

STORAGE NAME: h1137.cor

DATE: March 2, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMITTEE ON CORRECTIONS
ANALYSIS**

BILL #: HB 1137

RELATING TO: Probation & Community Control

SPONSOR(S): Representative Lacasa

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON CORRECTIONS
 - (2) CRIMINAL JUSTICE APPROPRIATIONS
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill proposes to toll the time period for probation or community control upon the filing of an affidavit alleging violation and to continue the tolling until such time as the probation or community control is revoked, modified, or continued. If continued, the probation or community control shall continue as previously imposed, "notwithstanding any period the probation or community control was tolled."

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Certain due process rights attach to those on probation, parole, or other forms of supervision:¹

Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. The United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) summarizing its ruling in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

Section 948.04(2), F.S., provides that when an individual has been placed on probation by the Court, upon the termination of the period of probation, the probationer shall be released from probation and is not liable to sentence for the offense for which probation was allowed.

Stated another way, a trial court lacks jurisdiction to revoke probation after the probationary period has expired. In *State ex rel. Ard v. Shelby*, 97 So.2d 631, 632 (Fla. 1 DCA 1957) the court said:

That upon expiration of the probationary period the court is divested of all jurisdiction over the person of the probationer unless in the meantime the processes of the court have been set in motion for revocation or modification of probation pursuant to s. 948.06, F.S.

Accord, *Carroll v. Cochran*, 140 So.2d 300 (Fla. 1962)

Exactly what constitutes "the processes of the court having] been set in motion for revocation" has also been the subject of litigation. In 1998 in *State v. Boyd*, 717 So.2d 524 (Fla. 1998), the Florida Supreme Court found that an arrest warrant was not issued for purposes of setting in motion probation revocation process and determining whether proceeding has commenced before expiration of probation term, until a judge has signed a warrant and the warrant has been delivered to proper executive officer in order for revocation process to be considered "set in motion."

¹ For purposes of due process, probation and parole revocation hearings are equivalent. *Baker v. Wainwright*, 527 F.2d 372 (CA 5 (Fla.) 1976).

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Presumably in response to *State v. Boyd*, the 1999 Legislature passed chapter 99-169, Laws of Florida, to be effective July 1, 1999. The bill added the sentence, "A warrant is issued at the time it is signed by the magistrate" to s. 901.02 (1).

Thus, prior to July 1, 1999, if an affidavit alleging a violation of supervision was signed on the last day of an individual's term of supervision and a warrant was signed by the judge on that last day, but the warrant is not delivered to the proper executive officer for execution, the period of supervision ended without the circumstances alleged in the affidavit being considered as a reason for revocation. This was the specific situation addressed by the Florida Supreme Court in 1998 in *State v. Boyd*.

After July 1, 1999, a defendant's probation can be revoked if the judge signs the warrant before the term of the probation expires even if it is not delivered to the sheriff to be executed until after the probationary period has ended. *McNeal v. State*, 741 So.2d 1205 (Fla 1DCA 1999); *Brown v. State*, 741 So.2d 1242 (Fla 1 DCA 1999).

C. EFFECT OF PROPOSED CHANGES:

While a judge is now empowered to revoke a probation by signing a warrant during the probationary period, the bill attempts to change this new law by "tolling" or suspending the probationary period upon the filing of an affidavit (presumably by an officer supervising the probation) alleging violation of probation or community control and extending until such time as the violation is proven and the offender's probation or community control is revoked, modified, or continued. If the affidavit is dismissed, the legislation indicates that the probation or community control "shall continue as previously imposed, notwithstanding any period the probation or community control was tolled."

It has long been established that the loss of liberty entailed in a parole revocation is a serious deprivation requiring that the parolee be accorded due process. *Morrissey*, supra. Today, "due process" requires that a judge determine if sufficient reason exists to sign a warrant which may end that loss of liberty. The change proposed would merely require an affidavit be signed by a supervising officer; this affidavit is not a judicial determination and may be considered insufficient due process.

In addition, the concept of "tolling" is almost universally limited to times and instances during which the party whose time is being "tolled" has absented himself from the jurisdiction of the court. The proposed change will alter the concept of tolling. The courts may also interpret "tolling" in this instance to be a rule of practice and procedure rather than a law of substance.

The proposed language does not define "filing of an affidavit," has no limitations upon the length of time of the tolling, nor does it afford the individual notice of the "filing" in a reasonable amount of time. Under the language as proposed, it appears it would be possible for a supervisor to write an affidavit on an individual's first day of supervision, place it in a drawer and say nothing to anyone, and have a warrant issued and executed near the end of the supervised period. The supervisee, despite no notice and having completed what the individual thought was a violation free probation, could then be treated as having served no supervised time, as the time was "tolled" by the affidavit.

D. SECTION-BY-SECTION ANALYSIS:

See II C above

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

A very small work load increase may be experienced by individuals supervising persons on probation or community Control.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

None

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Due Process

In *Herb v. State*, 714 So.2d 639 (Fla 4DCA 1998), the Fourth District Court of Appeal found revocation following expiration of the supervised term to be fundamental error:

Upon the termination of the period of probation, the probationer shall be released from probation and is not liable to sentence for the offense for which probation was allowed. Section 948.04 (2), F.S.

Moreover, when an individual was sentenced for violating probation, the term of which had expired, it was found to be the equivalent of convicting a person for a nonexistent crime, which is a denial of due process which can be raised for the first time on appeal. *State v. Sykes*, 434 So.2d 325 (Fla. 1983). See also *Richardson v. State*, 694 So.2d 147 (Fla 1 DCA 1997) which found that revoking probation based upon a violation not alleged in charging document is denial of due process which can be raised for the first time on appeal.

The suggested language changes do not limit the time in which to “file” the affidavit, or limit the time period during which the affidavit may exist without notice to the individual whose liberty may be restricted, or limit the time of “tolling.” The courts may perceive any of these items as violative of the due process rights which are to be afforded these individuals.

Rules of Practice and Procedure

The Supreme Court may find the “tolling” provisions to relate to “practice and procedure,” which encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. “Practice and procedure” may be described as the machinery of the judicial process as opposed to the product thereof.” *State v. Garcia*, 229 So.2d 236 (Fla. 1969).

B. RULE-MAKING AUTHORITY:

None required

C. OTHER COMMENTS:

None

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON COMMITTEE ON CORRECTIONS:

Prepared by:

Staff Director:

Jo Ann Levin

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