of stalking or any other criminal offense. A non-criminal violation of probation cannot be prosecuted as a separate criminal offense, but must be dealt with in a violation of probation proceeding. A sentencing court has wide discretion in dealing with any violation of a condition of probation. Available options range from taking no action to revoking probation and sentencing the offender to serve the maximum sentence of imprisonment that could have been imposed at the time of sentencing for the underlying offense. If imprisoned, the violator receives credit for any time previously served in jail or prison for the offense.

It is not uncommon for an offender who commits a violent crime to be given a split sentence which includes a term of incarceration to be followed by a term of probation or community control. Many conditions of probation are technical and do not have relevance during the term of imprisonment, such as the requirement that the offender regularly report to his or her probation officer. If an offender violates a no-contact order in such a manner that a crime is not committed, the violation is considered to be technical. A concern arises when a no-contact order is violated before the offender begins the period of probation, such as when the offender is serving a prison sentence. In *Stafford v. State*, 455 So.2d 385 (Fla. 1984), the Florida Supreme Court held that probation may be violated at any time for any course of conduct that is contrary to good behavior. However, some appellate courts have held that a defendant cannot violate a technical condition of a probationary term that has not commenced at the time of the alleged violation. See *Martin v. State*, 796 So.2d 1271 (Fla. 4th DCA 2001), *Washington v. State*, 579 So.2d 400, 401 (Fla. 5th DCA 1991). Therefore, in some jurisdictions probation could not be revoked for

violating a no-contact order prior to the beginning of the probationary period unless the conduct constituted a separate criminal offense. In such a situation, punishment of an incarcerated offender would be limited to sanctions available through the correctional disciplinary process.

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 921.244, F.S., to require that a sentencing court issue an order prohibiting an offender convicted of violating s. 794.011, F.S., (sexual battery) or s. 800.04, F.S., (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age) from having contact with the victim of the crime. The order applies to both direct contact, such as making a telephone call to the victim, and indirect contact, such as having another person deliver a message. There is no exception for incidental or inadvertent contact. However, if the order is a condition of probation or community control, an offender could not be found to have violated the condition unless the violation is willful and material.

The court may reconsider issuance of the order if requested by a victim who is at least 18 years of age at the time he or she makes the request. However, the court may not grant the request unless it conducts an evidentiary hearing to determine whether there has been a change in circumstances warranting a change in the order and whether modification or rescission of the order is in the best interest of the victim.

Section 1 also creates a new criminal offense for violating a no-contact order entered pursuant to the section. There is no requirement that the violation be knowing and willful, but the courts often apply such a requirement when the result would otherwise be unjust. Therefore, it is not anticipated that a person could be convicted of the offense for inadvertent and incidental contact with the victim. The new offense is a third degree felony. Because the offense is not ranked on the Offense Severity Ranking Chart in s. 921.0022, F.S., it is considered to be a Level 1 offense. Standing alone, a Level 1 offense would not result in imposition of sentence of imprisonment, although this would depend on the offender's prior record.

Section 2 of the bill amends s. 784.048, F.S., to provide that an offender commits the third degree felony of aggravated stalking if he or she: (1) has been convicted of violating s. 794.011, F.S., or s. 800.04, F.S.; (2) has been prohibited from contacting the victim of the offense under s. 921.244, F.S., which is created in Section 1 of the bill; and (3) willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim. There is nothing that limits commission of the new offense to the time period during which the offender is under sentence for the violation of s. 794.011, F.S., or s. 800.04, F.S.

The new offense created in Section 2 of the bill is not ranked and therefore is considered to be a Level 1 offense. Currently, an offender who stalks another person after imposition of any court-imposed condition of conduct toward the person or the person's property commits a Level 7 offense with a minimum permissible sentence of 21 months in prison. Because the new offense is more specific than the current offense, it is possible that violation of a court order issued pursuant to s. 921.244, F.S., would have to be prosecuted under the new offense with the lesser penalty.

Because the bill makes violation of a no-contact order a separate criminal offense, it will effect violation of proceedings when the offender is under any form of court-ordered supervision. Contact in violation of the order would be a non-technical violation of the conditions of supervision. Therefore, a sentencing judge could hold a violation of probation proceeding and would have the full range of penalties available to address the violation, even if the offender had not yet begun the non-incarcerative portion of his or her sentence. It should also be noted that probationers who commit a new criminal act are subject to both violation of probation and prosecution for the new offense.

Section 3 provides an effective date of July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Creation of the new offense for violation of a no-contact order may result in imprisonment of sexual offenders who would not otherwise be imprisoned for violating a no-contact order. However, the number of offenders who violate no-contact orders is not known and the deterrent effect of the new sanction cannot be predicted. Therefore, the fiscal impact is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
