The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Criminal and Civil Justice Appropriations Committee

BILL:	CS/CS/SB 146
INTRODUCER:	Criminal and Civil Justice Appropriations Committee, Criminal Justice Committee, Senator Dockery and others
SUBJECT:	Anti-Murder Act
DATE:	February 23, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Luczynski	Maclure	JU	**Fav/1 amendment**
3.	Butler/Luczynski	Sadberry	JA	**Fav/CS**
4.				
5.				
6.				

I. Summary:

This bill addresses felony probation and community control violations by designating certain alleged probation or community control violators as "violent felony offenders of special concern" (VFOSC). A violent felony offender of special concern or a person who meets specified VFOSC requirements, but does not already have the status of a VFOSC, who is alleged to have violated felony probation or community control, other than a failure to pay costs, fines, or restitution, cannot be released from jail until the court has held a hearing to determine whether supervision was violated. If supervision is found to have been violated, the court must make a written finding as to whether the violent felony offender of special concern is a danger to the community. The court must also determine whether to revoke or continue the probation or community control. If it is determined that the violator is a danger to the community, the court must revoke probation or community control and sentence the offender up to the statutory maximum or longer if permitted by law.

The Criminal Punishment Code provides a point system to determine an offender's minimum sentence. Currently, violation of felony probation or community control by commission of a new felony adds an additional 12 points to the score, and violation for any other reason adds 6 points. For a violent felony offender of special concern, the bill increases the additional points to 24 for a new felony conviction and 12 for other violations, except where the violation is solely for a failure to pay costs, fines, or restitution.

The bill substantially amends sections 921.0024 and 948.06, Florida Statutes; creates sections 903.0351 and 948.064, Florida Statutes; and reenacts sections 948.012(2)(b), 948.10(9), and 958.14, Florida Statutes.

II. Present Situation:

More than 151,000 offenders are actively supervised by the Department of Corrections through some form of community supervision.[1] Florida law recommends community supervision for offenders who do not appear to be likely to re-offend and who present the lowest danger to the welfare of society. Generally, this includes those offenders whose sentencing score sheet result does not fall into the range recommending incarceration under the Criminal Punishment Code.[2]

The two major types of community supervision are probation and community control. Community control is a higher level of supervision that is administered by officers with a statutorily mandated caseload limit.[3] Both probation and community control are judicially imposed sentences that include standard statutory conditions as well as any special conditions that are directed by the sentencing judge.

Approximately one-fourth of supervised offenders are on probation or community control for committing murder, manslaughter, a sexual offense, robbery, or another violent crime. Another one-fourth have theft, forgery, or fraud as their most serious offense, and drug offenders account for another one-fourth.

The statutory terms and conditions required of persons on probation or community control, as provided by s. 948.03, F.S., may include that the offender must:

- Report to the probation and parole supervisors as directed.
- Permit such supervisors to visit him or her at his or her home or elsewhere.
- Work faithfully at suitable employment insofar as may be possible.
- Remain within a specified place.
- Make reparation or restitution.
- Make payment of the debt due and owing to a county or municipal detention facility for medical care, treatment, hospitalization, or transportation received by the felony probationer while in that detention facility.
- Support his or her legal dependents to the best of his or her ability.
- Pay any monies owed to the crime victims compensation trust fund.
- Pay the application fee and costs of the public defender.
- Not associate with persons engaged in criminal activities.
- Submit to random testing to determine the presence or use of alcohol or controlled substances.
- Not possess, carry, or own any firearm unless authorized by the court and consented to by the probation officer.
- Not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician.
- Not knowingly visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used.

[1] Florida Department of Corrections, *Florida's Supervised Population Monthly Status Report November 2006* (2006), http://www.dc.state.fl.us/pub/spop/0611/index.html.
[2] Sections 921.002 through 921.0027, F.S.
[3] Section 948.10(3), F.S.

- Submit to the drawing of blood or other biological specimens.

The court may add other terms and conditions that it considers proper.

Section 948.06, F.S., provides procedures regarding violation of conditions of probation or community control. A police officer or a probation officer may make a warrantless arrest if he or she has reasonable grounds to believe that an offender violated probation or community control in any material respect. A judge may also issue an arrest warrant based upon reasonable cause that the conditions have been violated. At the first hearing on the violation, the court advises the offender of the charge. If the offender admits the truth of the charge, the court may immediately revoke, modify, or continue the probation or community control, or place a probationer into a community control program.

