

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 661 Modification or Continuation of Terms of Probation

SPONSOR(S): Botana

TIED BILLS: IDEN./SIM. BILLS: CS/SB 1088

FINAL HOUSE FLOOR ACTION: 116 Y's 0 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

HB 661 passed the House on April 1, 2021, and subsequently passed the Senate on April 14, 2021.

Probation is a form of community supervision requiring an offender to maintain specified contacts with a probation officer and complete other terms and conditions, such as community service and drug or alcohol testing. Failure to meet any condition of supervision is a violation of probation. Generally, upon a finding that an offender violated probation, a court may revoke, modify, or continue the offender's supervision. If a court chooses to revoke probation, it may impose any sentence that was permissible at the offender's original sentencing hearing under the Criminal Punishment Code (CPC) sentencing guidelines. Generally, a court may only sentence an offender to a sentence less than that required by the CPC if it makes written findings to justify a downward departure at the sentencing hearing.

A technical violation is any alleged violation of probation that is not a new felony, misdemeanor, or criminal traffic offense. In 2019, the Legislature passed legislation requiring a court to modify and continue, rather than revoke, probation for specified offenders who violate probation by committing certain technical violations deemed low-risk. The Legislature intended for this benefit to apply only to offenders meeting multiple eligibility criteria, namely specified offenders who commit a first time, low-risk technical violation. However, because of a technical drafting error, s. 948.06(2)(f)1., F.S., currently requires a court to modify or continue an offender's probation when **any** of the following conditions apply:

- The term of supervision is probation, rather than community control.
- The probationer does not qualify as a violent felony offender of special concern.
- The violation is a low-risk technical violation.
- The court has not previously found the probationer in violation of probation during the current term of supervision.

If s. 948.06(2)(f), F.S., requires a court to modify or continue an offender's probation, it may only impose a jail sentence up to 90 days as punishment for the violation. Since its enactment, multiple defendants sentenced to prison for a violation of probation have appealed their sentences claiming they were entitled to the 90 day jail cap under s. 948.06(2)(f), F.S., because they meet one of the statute's four criteria. Multiple courts have held that no reasonable person could intend for the terms of s. 948.06(2)(f), F.S., to apply to a probationer who meets only one of the criteria and the only way to avoid an absurd result is for the word **any** to be read as **all**. At least one of these courts has called on the Legislature to consider amending the statute to resolve any ambiguity.

HB 661 amends s. 948.06(2)(f), F.S., to align the statute with the Legislature's intent by requiring an offender to meet **all** four eligibility criteria before a court is required to modify or continue his or her probation and is limited to imposing a 90 day jail sentence for a technical violation of probation.

The bill will likely have no fiscal impact to local or state governments.

The bill was approved by the Governor on June 29, 2021, ch. 2021-210, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Probation and Community Control

A court may sentence an offender to probation or community control in lieu of, or in addition to, incarceration.¹ Probation is a form of community supervision requiring specified contacts with a probation officer and other terms and conditions.² Community control is a more intensive form of supervision involving an individualized program that restricts an offender's movement within the community, home, or residential placement.³ Several standard conditions of probation or community control apply automatically, including requirements to report to a probation officer as directed and to live without violating any law.⁴ The court may also impose special conditions of probation, such as community service, regular drug or alcohol testing, a no contact order, and treatment programs.⁵ Failure to meet any condition of supervision is a violation of probation or community control (VOP).

Generally, upon a finding that an offender committed a VOP, the court may revoke, modify, or continue supervision.⁶ If the court chooses to revoke probation, it may impose any sentence that was permissible at the offender's original sentencing hearing⁷ under the Criminal Punishment Code (CPC) sentencing guidelines.⁸ The sentencing guidelines provide a formula for computation of an offender's lowest permissible prison sentence, based on factors such as the offender's current and prior offenses. Generally, a court may only sentence an offender to a sentence less than that required by the CPC if it makes written findings justifying a downward departure at the sentencing hearing.⁹

If an offender who violates probation qualifies as a violent felony offender of special concern (VFOSC), the court must revoke supervision, unless it makes written findings that the VFOSC does not pose a danger to the community.¹⁰ A VFOSC is a person who is on felony supervision:

- Related to a qualifying offense¹¹ committed on or after March 12, 2007.
- For any offense committed on or after March 12, 2007, and has previously been convicted of a qualifying offense.
- For any offense committed on or after March 12, 2007, and is found to have violated such supervision by committing a qualifying offense.

