

# 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.)

Prepared By: Judiciary Committee

BILL: CS/SB 146

INTRODUCER: Criminal Justice Committee, Senator Dockery and others

SUBJECT: Anti-Murder Act

DATE: February 19, 2007      REVISED: 02/20/07 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<b>Fav/CS</b>
2.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	<b>Fav/1 amendment</b>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see last section for Summary of Amendments**

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

**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. A violent felony offender of special concern 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 was violated, the court must determine and enter 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 according to the Criminal Punishment Code, 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 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.

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 on some form of community supervision.<sup>1</sup> 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.

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.<sup>2</sup> 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.

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<sup>1</sup> Florida Department of Corrections, *Florida's Supervised Population Monthly Status Report November 2006*, at <http://www.dc.state.fl.us/pub/spop/0611/index.html>.

<sup>2</sup> Section 948.10(3), F.S.

- 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.
- 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).<sup>3</sup> 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, ss. 921.002 through 921.0027, F.S., 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 at 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.

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<sup>3</sup> Florida Department of Corrections, *Florida's Supervised Population Monthly Status Report November 2006*, at <http://www.dc.state.fl.us/pub/spop/0611/tab14.html>.

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 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 release of a violent felony offender of special concern who is arrested for an alleged violation of probation or community control. If the alleged violation is based on anything other than failure to pay costs, fines, or restitution, the offender cannot be granted bail or any form of pretrial release prior to the hearing on the probation or community control violation charge.

Section 948.06, F.S., is amended to provide details of the Anti-Murder Act. The restriction against pre-trial release of a violent felony offender of special concern 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 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 or had adjudication withheld for 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. 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” used in categories three through six is susceptible to different interpretations. Arguably, the designation as a violent felony offender of special concern would not attach until there has been a judicial determination that a qualifying act was “committed,” either through a conviction, finding that community supervision has been violated, or another judicial proceeding.<sup>4</sup> Consequently, the restriction against release before the violation hearing would not apply for offenders in these categories.

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<sup>4</sup> Consideration for 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

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 a violent felony offender of special concern is alleged to have committed any violation of 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.

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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.

If the court finds that the violent felony offender of special concern has violated any non-monetary term of probation or community control, it must decide whether to revoke the probation or community control. The court must also determine whether the offender poses a danger to the community. If the court determines that the violent felony offender of special concern is a danger, it must revoke probation or community control and sentence the offender under the Criminal Punishment Code up to the statutory maximum or longer if permitted by law for the underlying offense. If the offender is found not to be a danger to the community, the judge would have the same options that it has with any other violator, including continuing community supervision.

The bill does not specify that a hearing is required for the court to make its dangerousness determination, but does require that the finding of dangerousness be made based upon a preponderance of the evidence. The bill sets forth a number of factors that may be considered by the court in determining dangerousness, and requires the court to enter a written order in support of its findings.

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 violent felony offender of special concern's Total Sentence Points as a result of the violation. These additional points will have the effect of lengthening the lowest permissible sentence. The bill increases the additional assessment to 12 points for a technical violation or new misdemeanor offense, as opposed to the 6 points assessed under current law. For a violation involving a conviction for a new felony, the bill increases the assessment to 24 points from the current 12 points.

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 offenders who are violent felony offenders of special concern. The 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 jail where the offender 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 courts must create and maintain an automated system to provide the information to the court that has jurisdiction to conduct the hearings.

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.

#### 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.<sup>5</sup> The imposition of increased Community Sanction Violation Points appears to increase the penalty by which a crime is punishable for the aforementioned offenders. However, the *ex post facto clause* may not be violated, because current law 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.<sup>6</sup> Arguably, to the extent that the new sentence does not exceed the statutory maximum sentence that the court might have originally imposed, the *ex post facto* clause is not violated. 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.<sup>7</sup>

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

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<sup>5</sup> *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla. 1996).

<sup>6</sup> Section 921.002(1)(g), F.S.

<sup>7</sup> See *Peters v. State*, 531 So. 2d 121, 124 (Fla. 1988).

guidelines or the code in effect at the time the particular felony was committed.” In *Adekunle v. State*,<sup>8</sup> 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.

