

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1263 Criminal Sentencing  
**SPONSOR(S):** Amesty and others  
**TIED BILLS:** IDEN./SIM. BILLS: SB 1478

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Padgett	Hall
2) Judiciary Committee			

### SUMMARY ANALYSIS

Probation is a form of community supervision requiring an offender to maintain specified contacts with a probation officer and complete other terms and conditions. Several standard conditions of probation apply automatically, including requirements to report to a probation officer as directed and to live without violating any law. The court may also impose special conditions, such as community service hours, regular drug or alcohol testing, no contact orders, and treatment programs. Failure to meet any condition of supervision is a violation of probation. Generally, upon a finding that an offender violated probation, the court may revoke, modify, or continue supervision. If the court chooses to revoke supervision, it may impose any sentence that was permissible at the offender's initial sentencing.

In 2019, the Legislature passed legislation to address technical violations of probation more proportionally than had traditionally been authorized through court processes. A technical violation is any alleged violation of probation that is not a new felony, misdemeanor, or criminal traffic offense. Section 948.06(9)(h), F.S., requires each judicial circuit to establish an alternative sanctioning program (ASP), allowing the Department of Corrections to enforce technical violations with court approval, ensuring a swift and certain response without initiating the court process or arresting and booking the offender. Additionally, the law required a court to modify, rather than revoke, probation and imposed a 90-day jail cap for specified probationers committing a low-risk, technical violation.

HB 1263 amends s. 948.06, F.S., to revise provisions related to probation and the ASP. Specifically, the bill:

- Requires a probation officer to resolve a probation violation under the ASP if a probationer or offender commits a first or second low-risk violation, unless the court directs the probation officer to file an affidavit of violation;
- Expands eligibility to resolve a probation violation under the ASP to include arrests for specified misdemeanor offenses as "technical violations" and categorizes such offenses as a moderate-risk violation under the ASP;
- Requires a court to impose the sanction recommended by a probation officer for a first or second low-risk violation under the ASP unless the court finds specific risks to public safety;
- Requires a court to modify, rather than revoke probation, if a probationer meets specified criteria and has fewer than two previous violations of probation resolved by the court and limits the jail sentence a court may impose for a violation to 90 days for a first violation and 120 days for a second violation; and
- Requires a court to hold a hearing on a violation of probation within 20 days after a probationer's arrest if the violation is a criminal traffic offense or a low-risk violation or to release the probationer without bail.

The bill amends s. 921.0024, F.S., to prohibit a community sanction violation that was resolved through the ASP from being used when determining an offender's sentence for a violation of probation if probation is revoked.

The bill prohibits community sanction points from being assessed if a probationer resolves a violation of probation through the ASP; increases eligibility to resolve a probation violation through the ASP; requires a court to modify, rather than revoke, a person's probation if he or she commits a second violation of probation and meets specified criteria and caps a probationer's jail sentence if a person commits such a violation at 120 days; and requires a probationer who commits certain violations to be released within 20 days if a violation hearing does not occur. Thus, the bill may have a negative indeterminate jail and prison bed impact to the extent such probationers would otherwise be sentenced to a longer term of incarceration for committing a community sanction violation, would otherwise have their probation revoked and would be sentenced to jail or prison for committing a violation of probation, or would otherwise be required to remain in jail for committing a violation of probation until a hearing on the violation occurs.

The bill provides an effective date of October 1, 2023.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives .**

**STORAGE NAME:** h1263.CRJ

**DATE:** 3/18/2023

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Probation and Community Control

At sentencing for a criminal conviction, a judge may place an offender on probation or community control in lieu of or in addition to incarceration.<sup>1</sup> Probation is a form of community supervision requiring specified contacts with a probation officer and other terms and conditions.<sup>2</sup> Community control is a more intensive form of supervision involving an individualized program that restricts the offender's movement within the community, home, or residential placement.<sup>3</sup> 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.<sup>4</sup> The court may also impose special conditions, such as community service hours, regular drug or alcohol testing, no contact orders, and treatment programs.<sup>5</sup> Failure to meet any condition of supervision is a violation of probation or community control (VOP).

Generally, upon a finding that an offender violated probation or community control, the court may revoke, modify, or continue supervision.<sup>6</sup> If the court chooses to revoke supervision, it may impose any sentence that was permissible at the offender's initial sentencing.<sup>7</sup> Upon revocation of supervision, the court is bound by the sentencing guidelines under the Criminal Punishment Code.<sup>8</sup> The sentencing guidelines provide a formula for computation of the lowest permissible prison sentence, based on a number of factors such as the offender's current and prior offenses. If an offender's probation is revoked and the court sentences the offender under the sentencing guidelines, the number of violations of probation an offender has committed are factored into the sentencing formula as a "community sanction violation."<sup>9</sup> The court must make written findings, contemporaneous with sentencing for the revocation of supervision, to justify a downward departure and sentence an offender to less than the lowest permissible sentence.<sup>10</sup>

If an offender 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.<sup>11</sup> A VFOSC is a person who is on felony supervision:

- Related to a qualifying offense<sup>12</sup> committed on or after March 12, 2007.