Once brought before the court for an alleged violation, the offender is advised of the charge. If the charge is not admitted, the court may commit the offender to jail to await a hearing, release the offender with or without bail (subject to a dangerousness hearing for certain sex offenses, registered sexual predators, and registered sexual offenders), or dismiss the charge. If the offender admits the charge or is judicially determined to have committed the violation, the court may revoke, modify, or continue community supervision. If supervision is revoked, the court must adjudge the offender guilty of the offense for which he or she was on community supervision, and can impose any sentence that could have been imposed at the original sentencing.

As of November 30, 2006, 35,828 violations were pending against offenders who are on active or active-suspense supervision status for any type of supervision (a total of 151,096 offenders).[4] The Office of Program Policy Analysis and Government Accountability reports that offenders classified as maximum risk commit a disproportionate number of offenses that are defined as serious under the Jessica Lunsford Act. These include murder, sexual offenses, robbery, carjacking, child abuse, and aggravated stalking.

The Criminal Punishment Code is applicable to all felony offenses committed on or after October 1, 1998. The code provides a mathematical formula that determines the minimum sentence that a court may impose upon an offender. The minimum sentence is calculated based upon the total number of points assessed against the offender. If the total points exceed 44, the court must subtract 28 points and multiply by 75 percent. The resulting number is the minimum number of months in state prison that the offender must serve. However, the court may find that one or more of the mitigating circumstances under s. 921.0026, F.S., warrants a downward departure, except for capital felonies. Where a downward departure is granted, the court may sentence the offender to less than the minimum sentence.

If an offender is resentenced after being found guilty of violating the terms of his or her probation or community control, the total points are re-calculated, adding 12 points for a violation resulting from committing a new felony offense or 6 points for any violation other than a new felony offense. The additional points may cause the total score to exceed 44 and compel

[4] FLA. DEP'T OF CORR., *Florida's Supervised Population Monthly Status Report November 2006* (2006), http://www.dc.state.fl.us/pub/spop/0611/tab14.html.

the sentencing court to impose a new state prison sentence unless it finds grounds for a downward departure.

III. Effect of Proposed Changes:

This bill constitutes the "Anti-Murder Act" (Act). It creates s. 903.0351, F.S., in the chapter dealing with bail, prohibiting pretrial release of certain persons arrested for an alleged violation of felony probation or community control. This section provides that in the instance of an alleged violation of felony probation or community control, pretrial release shall not be granted prior to the resolution of the violation hearing, except where the alleged violation is based solely on the failure to pay costs, fines, or restitution, to:

- A violent felony offender of special concern (VFOSC), as defined in s. 948.06, F.S.;
- A person who is on felony probation or community control for any offense committed on or after the effective date of this act and who is arrested for a qualifying offense as defined in s. 948.06(8)(c), F.S.; or
- A person who is on felony probation or community control and has previously been found by a court to be a habitual violent felony offender as defined by s. 775.084(1)(b), a three-time violent felony offender as defined by s. 775.084(1)(c), or a sexual predator under s. 775.21, and who is arrested for committing a qualifying offense as defined in s. 948.06(8)(c), F.S., on or after the effective date of this act.[5]

For the purpose of this staff analysis, the aforementioned class of alleged violators of felony probation or community control is referred to as "included offenders."

Section 948.06, F.S., is amended to provide details of the Anti-Murder Act. The restriction against pretrial release found in the new s. 903.0351, F.S., is also added to s. 948.06(4) and (8)(d), F.S. In addition, a new subsection (8) defines six categories of offenders who are violent felony offenders of special concern. These include offenders who are on felony probation or community control:

1. For the commission of a qualifying offense committed on or after the effective date of the act;
2. For any offense committed on or after the effective date of the act, and who have previously been convicted of a qualifying offense;
3. For any offense committed on or after the effective date of the act, and who are found to have violated that probation or community control by committing a qualifying offense;
4. And who have been previously found by a court to be a habitual violent felony offender as defined in s. 775.084(1)(b), F.S., and have committed a qualifying offense on or after the effective date of the act;

[5] Pretrial release of offenders who are not affected by the no-release provision of this bill might still be restricted. Section 948.06(4), F.S., provides that an alleged violator who is under supervision for certain sex offenses, or who is a registered sexual predator or a registered sexual offender, cannot be released while awaiting a violation hearing unless the court enters a written finding that the violator is not a danger to the community. However, pretrial release under any conditions would be prohibited if that violator also meets the criteria as a violent felony offender of special concern.

