The Florida Senate

Interim Project Report 2006-109 *January 2006*

Committee on Criminal Justice Senator Stephen R. Wise, Chair

REVIEW OF SANCTIONS ORDERED FOR VIOLATIONS OF PROBATION

SUMMARY

In the last few years the state has come under considerable scrutiny and criticism over several high profile crimes committed by felony offenders on probation. The critics and the media reported that the state was too lax on criminals who repeatedly violated the terms of their probation. Two incidents in particular prompted the Department of Corrections to implement a "zero tolerance" policy on alleged probation violations. The policy seems to have had a domino effect on other parts of the criminal justice system by increasing accused probation violators in county jails. In the wake of these tragic cases, the court has increased incarcerative sanctions for revoked probation violators and lessened the opportunity for offenders to be continued on probation after a violation. The most dramatic shift occurred between fiscal years 2002-03 and 2003-04 when there was a doubling in the number of probationers revoked for technical reasons and admitted to prison.

It appears that enhanced concern for public safety has resulted in the judiciary and executive branches shifting toward more punitive sanctions for probation violators. Particularly illustrative is the fact that an additional 168 prison admissions per month have occurred as a result of the "zero tolerance" policy and these more punitive sanctions. Interestingly, the influx of probation violators into the prison system appears to have also altered the composition of the prison population. Notably, prisons have experienced a 42% increase in the number of inmates admitted with sentences of 15 months or less.

Concern for public safety after these tragic crimes also prompted the Attorney General to propose legislation during the 2004 and 2005 sessions to require enhanced penalties for alleged probation violators. The legislation did not pass. The legislation was estimated to generate the need for 7,166 new prison beds over the next five years at an estimated cost of $629,941,570 and an indeterminate but significant number of jail beds.

To assist policymakers in evaluating similar legislation in the future, a survey was conducted by staff to gather information on several provisions in the legislation. Findings revealed that there was not an overwhelming position one way or another on the major provisions, with respondents mixed in a sixty/forty split for restricting bail, requiring a dangerousness hearing, and requiring revocations. Overall, survey respondents supported the provisions of the legislation. Those who did not voiced the need for judges to have discretion to consider the individual and unique circumstances of every case.

Based on the findings in this report, staff recommends the Legislature carefully consider any *mandatory* proposal that would further increase incarcerative sanctions or detention for alleged technical probation violations. If the Legislature wants to consider legislation that would limit judicial discretion in granting bail for a particular group of offenders or require a specialized hearing for those who are charged with violating the terms of probation, it should craft the restriction narrowly, consult with practitioners, and appreciate the likely impact to our courts, prisons, and jails.

BACKGROUND

Types of Probation

As of October 2005, there were 93,115 offenders serving some form of state probation.

Standard Probation – 74,582 offenders. Standard Probation is a sentence imposed by the court which lasts for a specific time that cannot exceed the

maximum sentence that could have been imposed by the court. The probationer has general terms and specific conditions of supervision. To ensure that contact is maintained between the probationer and the probation officer, the probationer is required to regularly report to his or her correctional probation officer and also permit the officer to visit his or her work, home, or other places where the probationer often is found.

Administrative Probation – 1,820 offenders. When a probationer successfully completes half of the term of probation and is determined to be a low risk of harm to the community, he or she may be placed on administrative probation. The probationer is no longer required to report to the probation officer on a regular basis, but periodic checks are made to verify that the offender has not violated the law.

Drug Offender Probation – 13,960 offenders. Drug Offender Probation is an intensive form of supervision which emphasizes treatment. The correctional probation officers who supervise these probationers have special training or experience and their caseloads are limited to 50 offenders. These offenders are given individualized treatment plans and are subject to additional surveillance and random drug testing.

Sex Offender Probation – 2,753 offenders. Sex Offender Probation is an intensive supervision program which emphasizes individualized treatment. The officers who supervise these offenders also have limited caseloads and must have specialized training in this field. The sex offenders may be restricted in where they live, work, travel, and with whom they associate.

The Law Governing Arrest Powers and Dispositions for Violations of Probation

Under current law a police officer or a probation officer may make a warrantless arrest of a probationer when he or she has reasonable grounds to believe that the probationer has violated the terms of probation in any material respect.[1] Additionally, a judge may issue a warrant for a probationer's arrest when the facts for the arrest are supported by an affidavit provided to the judge. If the offender admits to the charges of violation the court may then revoke, modify, or continue the terms of probation or place the offender in a community control program. If probation is revoked the court must adjudge the probationer guilty and impose any sentence the court could have originally imposed. If the violation charge is not admitted the court may commit or release the offender with or without bail until the hearing, or dismiss the charge. After a violation hearing the court may revoke, modify, or continue the probation or place the probationer on community control. Again, if probation is revoked the court must adjudge the probationer guilty of the offense charged and impose any sentence it might have originally imposed.