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<sup>1</sup> S. 948.01, F.S.

<sup>2</sup> S. 948.001(8), F.S.

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

<sup>4</sup> S. 948.03(1), F.S.

<sup>5</sup> S. 948.03(2), F.S.

<sup>6</sup> S. 948.06(2)(b), F.S.

<sup>7</sup> *Id.*

<sup>8</sup> S. 921.0022, F.S.

<sup>9</sup> S. 921.0024, F.S.

<sup>10</sup> *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994).

<sup>11</sup> S. 948.06(8)(e)2.b., F.S.

<sup>12</sup> Section 948.06(8)(c), F.S., defines qualifying offense to include any of the following: 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 (b), 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 battery or attempt, s. 800.04(4); lewd and lascivious molestation, s. 800.04(5)(b) or (c), F.S.; lewd and lascivious conduct, s. 800.04(6)(b), F.S.; lewd and lascivious exhibition, s. 800.04(7)(b); lewd and lascivious 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.; lewd and lascivious 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 burglary offense that is a first or second degree felony, 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.

- 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 that supervision by committing a qualifying offense.
- After previously being found by a court to be a habitual violent felony offender,<sup>13</sup> three-time violent offender,<sup>14</sup> or sexual predator,<sup>15</sup> and has committed a qualifying offense on or after March 12, 2007.<sup>16</sup>

When a person is arrested for committing a crime, he or she is generally entitled to pretrial release on reasonable conditions under the Florida Constitution.<sup>17</sup> However, a person taken into custody for a VOP does not have a constitutional right to release pending the disposition of the VOP.<sup>18</sup> If the offender qualifies as a VFOSC, the court is prohibited from granting pretrial release.<sup>19</sup>

### Alternative Sanctioning Program

In 2019, the Legislature standardized a statewide alternative sanctioning program (ASP), allowing the Department of Corrections to enforce technical violations with court approval.<sup>20</sup> A technical violation is any alleged VOP that is not a new felony, misdemeanor, or criminal traffic offense. The ASP ensures a swift and certain response to technical violations without initiating the court process or arresting and booking the offender. After receiving written notice of an alleged technical violation and disclosure of the evidence supporting the violation, an offender who is eligible for the ASP may either elect to participate in the program or waive participation.<sup>21</sup> If the offender waives participation, the violation proceeds through the court resolution process.<sup>22</sup> A court may also disqualify a person from the ASP when initially sentencing him or her to probation.

The ASP identifies eligible offenders, eligible violations, and permissible sanctions. Eligible violations are classified as either low- 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.<sup>23</sup>

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;

<sup>13</sup> S. 775.084(1)(b), F.S.

<sup>14</sup> S. 775.084(1)(c), F.S.

<sup>15</sup> S. 775.21, F.S.

<sup>16</sup> S. 948.06(8)(b), F.S.

<sup>17</sup> Art. I, s. 14, Fla. Const. Exceptions include when a person is charged with a capital offense or offense punishable by life and the proof of guilt is evident or the presumption is great, or if no conditions can reasonably protect the community from risk of physical harm.

<sup>18</sup> *Bernhardt v. State*, 288 So. 2d 490, 497 (Fla. 1974).

<sup>19</sup> S. 903.0351, F.S.

<sup>20</sup> S. 948.06(9), F.S.

<sup>21</sup> S. 948.06(9)(g), F.S.

<sup>22</sup> S. 948.06(9)(h)1.a., F.S.

<sup>23</sup> S. 948.06(9)(b), F.S.

- A third low-risk violation by a probationer; or
- Any other violation as determined by administrative order of the chief judge of the circuit.<sup>24</sup>

The permissible sanctions 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.<sup>25</sup> 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 of up to 21 days.<sup>26</sup> 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 alternative sanctioning under any of the following circumstances:

- The offender is a violent felony offender of special concern;
- 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- 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.<sup>27</sup>

The ASP is voluntary, and the 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 a timeframe determined in the agreed-upon sanction, the original VOP proceeds to the court resolution process.

#### Mandatory Modification of Probation and Jail Cap

Section 948.06(2)(f), F.S., requires a court to modify, rather than revoke, probation and imposes a 90-day jail cap for specified probationers appearing before a court for committing a low-risk technical violation. Unless waived by a defendant, a court is required to modify or continue, rather than revoke, a probationary term, when all of the following 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 a probationer has less than 90 days of supervision remaining on his or her term of probation and meets the criteria for mandatory modification of probation, a court may revoke probation and sentence the probationer to 90 days in county jail.<sup>28</sup>

## **Effect of Proposed Changes**

### Sentencing for a Community Sanction Violation

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<sup>24</sup> S. 948.06(9)(c), F.S.

<sup>25</sup> S. 948.06(9)(e), F.S.

<sup>26</sup> S. 948.06(9)(f), F.S.

<sup>27</sup> S. 948.06(9)(d), F.S.