¹ S. 948.01, F.S.

² S. 948.001(8), F.S.

³ S. 948.001(3), F.S.

⁴ S. 948.03(1), F.S.

⁵ S. 948.03(2), F.S.

⁶ S. 948.06(2)(b), F.S.

⁷ *Id.*

⁸ S. 921.0022, F.S.

⁹ *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994).

¹⁰ S. 948.06(8)(e)2.b., F.S.

¹¹ Section 948.06(8)(c), F.S., defines a "qualifying offense" to include: kidnapping or attempted kidnapping, s. 787.01, F.S.; false imprisonment of a child under the age of 13, s. 787.02(3), F.S.; luring or enticing a child, s. 787.025(2)(b) or (c), F.S.; murder or attempted murder, s. 782.04, F.S.; attempted felony murder, s. 782.051, F.S.; manslaughter, s. 782.07, F.S.; aggravated battery or attempt, s. 784.045, F.S.; sexual battery or attempt, s. 794.011(2), (3), (4), or (8)(b) or (c), F.S.; lewd and lascivious (L & L) battery or attempt, s. 800.04(4); L & L molestation, s. 800.04(5)(b) or (c), F.S.; L & L conduct, s. 800.04(6)(b), F.S.; L & L exhibition, s. 800.04(7)(b); L & L exhibition on computer, s. 847.0135(5)(b); robbery or attempt, s. 812.13, F.S.; carjacking or attempt, s. 812.133, F.S.; home invasion robbery or attempt, s. 812.135, F.S.; L & L offense upon or in the presence of an elderly person or attempt, s. 825.1025, F.S.; sexual performance by a child or attempt, s. 827.071, F.S.; computer pornography, s. 847.0135(2) or (3), F.S.; transmission of child pornography, s. 847.0137, F.S.; selling or buying of minors, s. 847.0145, F.S.; poisoning food or water, s. 859.01, F.S.; abuse of a dead human body, s. 872.06, F.S.; any first or second degree felony burglary offense, s. 810.02(2) or (3), F.S.; arson or attempt, s. 806.01(1), F.S.; aggravated assault, s. 784.021, F.S.; aggravated stalking, s. 784.048(3), (4), (5), or (7), F.S.; aircraft piracy, s. 860.16, F.S.; throwing a deadly missile, s. 790.161(2), (3), or (4), F.S.; and treason, s. 876.32, F.S.

- After previously being found by a court to be a habitual violent felony offender,¹² three-time violent offender,¹³ or sexual predator,¹⁴ and has committed a qualifying offense on or after March 12, 2007.¹⁵

A person taken into custody for a VOP does not have a constitutional right to release pending the disposition of the VOP¹⁶ and if the offender qualifies as a VFOSC, a court is prohibited from granting pretrial release.¹⁷

Alternative Sanctioning Program

Section 948.06(9)(a), F.S., requires each judicial circuit in the state to establish an alternative sanctioning program (ASP), which authorizes the Department of Corrections to enforce technical VOPs with court approval. A technical violation is any alleged VOP that is not a new felony, misdemeanor, or criminal traffic offense.¹⁸ The ASP ensures a swift and certain response to technical violations without initiating the traditional court process or arresting and booking an offender. After receiving written notice of an alleged technical violation and disclosure of the evidence supporting such violation, an offender who is eligible for the ASP may either elect to participate in the program or waive participation.¹⁹ If the offender waives participation, the violation proceeds through the traditional court resolution process.²⁰ A court may also disqualify a person from the ASP as part of his or her initial sentence.

The ASP identifies eligible offenders, eligible violations, and permissible sanctions. Eligible violations are classified as either low-risk or moderate-risk.

Low-risk violations only apply to probationers, not offenders on community control, and include:

- A positive drug or alcohol test result;
- Failure to report to the probation office;
- Failure to report a change in address or other required information;
- Failure to attend a required class, treatment or counseling session, or meeting;
- Failure to submit to a drug or alcohol test;
- Violation of curfew;
- Failure to meet a monthly quota for any required probation condition, including making restitution payments, paying court costs, and completing community service hours;
- Leaving the county without permission;
- Failure to report a change in employment;
- Associating with people engaged in criminal activity; or
- Any other violation as determined by administrative order of the chief judge of the circuit.²¹

Moderate-risk violations include:

- Any violation classified as low-risk when committed by an offender on community control;
- Failure to remain at an approved residence by an offender on community control;
- A third low-risk violation by a probationer; or
- Any other violation as determined by administrative order of the chief judge of the circuit.²²

¹² S. 775.084(1)(b), F.S.