5. And who have been previously found by a court to be a three-time violent felony offender as defined in s. 775.084(1)(c), F.S., and have committed a qualifying offense on or after the effective date of the act; or
6. And who have been previously found by a court to be a sexual predator under s. 775.21, F.S., and have committed a qualifying offense on or after the effective date of the act.

The term "committed" as used in categories three through six may be susceptible to different interpretations. Arguably, "committed a qualifying offense" does not equate to "arrested for a qualifying offense"; rather, "committed" appears to require some judicial determination after a hearing. Moreover, at first appearance, when the court is deciding matters concerning pretrial release, the court is not postured to make that determination. Thus an alleged violator falling into categories three, four, five, or six, who does not already have the status of a VFOSC, would not appear to satisfy the requirements of a VFOSC prior to the court's determination that the qualifying offense had been "committed." Nevertheless, the bill contains provisions in s. 903.0351(1)(b) and (c), F.S., and in other sections as applicable which apply the restrictions on pretrial release to alleged violators falling into categories three, four, five, or six, who do not have the status of VFOSC at the time they are arrested.

The qualifying offenses are:

- Kidnapping or attempted kidnapping under s. 787.01, F.S., false imprisonment of a child under the age of 13 under s. 787.02(3), F.S., or luring or enticing a child under s. 787.025(2)(b) or (c), F.S.
- Murder or attempted murder under s. 782.04, F.S., attempted felony murder under s. 782.051, F.S., or manslaughter under s. 782.07, F.S.
- Aggravated battery or attempted aggravated battery under s. 784.045, F.S.
- Sexual battery or attempted sexual battery under s. 794.011(2), (3), (4), or (8)(b) or (c), F.S.
- Lewd or lascivious battery or attempted lewd or lascivious battery under s. 800.04(4), F.S., lewd or lascivious molestation under s. 800.04(5)(b) or (c)2., F.S., lewd or lascivious conduct under s. 800.04(6)(b), F.S., or lewd or lascivious exhibition under s. 800.04(7)(c), F.S.
- Robbery or attempted robbery under s. 812.13, F.S., carjacking or attempted carjacking under s. 812.133, F.S., or home invasion robbery or attempted home invasion robbery under s. 812.135, F.S.
- Lewd or lascivious offense upon or in the presence of an elderly or disabled person or attempted lewd or lascivious offense upon or in the presence of an elderly or disabled person under s. 825.1025, F.S.
- Sexual performance by a child or attempted sexual performance by a child under s. 827.071, F.S.
- Computer pornography under s. 847.0135(2) or (3), F.S., transmission of child pornography under s. 847.0137, F.S., or selling or buying of minors under s. 847.0145, F.S.
- Poisoning food or water under s. 859.01, F.S.
- Abuse of a dead human body under s. 872.06, F.S.

- Burglary or attempted burglary that is a first-degree or second-degree felony under s. 810.02(2) or (3), F.S.
- Arson or attempted arson under s. 806.01(1), F.S.
- Aggravated assault under s. 784.021, F.S.
- Aggravated stalking under s. 784.048(3), (4), (5), or (7), F.S.
- Aircraft piracy under s. 860.16, F.S.
- Unlawful throwing, placing, or discharging of a destructive device or bomb under s. 790.161(2), (3), or (4), F.S.
- Treason under s. 876.32, F.S.
- Any offense in another jurisdiction that would meet the definitions of these offenses if committed in Florida.

If an "included offender" is alleged to have committed any violation of felony probation or community control other than a failure to pay costs, fines, or restitution, the court must hold a recorded violation hearing at which both the state and the offender are represented. If the court finds that the VFOSC has violated any non-monetary term of probation or community control, it must make written findings as to whether or not the VFOSC poses a danger to the community. If the court determines that the VFOSC is a danger, it must revoke probation or community control and sentence the offender up to the statutory maximum or longer if permitted by law. If the offender is found not to be a danger to the community, the court would have the same options that it has with any other violator, including continuing community supervision. The bill does not require a dangerousness hearing, but does specify that the court shall base its written findings on one or more of a list of factors.