<sup>28</sup> S. 948.06(2)(f)3., F.S.

HB 1263 amends s. 921.0024, F.S., to prohibit any violation of probation that was resolved through the ASP from being assessed as community sanction violations points and being used in determining an offender's lowest permissible sentence of incarceration if the offender's probation has been revoked.

### Alternative Sanctioning Program

The bill amends s. 948.06, F.S., to *require*, rather than allow, a probation officer to proceed with the ASP in lieu of filing an affidavit of violation with the court if the probationer or offender on community commits a first or second low-risk violation, unless the probation officer is directed by the court to file an affidavit of violation.

The bill authorizes a probation violation resulting from an arrest for certain misdemeanor offenses to be considered a technical violation of probation and eligible to be resolved through the ASP. Under the bill, an arrest for a misdemeanor offense *other* than the following offenses is considered a technical violation:

- Ch. 784, F.S., relating to assault and battery;
- S. 741.28, F.S., relating to domestic violence;
- S. 316.193, F.S., relating to driving under the influence;
- S. 741.29, F.S., relating to violating a condition or pretrial release when the original arrest was for an act of domestic violence;
- S. 741.31, F.S., relating to violating an injunction for protection against domestic violence;
- S. 784.046, F.S., relating to violating a condition of pretrial release when the original arrest was for an act of dating violence;
- S. 784.047, F.S., relating to violating an injunction for protection against repeat violence, sexual violence, or dating violence;
- S. 784.048, F.S., relating to stalking or cyberstalking;
- S. 784.0487, F.S., relating to violating an injunction for protection against stalking or cyberstalking;
- S. 784.049, F.S., relating to sexual cyberharassment;
- S. 787.025, F.S., relating to luring or enticing a child into a dwelling, structure, or conveyance; or
- A criminal traffic offense *other* than a misdemeanor violation for driving with a suspended license under s. 322.34, F.S.

Under the bill, such offenses are considered a moderate-risk violation for purposes of determining sanctions under the ASP.

For a first or second low-risk violation, the bill requires a court to impose the sanction recommended by a probation officer unless the court finds specific, identified risk to public safety, in which case the court may direct the probation officer to submit a probation violation report, affidavit, and warrant to the court.

### Mandatory Modification of Probation and Jail Cap

The bill requires a court to modify, rather than revoke probation, if a person otherwise meets the criteria for modification in s. 948.06(2)(f), F.S., and a court has not, on *two or more* separate occasions, found the probationer in violation of his or her probation. Current law excludes a person who has previously been found by a court to be in violation of his or her probation from qualifying for mandatory modification of probation.

Under the bill, if a court previously found a probationer in violation of probation and modified probation by sentencing a probationer to up to 90 days in county jail as a special condition or probation, the court may only sentence the probationer to up to 120 days in county jail as a special condition of probation for a second violation of probation. If a probationer has less time on supervision than the number of days which court is authorized to sentence the probationer, the court may revoke probation and sentence the probationer to a maximum of either 90 days or 120 days in county jail, as applicable.

### Resolution of Violations

Under the bill, if a probationer is arrested for committing a low-risk violation or criminal traffic offense,<sup>29</sup> a court must, within 20 days of such arrest, give the probationer or offender an opportunity to be fully heard on his or her behalf in person or by counsel. The bill does *not* authorize a court to grant an extension of time for good cause or any other reason. If a hearing is not held within 20 days of the probationer's arrest, the court must release the probationer or offender without bail regardless of the underlying offense for which the probationer or offender was initially sentenced to probation. Under the bill, a court may impose nonmonetary conditions of release if the probationer or offender is released without bail.

The bill provides an effective date of October 1, 2023.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 921.0024, F.S., relating to Criminal Punishment Code; worksheet computations; scoresheets.

**Section 2:** Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

**Section 3:** Provides an effective date of October 1, 2023.

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

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

None.

**D. FISCAL COMMENTS:**

The bill prohibits community sanction points from being assessed if a probationer resolves a violation of probation through the ASP; increases eligibility to resolve a probation violation through the ASP; requires a court to modify, rather than revoke, a person's probation if he or she commits a second violation of probation and meets specified criteria and caps a probationer's jail sentence if a person commits such a violation at 120 days; and requires a probationer who commits certain violations to be released within 20 days if a violation hearing does not occur. Thus, the bill may have a negative indeterminate jail and prison bed impact to the extent such probationers would otherwise be sentenced to a longer term of incarceration for committing a community sanction violation, would otherwise have their probation revoked and would be sentenced to jail or prison, or would otherwise be required to remain in jail for committing a violation of probation until a hearing on the violation occurs.

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<sup>29</sup> The term "criminal traffic offense" is not defined in the bill. If the term is interpreted to mean *all* criminal offenses related to the operation of a motor vehicle, the term would include offenses such as DUI under s. 316.193, F.S.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

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

Not applicable. The bill does not appear to affect county or municipal governments.

##### **2. Other:**

None.

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

Not applicable.

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

None.

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