

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 73 Sexual Offenders

**SPONSOR(S):** Criminal Justice Subcommittee; Edwards; Eagle and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 182

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

### SUMMARY ANALYSIS

Sections 948.30, and 947.1405, F.S., require the court or the Florida Parole Commission to impose certain conditions of supervision for probationers, community controlees, and conditional releasees convicted of specified sexual offenses (e.g., curfew, residency restrictions, employment restrictions, sex offender treatment, etc.). Currently, one of these conditions prohibits an offender from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services *that are relevant to the offender's deviant behavior pattern* (unless otherwise indicated in a treatment plan).

The bill amends ss. 948.30 and 947.1405, F.S., to prohibit probationers, community controlees, and conditional releasees convicted of specified sexual offenses, whose crimes were committed on or after October 1, 2014, from possessing obscene, pornographic or sexually stimulating material, *regardless of its content* (unless otherwise indicated in a treatment plan).

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. However, because the bill imposes a new condition of supervision, it could result in more violations of supervision, which could have a negative prison and jail bed impact.

The bill is effective October 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current Situation**

##### *Probation/Conditional Release*

Probation is a form of community supervision requiring specified contacts with parole and probation officers, compliance with standard statutory terms and conditions, and compliance with any specific terms and conditions required by the sentencing court.<sup>1</sup> Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by probation officers with restricted caseloads.<sup>2</sup> Conditional release, administered by the Florida Parole Commission (Commission), is a mandatory postrelease supervision required for certain violent inmates.<sup>3</sup> The Department of Corrections (DOC) supervises all probationers, community controlees, and conditional releasees sentenced in circuit court.<sup>4</sup>

Courts are required to impose the conditions of supervision found in s. 948.03, F.S., on probationers and community controlees.<sup>5</sup> Similarly, the Commission is required to impose conditions of supervision found in s. 947.1405, F.S., on conditional releasees.<sup>6</sup> In addition to these standard conditions of supervision, the court/Commission may add special conditions of supervision that it deems proper.<sup>7</sup>

##### *Sex Offender Supervision*

In addition to the standard conditions of supervision described above, ss. 948.30 and 947.1405, F.S., require the court/Commission to impose additional conditions of supervision for probationers, community controlees, and conditional releasees convicted of specified sexual offenses. For example, these offenders are subject to a curfew, residency restrictions, employment restrictions, and sex offender treatment.

Currently, ss. 948.30(1)(g), and 947.1405(7)(a)7., F.S., require the court/Commission to impose a condition prohibiting an offender convicted of a specified sexual offense<sup>8</sup> from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material<sup>9</sup> *that is relevant to the offender's deviant behavior pattern* (unless otherwise indicated in a treatment plan proscribed in the sexual offender treatment program).<sup>10</sup>

#### **Effect of the Bill**

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<sup>1</sup> Section 948.001(8), F.S.

<sup>2</sup> Section 948.001(3), F.S.

<sup>3</sup> Section 947.1405, F.S., requires conditional release for an inmate who:

- Is convicted of a crime committed on or after October 1, 1988, and before January 1, 1994, and any inmate who is convicted of a crime committed on or after January 1, 1994, which crime is or was contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure (1993), and who has served at least one prior felony commitment at a state or federal correctional institution;
- Is sentenced as a habitual or violent habitual offender or a violent career criminal pursuant to s. 775.084, F.S.; or
- Is found to be a sexual predator under s. 775.21, F.S., or former s. 775.23, F.S.

<sup>4</sup> Sections 948.001(1) and 947.1405, F.S.

<sup>5</sup> Sections 948.001(8) and 948.03, F.S. These conditions require offenders to comply with a variety of requirements (e.g., report to probation supervisors as directed, permit probation supervisors to visit at home or elsewhere, work faithfully at suitable employment, make restitution, not associate with persons engaged in criminal activities, etc.).

<sup>6</sup> Section 947.1405(2), F.S.

<sup>7</sup> Sections 948.03(2) and 947.1405(6), F.S.

<sup>8</sup> These offenses include violations of ch. 794, F.S., relating to sexual battery; s. 800.04, F.S., relating to lewd or lascivious offenses; s. 827.071, F.S., relating to sexual performance by a child; s. 847.0135(5), F.S., relating to certain computer transmissions of pornography; and s. 847.0145, F.S., relating to buying and selling minors.

<sup>9</sup> This material includes telephone, electronic media, computer programs, or computer services.

