

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 251 High-Risk Offenders
SPONSOR(S): Allen and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1666

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Criminal Justice Committee</u>	_____	<u>Kramer</u>	<u>Kramer</u>
2) <u>Local Government Council</u>	_____	_____	_____
3) <u>Education Appropriations Committee</u>	_____	_____	_____
4) <u>Justice Council</u>	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill provides that the act may be cited as the "Sexual Predator Elimination Act".

The bill prohibits a prosecutor who charges a person with capital sexual battery from presenting or entering into with the accused a plea bargain for a term of less than life in prison without the possibility of parole or eligibility for gain-time. The bill also provides that any person who has been designated a sexual predator who is convicted of an offense under chapter 794 upon a child under the age of 12 that is a capital, life or first degree felony and who was 18 or older at the time of the offense, must be sentenced to life in prison without the possibility of parole or eligibility for gain-time.

During the 2004 session, section 794.065, F.S. was created which makes it unlawful for a person convicted on or after October 1, 2004 (the effective date of the law) of a specified sexual battery or lewd or lascivious offense, against a victim under the age of 16 from living within 1,000 feet of a school, day care center, park or playground. In recent months, a large number of cities and counties throughout the state have passed local ordinances designed to restrict where people who have been convicted of a sexual offense can live. HB 251 amends section 794.065, F.S. to provide that no state law shall prevent a county or municipality from enacting an ordinance restricting the residence of sexual predators or sexual offenders within its jurisdiction as it deems appropriate to protect its citizens.

Currently, section 794.0115, F.S. requires a judge to impose a minimum of a 25 year sentence and a maximum of a life sentence upon an offender who is sentenced for a violation of one an enumerated list of sexual offenses and who:

- Caused serious personal injury to the victim as a result of the commission of the offense;
- Used or threatened to use a deadly weapon during the commission of the offense;
- Victimized more than one person during the course of the criminal episode applicable to the offense;
- Committed such offense while under the jurisdiction of the court for a felony offense or;
- Has previously been convicted of a violation of one of the enumerated offenses.

The bill amends this section to require the imposition of a life sentence.

The bill also amends language which passed during the 2005 session as part of the Jessica Lunsford Act which requires criminal history checks of contractual school personnel who are permitted access to school grounds when students are present. The bill creates the Statewide Background Screening Clearinghouse within the Department of Education and requires the issuance of a statewide credential to contractual school personnel who have passed the level 2 screening. *[Note: It is expected that the sponsor of the bill will offer an amendment to remove this language from the bill.]*

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

STORAGE NAME: h0251.CRJU.doc
DATE: 2/23/2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill limits the state attorney's discretion in entering into a plea agreement when a defendant is charged with capital sexual battery. As filed, the bill requires the creation of a statewide database of background screening results for contractual school personnel.

Safeguard individual liberty: The bill provides that no state law shall prevent a county or municipality from enacting an ordinance restricting the residence of sexual predators or sexual offenders within its jurisdiction as it deems appropriate to protect its citizens.

Promote personal responsibility: The bill provides for increased sanctions for certain criminal offenses.

B. EFFECT OF PROPOSED CHANGES:

The bill provides that the act may be cited as the "Sexual Predator Elimination Act".

Sexual battery: Section 794.011, F.S. provides that a person 18 years of age or older who commits sexual battery upon, or attempts to commit sexual battery and injures the sexual organs of, a person less than 12 years of age commits a capital felony. This is commonly referred to as "capital sexual battery". A capital felony is punishable by a sentence of death or a sentence of life in prison.¹ However, the Florida Supreme Court has held that a sentence of death for the crime of "capital sexual battery" constitutes cruel and unusual punishment in violation of the Eighth Amendment.² As a result, the offense of capital sexual battery is punishable by a mandatory life sentence.³ A person who receives a life sentence must spend the rest of his or her life in prison and is not eligible for parole or any type of early release other than as a result of a pardon or the granting of clemency.⁴

Plea Agreements: A person charged with a criminal offense has a right under the federal and state constitutions to a trial by jury.⁵ However, a significant percentage of all criminal prosecutions are disposed of by a plea agreement between the state, represented by the state attorney, and the criminal defendant. As part of such an agreement, the criminal defendant waives his or her right to trial and, in exchange, the state makes concessions. For example, the state attorney may drop other charges against the defendant, recommend a specific sentence, allow the defendant to enter a plea to a lesser charge than the charge initially filed, or reach some other agreement with the defendant.