The bill also amends the Criminal Punishment Code (s. 921.0024, F.S.) to increase the number of community sanction violation points that are added to the VFOSC's total sentence points as a result of the violation. These additional points will have the effect of lengthening the lowest permissible sentence. For a violation not involving a new felony conviction, the bill increases the assessment to 12 points from 6 points under the current law. However, if a VFOSC's violation is based solely on the failure to pay costs, fines, or restitution, the increased assessment does not apply. For a violation involving a conviction for a new felony, the bill increases the assessment to 24 points from 12 points under the current law.

The bill creates s. 948.064, F.S. This new section is intended to provide the courts and criminal justice system with a means of readily identifying when an arrested person meets the bill's conditions. The identification requirements are:

- The Department of Corrections must develop a system for identifying violent felony offenders of special concern in the department's database and post a list of the offenders on the Florida Department of Law Enforcement's Criminal Justice Intranet no later than October 1, 2007.
- The county where the arrested person is booked must ensure that state and national criminal history information and information in the Florida Crime Information Center and the Federal Crime Information Center is provided to the court at the offender's first appearance. The county must also provide notice that the arrested person meets the requirements for restrictions on pretrial release as provided for in the bill.

- The courts must create and maintain an automated system to provide the information to the court that has jurisdiction to conduct the hearings.
- The state attorney or statewide prosecutor, as applicable, must apprise the court at each critical stage in the judicial process, at which the state attorney or statewide prosecutor is represented, whether an alleged or convicted offender is a VFOSC or other designated offender.

The bill directs the Department of Corrections to coordinate preparation of an interagency report, by February 1, 2008, on any problems related to the implementation.

The bill appropriates $86,236 in recurring funds and $221, 526 in non-recurring funds from the General Revenue Fund and authorizes one full-time equivalent position and associated rate of 53,093 to the Office of the State Courts Administrator.

The bill appropriates $474,936 in recurring funds from the General Revenue Fund to the Department of Corrections for operational costs associated with inmate population increases.

The bill includes a severability clause providing that a finding that one section is invalid does not affect the remainder of the Act. It also provides that the Act is effective upon becoming a law.

This Act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill could have a significant fiscal impact on counties but appears to be exempt from the provisions of Article VII, Section 18(a) of the Florida Constitution because it amends a criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

An offender who is defined as a violent felony offender of special concern under new ss. 948.06(8)(b)4., 5., or 6., F.S., (habitual violent felons, three-time violent felons, and sexual predators) would have a potential *ex post facto* challenge to the assessment of increased Community Sanction Violation Points. This is a concern for offenders in these categories whose probation or community control was imposed prior to the effective date of the Act.

The *ex post facto* clause precludes the application of a law that is (1) retrospective in effect, and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable.[6] The imposition of increased Community Sanction Violation Points appears to increase the penalty by which a crime is punishable for the aforementioned offenders. However, to the extent that the new sentence does not exceed the statutory maximum sentence that the court might have originally imposed, it appears that the *ex post facto* clause is not violated. This conclusion is based on current statutory law that permits the court to impose a sentence up to and including the statutory maximum for an offense that is before the court due to a violation of probation or community control[7] and Florida case law. Under somewhat analogous circumstances, the Florida Supreme Court held that there was no *ex post facto* violation where the defendant was not penalized to a greater extent by the use of the revised Florida Rules of Criminal Procedure rather than the rule in effect at the time of the commission of the crimes for which he was placed on probation.[8] Whether or not the *ex post facto* clause would be violated in a situation where the new sentence did exceed the statutory maximum sentence that the court might have originally imposed is not clear, as there does not appear to be Florida case law on point.

Even if the *ex post facto* clause is not violated, the assessment of increased Community Sanction Violation Points for offenders in the categories whose probation or community control was imposed prior to the effective date of the Act appears to violate existing law. Section 921.002(2), F.S., provides that "each felony shall be sentenced under the guidelines or the code in effect at the time the particular felony was committed." In *Adekunle v. State*,[9] the court stated that the "law is well-settled that following revocation of probation the trial court must use the original scoresheet used at the time the defendant was placed on probation." Finally, rule 3.704(d)(28) of the Florida Rules of Criminal Procedure provides that "[s]entences imposed after revocation of probation or community control must be imposed according to the sentencing law applicable at the time of the commission of the original offense."

The bill provides for an effective date upon becoming law. This is contrary to the recommended bill drafting practice, particularly with criminal laws, of providing time for the act to become law, be published in the Laws of Florida, and for affected and interested parties to learn of its provisions. The concern in this situation arises when a law related to crimes or punishments is applied to a person between the time it became law and when it was published in the Laws of Florida. In that situation, a person may have a valid due process challenge based on lack of adequate notice regarding the conduct that is prohibited.