One High Profile Murder and a Mass Murder

In February of 2004, a car wash security camera recorded the abduction of 11-year old Carlie Brucia as she walked home from a friend's house in Sarasota, Florida. A suspect was apprehended in part as a result of public response to the dissemination of the video and pictures by the media. The body was discovered five days after her abduction.

It was quickly learned that the suspect who was later convicted, Joseph P. Smith, was a felon who was on state drug offender probation at the time of the crime. Smith had a significant criminal past, and there were indications that he had violated the conditions of his probation by using drugs and failing to meet court-ordered financial obligations. If a court had found that Smith violated his probation in a material respect, it could have revoked his probation and returned him to custody. Joseph P. Smith was not jailed, and some critics portrayed the case as a failure of the system, or of individuals in the system, to properly carry out the duty of protecting the public.

In August of 2004, Deltona police arrested Troy Victorino in the bludgeoning deaths of six people. Days before the murders Victorino was in police custody after an arrest for a felony battery charge, a potential violation of probation. Instead of being detained, he was released from jail on $2,500 bail. His release was in part due to the fact that probation officials were late submitting a violation report that could have led the judge to place Victorino back in jail. Additionally, Victorino visited his probation officer the day before the mass murder but was allowed to leave the probation office instead of being arrested. The Florida Department of Corrections (department) fired four probation officials after the murders because of

[1] s. 948.06, Florida Statutes

what it said were errors in handling the alleged violation.

Media attention following these tragic cases was intense and essentially criticized the state for being too lax on criminals who repeatedly violate the terms of their probation.[2]

Reaction by the executive and legislative branches of government to these perceived failures of the probation system was swift. The next three sections of this report describe the policy changes that have resulted from these cases as well as one legislative policy initiative which did not pass.

Department Policy Changes in Aftermath of High-Profile Cases: "Zero Tolerance"

These two incidents prompted the department to implement a "zero tolerance" policy that was staggered into implementation between March 2003 and March 2004, where it:

- Eliminated probation officer discretion in officially reporting an alleged technical violation to the court, especially if the violation was a minor one.
- Stopped the practice of having probation officers recommend to the court a disposition of the case (prison or continued on community supervision, for example).[3]
- Ended a long-standing policy of assigning probation officers in every courtroom. Typically, the most senior and experienced officers were placed in the courtroom to assist the court in making probation violation decisions.
- Began immediately arresting certain probationers who were charged with an additional felony.
- Began immediately arresting probationers who have a violent past who were accused of violating the technical terms of probation, such as missing a counseling appointment or failing a drug test.

Legislation in Aftermath of High-Profile Cases

In the 2004 and 2005 legislative sessions, the Attorney General proposed public safety legislation (HB 1801 and SB 608, respectively) which would have enhanced penalties for probation violators. Both pieces of legislation, which did not pass, were principally in response to the tragic death of 11 year old Carlie Brucia in February of 2004. The main theme of the legislation was to detain more alleged probation violators by denying bail, to require the court to add points to the probation violator's criminal punishment score sheet, and to require the court to hold a newly created "danger to the community" hearing to determine if a violator posed a risk to the community. The proposed legislation was estimated to generate the need for 7,166 new prison beds over the next five years at an estimated cost of $629,941,570 and an indeterminate but significant number of jail beds.[4] The projected costs of the legislation resulted from some offenders serving longer sentences and from some offenders going to prison on a probation violation who otherwise would not have gone to prison.

The 2004 and 2005 legislation would have prohibited forcible felony violators from being granted bail or pretrial release before the probation or community control violation hearing was resolved, unless the violation was only based on a failure to pay costs, fines, or restitution payments. The legislation also prohibited a court from dismissing the probation or community control violation warrant against a forcible felony violator without holding a recorded hearing with both the state and the defendant present. If the court determined that a forcible felony violator had violated any non-monetary term of probation or community control, the court was required to revoke probation or community control, adjudicate the defendant guilty, and sentence the defendant in accordance with the Criminal Punishment Code. If the violation was committed by a forcible felony violator but was not a new felony conviction, 12 community sanction violation points were added to the sentencing worksheet. If the violation was based on a new felony conviction, 24 points were added for the violation and for each additional violation based on felony convictions. Under current law, technical violators receive 6 community sanction violation points and violators with new offenses receive 12 community sanction violation points. Therefore, the proposed

[2] "State Lax on Violent Criminals: Thousands of convicts with profiles similar to Joseph Smith – the man charged in the slaying of Carlie Brucia – still have their freedom in Florida" Miami Herald-Tribune Special Report, March 9, 2004.