¹³ S. 775.084(1)(c), F.S.

¹⁴ S. 775.21, F.S.

¹⁵ S. 948.06(8)(b), F.S.

¹⁶ *Bernhardt v. State*, 288 So.2d 490, 497 (Fla. 1974).

¹⁷ S. 903.0351, F.S.

¹⁸ S. 948.06(9), F.S.

¹⁹ S. 948.06(9)(g), F.S.

²⁰ S. 948.06(9)(h)1.a., F.S.

²¹ S. 948.06(9)(b), F.S.

²² S. 948.06(9)(c), F.S.

Permissible sanctions under the ASP correspond to the violation risk level. For example, a probation officer may impose sanctions such as additional community service hours, counseling or treatment, drug testing, or curfew in response to a low-risk violation.²³ In response to a moderate-risk violation, examples of additional sanctions include residential treatment or electronic monitoring for up to 90 days or a maximum jail sentence up to 21 days.²⁴ Such responses are designed to be proportional to the severity of the technical violation and to directly respond to the nature of the technical violation.

Offenders are disqualified from the ASP under any of the following circumstances:

- The offender is a VFOSC;
- The violation is a felony, misdemeanor, or criminal traffic offense;
- The violation is absconding;
- The violation is of a stay-away order or no-contact order;
- The violation is not identified as low-risk or moderate-risk by statute or administrative order;
- The offender has a prior moderate-risk level violation during the same term of supervision;
- The offender has three prior low-risk level violations during the same term of supervision;
- The term of probation is scheduled to terminate in less than 90 days; or
- The terms of the sentence prohibit alternative sanctioning.²⁵

The ASP is voluntary, and an offender may withdraw from participation at any time. Successful completion of an ASP does not affect an offender's withheld adjudication. If the offender withdraws or fails to complete a sanction within either 90 days or the timeframe determined in the agreed-upon sanction, the original VOP proceeds to the traditional court resolution process.

Mandatory Modification of Probation and Jail Cap

A court must modify and continue, rather than revoke, probation and is limited to imposing a 90-day jail sentence for specified probationers violated for committing a low-risk technical violation. Unless waived by a defendant, s. 948.06(2)(f), F.S., requires a court to modify or continue, rather than revoke, probation when **any** of the following conditions apply:

- The term of supervision is probation, rather than community control.
- The probationer does not qualify as a VFOSC.
- The violation is a low-risk technical violation.
- The court has not previously found the probationer in violation of probation during the current term of supervision.

Since its enactment in 2019,²⁶ multiple defendants sentenced to prison for a VOP have appealed their sentences claiming they were entitled to the benefit of the 90 day jail cap under s. 948.06(2)(f), F.S., because they meet one of the statute's four criteria. Multiple courts have held that no reasonable person could intend for the terms of s. 948.06(2)(f), F.S., to apply to a probationer who meets only one of the criteria and that the only way to avoid an absurd result is for the word **any** to be read as **all**.²⁷ At least one of these courts has called on the Legislature to consider amending the statute to avoid an absurd and unintended result.²⁸

Effect of the Bill

²³ S. 948.06(9)(e), F.S.

²⁴ S. 948.06(9)(f), F.S.

²⁵ S. 948.06(9)(d), F.S.

²⁶ Ch. 2019-167, Laws of Fla.

²⁷ *Owens v. State*, 303 So.3d 993 (Fla. 1st DCA 2020), *Kirk v. State*, 303 So.3d 604 (Fla. 5th DCA 2020), *Massey v. State*, 2021 WL 128212 (Fla. 1st DCA 2021).

²⁸ *Kirk v. State*, 303 So.3d 604, 606 (Fla. 5th 2020).

HB 661 amends s. 948.06(2)(f)1., F.S., to clarify the required criteria a defendant must satisfy to qualify for mandatory modification of probation and the 90 day jail cap. The bill requires a court to modify or continue probation only when **all** of the following conditions apply:

- The term of supervision is probation, rather than community control.
- The probationer does not qualify as a VFOSC.
- The violation is a low-risk technical violation.
- The court has not previously found the probationer in violation of probation during the current term of supervision.

The bill corrects a technical drafting error and aligns the statute with the Legislature's intent.

Subject to the Governor's veto powers, the effective date of this bill is upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.