[6] *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla. 1996).
[7] Section 921.002(1)(g), F.S.
[8] *See Peters v. State*, 531 So. 2d 121, 124 (Fla. 1988).
[9] 916 So. 2d 950, 952 (Fla. 4th DCA 2005).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

State Government
The Criminal Justice Estimating Conference has provided the following information on the estimated costs of the bill.

Fiscal Impact of CS/SB 146 Primary, Additional, and Prior Offenses Considered						
			FUNDS REQUIRED			
Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2007-2008	48	48	$474,936	$21,840,000	**$22,314,936**	**$22,314,936**
2008-2009	420	372	$4,732,416	$38,110,176	**$42,842,592**	**$65,157,528**
2009-2010	1,122	702	$15,904,959	$41,611,020	**$57,515,979**	**$122,673,507**
2010-2011	1,859	737	$31,331,801	$37,858,830	**$69,190,631**	**$191,864,138**
2011-2012	2,505	646	$46,784,262	$31,327,786	**$78,112,048**	**$269,976,186**
Total	**2,505**	**2,505**	**$99,228,374**	**$170,747,812**	**$269,976,186**	**$269,976,186**

The Florida Department of Law Enforcement (FDLE) estimates that it will need one FTE, a fingerprint analyst to ensure the quality of fingerprints in the Automated Fingerprint Identification System to guarantee that appropriate notification of a "violent felony offender of special concern" can occur. System changes to create a new status record for "violent felony offenders of special concern" and other systems changes will require a contract systems programmer. Costs estimates for the first year include one-time funding of $3,000 for hardware and $4,726 for standard equipment. The estimate for the contract systems programmer is $43,500 in the first year and $11,250 recurring cost in subsequent years. The cost for a fingerprint analyst is estimated at $48,246 per year.

Local Government
The impact on local government is indeterminate but could be significant. The bill requires a violent felony offender of special concern and other designated offenders to be detained without bail pending the final hearing on the violation charge, except where the alleged violation is only for a failure to pay costs, fines, or restitution. As such, the violator will be held in a county jail at county expense. One factor that makes it difficult to estimate the financial impact upon local government is a lack of data concerning how many affected offenders are jailed pending a violation hearing under current practice. The financial impact will also be mitigated if passage of the bill results in more discretionary

enforcement for probationers or community controllees who do not fall into the high-risk category of being a violent felony offender of special concern.

State Courts System

The Office of the State Courts Administrator (OSCA) estimates that the bill will have a significant impact on the court system due to increased judicial workload from new first appearances, time required for danger to the community hearings,[10] and an increase in the number of trials and appeals. The office also estimates that there will be a 5 percent increase in the number of trials conducted throughout the state for cases arising under this legislation due to the increased consequences of a conviction.

Based upon its estimates of increased workload, OSCA projects that the bill will require five additional circuit court judges the first year that it is implemented, 17 circuit court judges in the second year, and 28 circuit court judges in the third year, as well as additional support resources each year. It also projects that the increased appellate workload would require one additional district court judge in the second year and two additional district court judges in the third year. This impact will be included in the certification order the court provides to the Legislature each year requesting new judges. OSCA also notes that the mandates of the bill could also impact other divisions in the court system by slowing down those divisions if judges and resources were shifted away from them to the criminal area to dispose of these cases.

In order to meet the technical requirements of disseminating information to the courts, OSCA estimates that it will need one-time funding of $206,800 to purchase additional computer servers and necessary software licensing, and an annual need of an additional $10,000 to expand to 24-hour vendor support. Programming changes to OSCA's Judicial Information System to establish the flag for the "violent felony offender of special concern" will require a one-time funding of $10,000. It also projects a need to employ an additional computer consultant to provide training and support for users of the Justice Information System.

The requirement for the state attorney or statewide prosecutor, as applicable, to advise the court at each critical stage in the judicial process on whether an alleged or convicted offender is a VFOSC or other designated offender could impact the workloads of those responsible parties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[10] When OSCA presented its estimate, there was some uncertainty as to whether the language of the bill required a hearing on dangerousness. The current version of the bill clarifies that a written finding, not a hearing, is required regarding dangerousness.

VIII. Summary of Amendments:

None.