[3] Specifically, the policy change directed the 2,600-plus probation officers to stop using a "technical violation letter," a one-page document informing a judge about a technical violation, usually failure of a drug test. Officers were instead instructed to use the formal violation report forms that were revised to remove the section that allowed an officer to make a recommendation to the court.

[4] Fiscal impact of CS/SB 608, Office of Economic and Demographic Research. These figures were based on the assumption that judges would find offenders to pose a danger to the community 75% of the time.

legislation increased the community sanction violation points for technical violators by 18 points and for violators with new offenses by 12 points.

Before the court was authorized to release a forcible felony violator from custody or impose a non-state prison sanction for violation of probation, the court was required to hold a "danger to the community" hearing following the violation hearing. Factors to be considered included the nature and circumstances of the violation and new offenses, past and present conduct, family ties, length of residence in the community, employment history, and mental condition. If the court found, based on a preponderance of the evidence, that a forcible felony violator posed a danger to the community, the court was required to sentence the violator up to and including the statutory maximum, without mitigation or downward departure. Where it was determined that a violator did not pose a danger to the community, the court could have ordered a sentence pursuant to the Criminal Punishment Code, and considered mitigating factors.

Legislation Requiring Dangerousness Finding by the Court

Effective September 1, 2005, with the passage of the Jessica Lunsford Act, additional conditions were imposed on the court when hearing violations of probation. In order to release an offender who is under supervision for sexual crimes involving children or who is required to register as a sexual offender or predator, the court must make a finding that the probationer is not a danger to the public prior to release with or without bail. This provision was very similar to the Attorney General's proposed legislation. In determining whether the offender is a danger to the public the court may look at the nature and circumstances surrounding the violation as well as any new offenses charged, the probationer's conduct, previous convictions of crimes, previous arrests for violent or sexual crimes that did not result in a conviction, allegations of illegal sexual conduct or violence, family ties, how long the offender has been in the community, history of employment, mental condition, conduct during this or previous probation periods, disciplinary records of previous incarcerations and the likelihood that the probationer will engage in criminal conduct, and the evidence against the probationer as well as any other facts which the court feels are relevant to consider.

In December of 2005, the Florida Bar Criminal Procedure Rules Committee recommended incorporating the Act into the Florida Rule of Criminal Procedure with some slight modifications to the language.[5]

According to the Office of the State Courts Administrator, there have been no hearings conducted since the effective date of the Act.

METHODOLOGY

Staff reviewed reports, legislative documents, statistics, agency rules, proposed court rules, criminal justice estimating conference work products, and case law. Staff also surveyed judges, circuit administrators, prosecutors, public defenders, jail administrators, county officials, and other stakeholders.

FINDINGS

Impact of "Zero Tolerance" Policy on State Prison Beds, and County Jail Beds

The intent of the department's "zero tolerance" policy was to increase public safety by aggressively responding to alleged probation violators, both for new law violations and for technical violations. While it is difficult to determine whether this policy shift has prevented probationers from committing subsequent crimes because of being detained, it has had an impact on other parts of the criminal justice system. Most notably, it has resulted in:

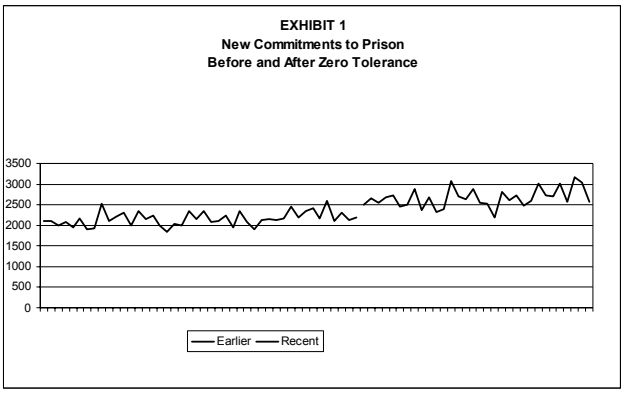
- An increase in probation violators in county jails; and
- An increase in state prison populations.