<sup>10</sup> The condition applies to offenders whose crime was committed on or after October 1, 1995.

The bill amends ss. 948.30 and 947.1405, F.S., to require the court/Commission to impose a condition prohibiting probationers, community controlees, and conditional releasees from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, *regardless of its content* (unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program). Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

The condition applies to offenders whose crime was committed on or after October 1, 2014, and who are placed on probation, community control, or conditional release for a violation of ch. 794, F.S. (sexual battery); s. 800.04, F.S. (lewd or lascivious offenses); s. 827.071, F.S. (sexual performance by a child); s. 847.0135(5), F.S. (computer transmissions of pornography); and s. 847.0145, F.S. (buying and selling minors).

As a result, these offenders will be prohibited from possessing obscene, pornographic or sexually stimulating material, regardless of its content.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 947.1405, F.S., relating to conditional release.

Section 2. Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 3. Provides an effective date of October 1, 2014.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. However, because the bill imposes a new condition of supervision, it could result in more violations of supervision, which could have a negative prison bed impact.

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

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill imposes a new condition of supervision. This could result in more violations of supervision, which could have a negative jail bed impact.

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

None.

## D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

#### 2. Other:

##### **Vagueness**

A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give an adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement.<sup>11</sup>

Courts throughout the country are split as to whether a general ban on pornographic materials is unconstitutionally vague. For example, in *McVey v. State*, the court found that the condition prohibiting possession of pornographic or sexually explicit materials was unconstitutionally vague because it failed to clearly inform the offender what conduct was prohibited.<sup>12</sup> Whereas in *Wilfong v. Commonwealth*, the court determined that a commonsense reading of “sexually arousing materials” does not render the phrase unconstitutionally vague.<sup>13</sup>

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This language could be challenged as being unconstitutionally vague.

##### **Probationer Rights**

The Florida Supreme Court has found that “constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation.”<sup>14</sup> In other words, trial courts have broad discretion to impose various conditions of probation, but cannot impose a condition of probation that is not reasonably related to rehabilitation.<sup>15</sup> In determining whether a condition of probation is reasonably related to rehabilitation, courts look to whether the condition:

- Has a relationship to the crime of which the offender was convicted;
- Relates to conduct which is not in itself criminal; and
- Requires or forbids conduct which is not reasonably related to future criminality.<sup>16</sup>

The bill prohibits persons subject to sex offender supervision from possessing obscene, pornographic or sexually stimulating material, regardless of its content. This could be challenged as not being reasonably related to rehabilitation.

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<sup>11</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>12</sup> *McVey v. State*, 863 N.E.2d 434, 447 (Ind.Ct.App.2007). See also *State v. Bahl*, 193 P.3d 678, 688 (Wash. 2008).

<sup>13</sup> *Wilfong v. Commonwealth*, 175 S.W.3d 84, 99 (Ky.Ct.App.2004). See also *Belt v. State*, 127 S.W.3d 277, 281–82 (Tex.Ct.App.2004) (condition prohibiting possession of “sexually stimulating” or “sexually oriented” material was not unconstitutionally vague); *Commonwealth v. Perreault*, 930 A.2d 553, 560 (Pa.Super.Ct.2007) (a condition is not unconstitutionally vague when statutes provide definitions of the terms).

<sup>14</sup> *Biller v. State*, 618 So.2d 734 (Fla. 1993).

<sup>15</sup> *Nank v. State*, 646 So.2d 762 (Fla. 2nd DCA 1994).

<sup>16</sup> *Biller v. State*, 618 So.2d 734 (Fla.1993).

## **First Amendment**

The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."<sup>17</sup>

In *Miller v. California*, the Supreme Court of the United States found that obscene materials are not protected by the First Amendment.<sup>18</sup> However, materials not considered to be obscene do receive First Amendment protections.

The bill prohibits persons subject to sex offender supervision from possessing pornographic or sexually stimulating material. While offenders have diminished constitutional rights by virtue of being on supervision, this provision could be challenged as violating an offender's First Amendment rights.

### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

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

None.

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

On January 16, 2014, the Criminal Justice Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The strike all amendment amends ss. 948.30 and 947.1405, F.S., to prohibit probationers, community controllees and conditional releasees, whose crimes were committed on or after October 1, 2014, and who are convicted of specified sexual offenses, from possessing obscene, pornographic or sexually stimulating material, regardless of its content, unless otherwise indicated in a treatment plan.

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

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<sup>17</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>18</sup> 413 U.S. 15 (1973).