For a number of reasons, in capital sexual battery cases (where by definition the victim is less than 12 years of age) a state attorney may offer a defendant the opportunity to plead guilty to a lesser offense. For example, the state attorney may not be sure that the victim, because of his or her age, will be an effective witness, the parents of the victim may be reluctant to allow their child to testify or the state attorney may conclude that testifying would be emotionally damaging to the child. In some cases, the victim may be reluctant to testify because the offender is the parent of the victim or another person in a position of authority. If the state attorney decides that ensuring that the defendant will be sentenced to a term of imprisonment (even if it is less than life in prison) is preferable to risking the defendant being

¹ S. 775.082(1), F.S.

² *Buford v. State*, 403 So.2d 943 (Fla.1981).

³ *Huffman v. State*, 813 So.2d 10 (Fla. 2000); *Welsh v. State*, 850 So.2d 467, 468 (Fla. 2003)("The crime of sexual battery on a child less than twelve set forth in Florida Statutes section 794.011(2)(a) is referred to as "capital" sexual battery because the crime historically has been statutorily punishable by death. However, in [*Buford*], this Court determined that the sentence of death for the crime of 'capital sexual battery' constituted cruel and unusual punishment in violation of the Eighth Amendment."

⁴ s. 944.275(4)(b)3, F.S.

⁵ See U.S. Const. Amend 6, Art. I, s. 22, Fla. Const.

acquitted at trial, the state attorney may offer the defendant the chance to plea to a lesser offense. Currently, nothing in statute limits a state attorney's discretion in offering a plea to a lesser offense.⁶

HB 251 amend s. 794.011, F.S. to provide that any prosecutor who charges a person with a violation of s. 794.011(2)(a), F.S. - sexual battery where the offender is 18 or over and the victim is less than 12 – may not present or enter into with the accused any plea bargain for a term of less than life in prison without the possibility of parole or eligibility for gain-time.

The bill also provides that any person who has been designated a sexual predator who is convicted of an offense under chapter 794 upon a child under the age of 12 that is a capital, life or first degree felony and who was 18 or older at the time of the offense must be sentenced to life in prison without the possibility of parole or eligibility for gain-time. [See DRAFTING ISSUES OR OTHER COMMENTS].

Unlawful place of residence for persons convicted of certain sex offenses: Before the 2004 legislative session, there was no statutory prohibition on where a sexual predator or sexual offender who was no longer on supervision could live.⁷ In other words, a sexual predator or sexual offender who was not on supervision could live wherever he or she wished but was required to report his or her residence to law enforcement. During the 2004 session, section 794.065, F.S. was created⁸ which makes it unlawful for a person convicted on or after October 1, 2004 (the effective date of the law) of a specified sexual battery or lewd or lascivious offense⁹, against a victim under the age of 16 from living within 1,000 feet of a school, day care center, park or playground. The offense is a third degree felony if the sexual offense for which the offender was previously convicted was classified as a first degree felony or higher. The offense is a first degree misdemeanor if the sexual offense for which the offender was previously convicted was classified as a second or third degree felony.

In recent months, a large number of cities and counties throughout the state have passed local ordinances designed to restrict where people who have been convicted of a sexual offense can live. Generally, the ordinances appear to be modeled after section 794.065, F.S. but extend the distance from 1,000 feet to 2,500 feet. Many of the ordinances also prohibit an offender from living within 2,500 feet of places such as libraries, churches and bus stops that are not included in the state statute. By request of the staff of the Judiciary Committee, the Legislative Committee on Intergovernmental Relations surveyed 321 municipalities and all 67 counties to determine whether they had passed an ordinance restricting the residence of sexual offenders. As of October 17, 2005, of the 153 municipalities that responded, 50 municipalities indicated that they had passed ordinances and 14 had pending proposed ordinances. Of the 44 counties that responded, two had passed ordinances and 5 had pending proposed ordinances.

HB 251 amends section 794.065, F.S. to provide that no state law shall prevent a county or municipality from enacting an ordinance restricting the residence of sexual predators or sexual offenders within its jurisdiction as it deems appropriate to protect its citizens.