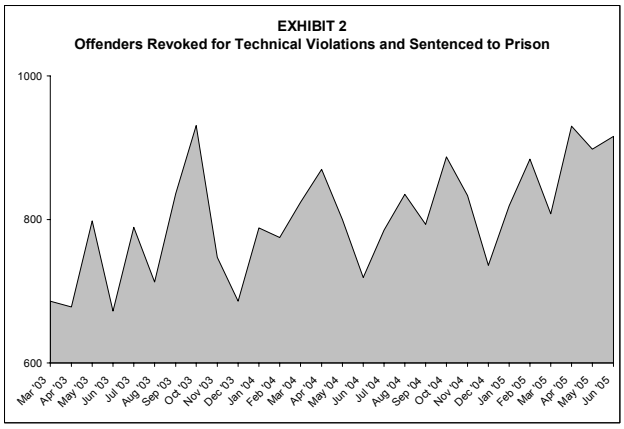
Jails – Statewide, Florida jails detain approximately 61,000 inmates. Since the implementation of the "zero tolerance" policy the number of technical violators in the county jails reportedly rose from 2,934 in February of 2003 to 3,400 in July of 2005, an increase in the average daily population of 466 violators. This figure may be an under representation since every month various counties are not included in the totals because of reporting problems. Furthermore, this is only part of the impact from technical violators in county jails while they await resentencing. Once they have been resentenced, offenders who are sentenced to state prison may spend further time in the jail pending their transportation to state prison, and those sentenced to a county jail term remain in county jail. In both cases they are classified as sentenced felons in the county jail reports, and are not distinguishable from other sentenced felons for reporting purposes. Hence the total

[5] Out-of-Cycle Report of the Florida Bar Criminal Procedure Rules Committee, Case Number: SC05-739.

impact on the county jails is not directly measurable. While the total impact of the increase is unknown, the local county jails have experienced a significant increase in population in an already crowded jail bed situation. These accused and resentenced probation violators reportedly pose a security, transportation, and financial strain on local governments. Media reports from Pinellas, Hillsborough, Alachua, St. Lucie, Columbia, and others quote local officials who directly attribute recent jail overcrowding problems to the "zero tolerance" policy. In Alachua County, local officials estimated that the policy change meant an additional 100 inmates in the jail each day.[6] Additionally, officials from the Board of County Commissioners in St. Lucie, reported that approximately 33% of the inmate population in the county jail was for violation of probation offenders awaiting hearing and the "zero tolerance" policy caused their jail population to rise to record levels.[7]

Prisons – Not only have jails been infused with more alleged probation violators, admissions to state prisons have also been impacted. The two exhibits below show the increase in prison admissions immediately after the start of the "zero tolerance" policy and the steady climb of offenders being revoked for technical violations and sentenced to prison. It is estimated that prison admissions have risen by an average of 168 inmates per month as a result of the "zero tolerance" policy.[8]





The influx into the prison system of probation violators who are typically sentenced to very short terms has altered the composition of the prison population. Prisons have experienced a 42% increase in the number of inmates admitted with sentences of 15 months or less.[9] Another way to illustrate this trend is to track the "year and a day" sentences as a percent of prison admissions. Prior to 2003, approximately 8% of all prison admissions had sentences of 366 days, just over the threshold for a state-funded prison sentence rather than a county-funded jail sentence. Since 2003, approximately 13% of all prison admissions are "a year and a day" sentences.[10]

This information is important for the Legislature to consider when looking at legislation restricting the right to bail for a particular group of offenders who are charged with violating the terms of probation. This is because of the likely impact it will have on the prisons and jails especially since the "zero tolerance" policy has shown how sensitive a policy lever jailing alleged probation violators can be.

Reaction to "Zero Tolerance" Policy

Reaction to these policy changes have been mixed with some law enforcement officials initially applauding it. The judiciary, however, has been critical of the policy shift. One controversial aspect of the "zero tolerance" policy was the decision to withhold a probation officer's recommendation to the court when an alleged violation was before the court.[11] Judges criticized the

[6] "Why is the jail so crowded?" Gainesville Sun, November 17, 2005.

[7] Letter dated October 26, 2005, from Criminal Justice Coordinator, Mark J. Godwin.

[8] Working papers dated October 21, 2005, from the Office of Economic and Demographic Research, Florida Legislature.

[9] Ibid, between 2002 and 2004.