**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.

<b>Fiscal Impact of CS/SB 146</b>						
Primary, Additional, and Prior Offenses Considered						
			<b>FUNDS REQUIRED</b>			
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	<b>\$22,314,936</b>	<b>\$22,314,936</b>
2008-2009	420	372	\$4,732,416	\$38,110,176	<b>\$42,842,592</b>	<b>\$65,157,528</b>
2009-2010	1,122	702	\$15,904,959	\$41,611,020	<b>\$57,515,979</b>	<b>\$122,673,507</b>
2010-2011	1,859	737	\$31,331,801	\$37,858,830	<b>\$69,190,631</b>	<b>\$191,864,138</b>
2011-2012	2,505	646	\$46,784,262	\$31,327,786	<b>\$78,112,048</b>	<b>\$269,976,186</b>
<b>Total</b>	<b>2,505</b>	<b>2,505</b>	<b>\$99,228,374</b>	<b>\$170,747,812</b>	<b>\$269,976,186</b>	<b>\$269,976,186</b>

<sup>8</sup> 916 So. 2d 950, 952 (Fla. 4th DCA 2005).

The Florida Department of Law Enforcement (FDLE) estimates that it will need 1 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 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, 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 5 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 1 additional district court judge in the second year and 2 additional district court judges in the third year. 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.

## **VI. Technical Deficiencies:**

Section 948.06(8)(b), F.S., defines the term “violent felony offender of special concern” for the purposes of subsection 948.06(8). However, the term is also used in subsection 948.06(4), F.S. The word “subsection” in s. 948.06(8)(b), F.S., should be changed to “section” to correct this technical deficiency. This deficiency is corrected in amendment 524568.

Section 948.06(8)(b)2., F.S., uses the term “convicted” in the second criterion for a “violent felony offender of special concern” in a manner that is not comprehensive. This deficiency could be corrected by adding a definition of “convicted” that is consistent with other statutory provisions that define “convicted” in a comprehensive fashion. This deficiency is corrected in amendment 524568.

Section 948.064(1), F.S., uses the term “department” in a context that seems to refer to the “Department of Corrections”; however, “department” does not appear to be defined in this section or in this chapter. This deficiency could be corrected by changing the reference to the “department” to the “Department of Corrections.” This deficiency is corrected in amendment 524568.

The bill amends s. 921.0024(b), F.S., to prescribe increased community sanction violation points for “violent felony offenders of special concern.” Based on the exceptions in other parts of the bill, it appears that the Legislature did not intend to apply the increased community sanction violation points to “violent felony offenders of special concern” where the only violation is for a failure to pay costs or fines or make restitution payments. Nevertheless, there is no exception language in s. 921.0024(b), F.S. This deficiency is corrected in amendment 524568.

## **VII. Related Issues:**

None.

## VIII. Summary of Amendments:

### Barcode 524568 by Judiciary:

- Clarifies that the court may not grant pretrial release to an individual who violates felony probation or community control by committing a qualifying offense and meets specified requirements of a “violent felony offender of special concern” (VFOSC), but does not already have the status of a VFOSC. This change addresses the fact that, at the time pretrial release is addressed, the court may not be able to put the VFOSC label on the person because there has not been a legal determination that the person has committed the qualifying offense.
- Clarifies that the terms “probation” and “probationer” refer to felony probation and felony probationer.
- Adds a standard definition for the term “convicted” in s. 948.06(8)(a), F.S., for the purpose of the second criterion for being designated a VFOSC in s. 948.06(8)(b)2., F.S. This change provides that the term “convicted” has a meaning that is consistent with other statutory provisions that define the term in a comprehensive fashion.
- Reorganizes and revises the provisions related to the dangerousness finding. Clarifies that the court must make a written finding of dangerousness where the offender has been found to have violated felony probation or community control. Removes reference to the standard of “a preponderance of the evidence” and authorizes the court to make its finding on any one of a shorter list of less subjective factors to clarify that this requirement is for a judicial finding, not a hearing.
- Clarifies that a reference to “department” in s. 948.064, F.S., is to the “Department of Corrections.”
- Clarifies the responsibilities of the county to provide certain criminal history information to the court at first appearance as well as notice that the arrested person meets the requirement for restrictions on pretrial release in s. 903.0351(1)(b), F.S. Requires the state attorney or statewide prosecutor, if applicable, to apprise the court whether an alleged or convicted offender is a VFOSC or other designated offender.
- Creates an exception to the application of increased community sanction violation points where the violation is based solely on the probationer or offender’s failure to pay costs or fines or make restitution payments.
- Directs the Department of Corrections to coordinate preparation of an interagency report, by February 1, 2008, on any problems related to the implementation. (WITH TITLE AMENDMENT)