Dangerous sexual felony offender sentencing: Section 794.0115, F.S. is known as the "Dangerous Sexual Felony Offender Act". The section provides that if a person is convicted of sexual battery¹⁰,

⁶ There does not appear to be any statutory limitation on a *state attorney's* discretion to offer a plea to a lesser offense in any criminal prosecution. However, section 316.656, F.S. provides that no *trial judge* may accept a plea of guilty to a lesser offense from a person charged with DUI manslaughter or with DUI where the breath-alcohol level was in excess of .20.

⁷ In cases in which the victim was a minor, a sexual predator is prohibited from *working* in a business, school, day care center, park, playground or other place where children regularly congregate. s. 775.21(10)(b), F.S. If a sexual predator or sexual offender is working at or attending an institution of higher education, this fact must be disclosed to FDLE who then, in turn, must inform the institution of higher education. ss. 775.21(6)(a)1b, 943.0435(2)(b)2, F.S.

⁸ See 2004-391, Laws of Florida.

⁹ Included are ss. 794.011, 800.04, 827.071 and 847.0145, F.S.

¹⁰ s. 794.011(2), (3), (4), (5) or (8), F.S.

lewd or lascivious battery¹¹, lewd or lascivious molestation¹², sexual performance by a child¹³, selling or buying a minor¹⁴, lewd or lascivious offenses committed upon an elderly person or disabled adult¹⁵ or luring or enticing a child¹⁶ where the offender was 18 years of age or older and the person:

- o Caused serious personal injury to the victim as a result of the commission of the offense;
- o Used or threatened to use a deadly weapon during the commission of the offense;
- o Victimized more than one person during the course of the criminal episode applicable to the offense;
- o Committed such offense while under the jurisdiction of the court for a felony offense or;
- o Has previously been convicted of a violation of one of the above offenses;

must be sentenced as a “dangerous sexual felony offender” to a mandatory minimum term of 25 years imprisonment up to and including life imprisonment. The enhanced sentencing provision could be applied to offenders upon the commission of a first offense if the facts of the case met one of the first four criteria listed above.

HB 251 amends this section of statute to provide that a person who is sentenced as a dangerous sexual felony offender must be sentenced to a mandatory minimum term of life in prison without the possibility of parole or eligibility for gain time.

Background screening: During the 2005 session, HB 1877, known as the Jessica Lunsford Act, passed the legislature and was signed by the Governor on May 2, 2005. [Ch. 2005-28, Laws of Fla.] The bill had an effective date of September 1, 2005.

The bill amended several statutes relating to sexual predators and sexual offenders, required electronic monitoring of certain probationers who had committed a sexual offense and mandated lifetime imprisonment or lifetime supervision with electronic monitoring for persons convicted of lewd and lascivious molestation of a child under the age of 12. Additionally, section 21 of the act amended section 1012.465, F.S. Prior to the passage of HB 1877, this section had required noninstructional school district employees or contractual personnel who had direct contact with students or had access to or control of school funds to meet level 2 screening requirements as described in s. 1012.32, F.S.¹⁷ The bill expanded this requirement to contractual personnel who are permitted access on school grounds when students are present. The bill defined the term “contractual personnel” to include “any vendor, individual or entity under contract with the school board.”

A level 2 screening includes a statewide criminal records check through the Florida Department of Law Enforcement (FDLE) and a federal criminal records check through the Federal Bureau of Investigation (FBI).¹⁸ Section 1012.32, F.S. provides persons “found through fingerprint processing to have been

¹¹ s. 800.04(4), F.S. This section requires proof that the offender had engaged in sexual activity with a person 12 years of age or older but less than 16 years of age. “Sexual activity” means the oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object. Consent is not a defense to this offense.

¹² s. 800.04(5), F.S. This section requires proof that a person intentionally touched in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks or the clothing covering them of a person less than 16 years of age or forced or enticed the victim to so touch the offender.

¹³ s. 827.071(2), (3), (4), F.S. This section makes it unlawful for a person to employ a child less than 18 years of age to engage in sexual performance.