[10] Pressure to relieve jail overcrowding in the wake of the "zero tolerance" policy could be contributing to offenders being sentenced to 366 days, thereby shifting who pays for the incarceration away from the county coffers and toward the state coffers.

[11] "Probation officers' case input to be held back: Judges criticize recent move by Department of Corrections" Tallahassee Democrat, March 9, 2004.

move and testified at a Senate hearing that the probation officer is the most knowledgeable about the defendant.[12] Absent their presence in the courtroom and recommendation to the court, some judges questioned whether they would have enough written documentation to make intelligent decisions about the pending probation violation cases.

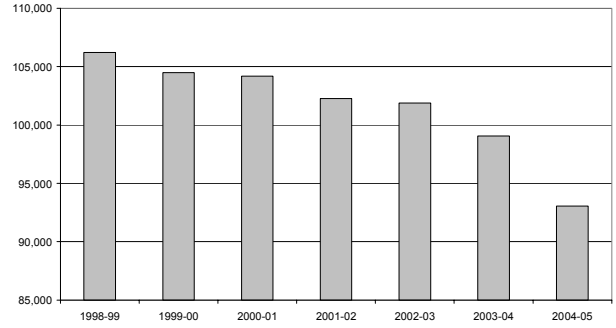
More recently, criticism of the policy also surfaced from the Governor's Ex-Offender Task Force.[13] In its December 31, 2005 Preliminary Report, the task force stated that returning a person to prison for technical violations of conditions of supervision is not necessarily a cost effective means to protect public safety. After reviewing the "zero tolerance" supervision policy, the task force members characterized the problem as follows:

> "Probation officers no longer have any discretion in deciding whether to violate an individual or not. Some sense that this policy shift was in reaction to certain high profile cases where an individual was not sent back to prison on a technical violation and then committed a heinous crime. But what has troubled the Task Force are the instances in which there is an absence of any apparent nexus between the nature of the violation and any propensity to commit another crime, let alone a heinous crime. What is the policy rationale behind sending an otherwise compliant and gainfully employed ex-offender back to prison on a curfew violation? And in cases where the violation is for drug use, might not treatment be more conducive to rehabilitation than more time in prison? When the violation is related to the past offense, such as would be the case of a sexual predator loitering around a school yard, it is one thing. But when the offense is unrelated to both past crimes and any potential new crimes, the policy rationale is unclear."[14]

Shrinking Probation Population

In addition to increasing probation violators in county jails and prisons, the "zero tolerance" policy may have contributed to lowering community supervision populations, including probation. The exhibit below documents the decline in the number of persons on probation. From a common sense perspective, it is logical that a crackdown on probation violators that results in more incarcerative sanctions would siphon those offenders away from community supervision. Certainly other factors may be at work in the decline shown below. However, from a public safety orientation, this trend will reduce caseload ratios and potentially have a positive impact on the department's ability to supervise probationers and respond to violators swiftly.

EXHIBIT 3
Shrinking Probation Population
(Source: Criminal Justice Estimating Conference, August 2005)



Trends in Sanctions Ordered for Violations of Probation

Below is a table that shows the trends in how the court has responded to violations of probation over the last two or three fiscal years immediately before and after the high profile cases. In all instances, a new felony, misdemeanor, or technical violation, the court has been increasing incarcerative sanctions and lessening the opportunity for offenders to be continued on probation. As shown on the table, the most dramatic turnaround occurred between FY 02/03 and FY 03/04 when there was a doubling in the number of probationers revoked for technical reasons and admitted to prison. It appears that enhanced concern for public safety has resulted in the judiciary and executive branches shifting toward more punitive sanctions for probation violators.

[12] Joint meeting of Senate Criminal Justice and Senate Judiciary Committees held March 9, 2004, to discuss weaknesses in justice system relating to probation.
[13] State of Florida, Executive Office of the Governor, Executive Order No. 05-28.
[14] Governor's Ex-Offender Task Force Preliminary Report, December 31, 2005, pg18, http://exoffender.myflorida.com.

EXHIBIT 4

Sanctions Ordered for Violations of Probation[15]

Revocations for New Felony		
	FY 03-04	FY 04-05
Prison	47%	47%
Jail	32%	34%
Probation	18%	15%
Other	3%	4%
Revocations for New Misdemeanor		
	FY 03-04	FY 04-05
Prison	29%	30%
Jail	48%	50%
Probation	17%	14%
Other	6%	6%

Revocations for Technical Violations			
	FY 02-03[16]	FY 03-04	FY 04-05
Prison	12%	27%	28%
Jail	21%	41%	42%
Probation	65%	23%	21%
Other	2%	9%	9%

Survey of Stakeholders
Over 200 surveys were sent to chief circuit judges, state attorneys, public defenders, regional and circuit probation administrators, jail administrators, and county government officials, with a 51% response rate.[17]

The purpose of the survey was to gather information from stakeholders on provisions that enhanced penalties, denied bail, and required revocation for alleged probation violators. Specifically, the survey asked how respondents felt about holding alleged probation violators in custody until a revocation hearing could be held. Respondents were also asked about requiring the revocation of probation or community control under certain circumstances and whether a "danger to the community" hearing was appropriate in certain circumstances. Additionally, respondents were asked how important holding potential violators in custody until a hearing, requiring revocation, and holding a "danger to the community" hearing was to increasing public safety. Finally, respondents were asked whether the Criminal Punishment Code needed to be changed to increase the points assessed for probation violations.

Summary of Results from Survey
Fifty-nine percent of the respondents thought that the Legislature should mandate that certain alleged probation violators be held in custody until their violation hearing. Sixty percent of the respondents thought that revocations should be automatic for all forcible felony offenders. Many respondents also believed that revocations should be automatic for offenders who commit a new law violation (41 respondents) or violate supervision more than once (39 respondents).

Sixty three percent of the respondents believed that the court should be mandated to hold "danger to the community" hearings before allowing an alleged violator to be released. Finally, 76% of the respondents believed that community sanction violation points should *not* be increased, but remain the same.

Two general observations can be drawn from the quantifiable survey findings. First, there was not an overwhelming position one way or another, with respondents mixed in a sixty/forty split for restricting bail and requiring dangerousness hearings and revocations. Secondly, the respondents consistently reflected the particular position they held in the criminal justice system – with prosecutors and corrections officials espousing a more punitive perspective, judges and public defenders supporting an approach that emphasized judicial discretion, and jail administrators expressing concern for unfunded mandates and jail overcrowding.

In conclusion, survey respondents supported most of the provisions of the legislation proposed by the Attorney General. Those who did not voiced the need for judges to have the discretion to consider the individual and unique circumstances of every case.

Summary of Open-Ended Comments from Survey Respondents
Approximately 15% of the survey respondents took the opportunity to provide additional comments. Below is a summary of those comments:

One circuit court judge surveyed for this project wrote:

> "The Department of Corrections files violation reports and seeks arrest even in the most petty of situations. This is done without regard to the ramifications to caseload and court time. Warrants

[15] Probation refers also to community control and other non post prison forms of community supervision. Source: Florida Department of Corrections; Bureau of Research and Data Analysis, December 2003, November 2005.
[16] July 2002 through October 31, 2003
[17] 217 were sent, 110 received.

> are regularly sought for such violations as (a) being behind in payment of cost of supervision (even when the Department knows that the defendant has lost his/her job); (b) being fifteen minutes late for curfew; (c) receiving a civil traffic ticket; and (d) being behind in child support (even when the defendant has lost his/her job)."

Several jail administrators wrote that local jails should not be responsible for housing accused state probation violators. Instead, the burden should be placed on the state or the state should somehow compensate the counties for housing and processing state probation offenders.

One county official surveyed wrote:

> "The state should resist a knee-jerk reaction to tragic events and provide reasonable bail opportunities to accused violators, especially technical violators."

Many judges, state attorneys, public defenders, jail administrators, and county government officials expressed the opinion that judicial discretion is important and the individual circumstances of the case need to be considered in handling accused probation violators. One such respondent wrote:

> "Whether to detain an accused violator is an important decision for the court, but should not be mandated in every decision. The facts should be considered in every case."

RECOMMENDATIONS

- The Legislature may wish to request OPPAGA to evaluate the effectiveness of the newly mandated "danger to the community" hearings for sex offenders and its impact upon the system to determine if the dangerousness hearing requirement should be expanded to violent offenders as proposed in the Attorney General's proposed legislation.
- The Legislature should proceed carefully with any mandatory proposal that would further increase incarcerative sanctions or detention for alleged probation violations, particularly technical violations.
- If the Legislature wants to consider legislation that would limit judicial discretion in granting bail for a particular group of offenders or require a specialized hearing for those who are charged with violating the terms of probation, then it should craft the restriction narrowly, consult with practitioners, and appreciate the likely impact to our courts, prisons, and jails.