¹⁴ s. 847.0145, F.S. This section requires proof that the a person sold or purchased a minor with knowledge that as a consequence of the transfer, the minor will be portrayed in a visual depiction engaging in sexually explicit conduct.

¹⁵ s. 825.1025. This section prohibits various lewd or lascivious offenses committed against a person over the age of 60 or against a disabled adult.

¹⁶ s. 787.025, F.S. This section makes it a third degree felony to lure or entice a child under the age of 12 into a structure, dwelling or conveyance for other than a lawful purpose.

¹⁷ Additionally, section 943.04351, F.S. requires that “a state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the Department of Law Enforcement”.

¹⁸ See ss. 1012.465(2) and 435.04, F.S.

convicted of a crime involving *moral turpitude* shall not be employed, engaged to provide services, or serve in any position requiring direct contact with students.”

A screening required under the Jessica Lunsford Act is accomplished by the contractor submitting his or her fingerprints to school district personnel who submits the fingerprints to FDLE. FDLE then submits the fingerprints to the FBI for the federal check. FDLE sends the results of the state and federal check back to the school district. The school district then determines whether the results indicate that the contractor has been convicted of a crime involving moral turpitude.

After the legislative session, school districts and businesses that contract with school districts expressed difficulties in implementing the criminal history screening provisions of the bill. The most common complaints can be characterized as follows:

- Many contractors work in multiple school districts throughout the state and have been required to undergo a separate criminal history check for each school district. Although school districts are authorized to share screening results with other school districts, initially there was no central database to facilitate sharing of the results.
- Contractors claimed that some school districts have charged processing fees for a criminal history screening that are cost prohibitive, particularly if a business has many employees who conduct business in multiple school districts.
- School districts and contractors expressed confusion as to who should be considered contractual personnel and what should be considered school grounds.
- Because there is no statutory definition of the term “moral turpitude”, interpretation is left to the school districts. Contractors have claimed that this results in inconsistency – based on different interpretations of the phrase, a contractor could be permitted to work in one school district and barred from working in another. Further, contractors have complained that they have been barred from working in a school district for what they consider minor criminal offenses or offenses that were committed many years ago.
- Contractors who are required to undergo level 2 checks for their other employment have complained that school districts have required them to undergo an additional screening to be permitted on school grounds when students are present.

FDLE was asked by the Speaker of the House of Representatives and the President of the Senate to implement a system to allow for criminal history information provided to a school district to be shared with other school districts. FDLE developed the Florida Shared School Results (FSSR) system which became available to school districts on September 30, 2005. After a school district requests a criminal history check from FDLE, the department posts the results on a secure website that is accessible to the school districts. Other school districts can then access the results and view the same criminal history record that was received by the original school district. The information is searchable by name, social security number or submitting agency.

[Note: It is expected that the bill sponsor will offer an amendment to remove the following provisions from the bill, contained in sections 5 and 6.] HB 251 amends section 1012.465, F.S. to require the Department of Education (DOE), in cooperation with the Department of Law Enforcement to create the “Statewide Background Screening Clearinghouse” which will maintain a database of background screening results for contractual personnel. DOE will be required to provide each contractor who passes the required level 2 screening with a statewide credential, bearing a photograph of the contractor, indicating that the contractor has passed the level 2 screening. The credential will be valid for 1 year, at the end of which time the contractor will be required to reapply for a background screening without the requirement that fingerprints be taken. The bill will require all counties to accept the credential during the period that the credential is valid. The cost of the state and federal screening will be borne by the district school board or the contractor. Screening results will be disposed of after 12 months.

Each year, a person who is under a contract with the school district will be required to apply to the local school district to renew his or her credential. The district will then repeat the background screening and if the person meets the screening requirements, will issue a renewed credential.

The bill authorizes the department to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement these provisions.

The bill also provides that each person who is employed or under contract with a school district must agree as a condition of receiving the credential described above to inform his or her employer or the party with whom he or she is under contract and DOE within 48 hours if charged with any disqualifying offense while he or she is employed or under contract in that capacity. A person who willfully fails to comply with this requirement, commits a third degree felony.

C. SECTION DIRECTORY:

Section 1. Provides that the act may be cited as the "Sexual Predator Elimination Act".

Section 1. Amends s. 794.011, F.S. to prohibit certain plea agreements.

Section 3. Amends s. 794.0015, F.S. increase minimum mandatory sentence applicable to dangerous sexual felony offenders.

Section 4. Amends s. 794.065, F.S. to prohibit state law which would prevent a county or municipal ordinance restricting residence of sexual offenders or predators.

Section 5. Amends s. 1012.465, F.S. to create Statewide Background Screening Clearinghouse; requires fingerprint based criminal history checks in certain circumstances.

Section 6. Reenacts portions of s. 1012.32, F.S. for purpose of incorporating amendment made by act to section 1012.465, F.S.

Section 7. Provides that amendments to ss. 794.011 and 794.0115 by the act shall apply to offenses committed on or after effective date of act.

Section 8. Provides that the act will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

- #### 2. Expenditures:
- [Note: It is expected that the bill sponsor will offer an amendment to remove the requirement from the bill that DOE create a "Statewide Background Screening Clearinghouse".] The following information was obtained from DOE's analysis of HB 251 on the bill as filed which requires DOE to maintain a database of background screening results for contractual personnel:

COST SUMMARY

Description	Recurring			One-Time Costs	
	Salary & Benefits	EXP	Human Resource Services	EXP	OCO
Test & Production Servers					\$31,046
SAN Storage					\$20,818
SQL Server Licenses		\$6,524			
OS Software				\$10,873	
Laminated badge printers (85 x \$1,872)					\$159,120
First year printer supplies (200,000 x \$.25)		\$50,000			
Postage (one mailing annually 200,000 x \$.21)		\$42,000			
Contract programmers (3 FTE for 5 months @ \$75)				\$189,000	
Director of Statewide Background Screening Clearinghouse	\$95,630	\$6,403	\$393	\$3,343	\$1,900
Program Specialist IV (2)	\$114,450	\$12,806	\$786	\$6,686	\$3,800
Distributed Computer Systems Consultant	\$51,156	\$6,403	\$393	\$3,343	\$1,900
Senior Attorney	\$81,387	\$6,403	\$393	\$3,343	\$1,900
Administrative Assistant II	\$38,550	\$5,195	\$393	\$2,791	\$2,100
TOTAL	\$381,173	\$135,734	\$2,358	\$219,379	\$222,584
TOTAL RECURRING COSTS	\$519,265				
TOTAL ONE-TIME COSTS				\$441,963	

Additional recurring costs of \$308,687 and one-time costs of \$20,620 would be required if three additional attorneys and one additional support staff are needed to meet the demands of grievance procedures.

The Criminal Justice Impact Conference is charged with forecasting the five year prison bed impact of filed bills on the Department of Corrections. On February 28, 2006, the conference determined the bill would have an insignificant impact over the next five years but could have a long term prison bed impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

[Note: It is expected that the bill sponsor will remove the following requirement from the bill.] The bill will require contractual personnel to apply annually to school districts for renewal of the statewide credential indicating that the contractor has passed the level 2 screening.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

As filed, the bill will require annual criminal history checks of contractual personnel.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes DOC to adopt rules to implement the criminal history check requirements of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that any person who has been designated a sexual predator who is convicted of an offense under chapter 794 upon a child under the age of 12 that is a capital, life or first degree felony and who was 18 or older at the time of the offense must be sentenced to life in prison without the possibility of parole or eligibility for gain-time. It is not clear how this provision changes current law. Under s. 794.011(2)(a), F.S. a person 18 years of age or older who commits sexual battery on a person under the age of 12 commits a capital felony. For this offense, a capital felony is punishable by a life sentence. A person who is sentenced to life in prison is ineligible for parole or gain time. The other life or first degree felony offenses that are currently in this section of statute apply to a victim over the age of 12 or an offender under the age of 18 and the language of the bill would not apply to these offenses.

The bill also amends s. 794.011(2)(a), F.S. to provide that "any prosecutor who charges a person with [capital sexual battery under s. 794.011(2)(a), F.S.] shall not present or enter into with the accused any plea bargain for a term of less than life in prison without the possibility of parole or eligibility for gain-time." It is possible that this language could be interpreted to not only prohibit a state attorney from making a plea offer for a violation of s. 794.011(2)(a) to a sentence of less than life in prison (something that is currently prohibited) but to also prohibit a state attorney from making a plea offer that would reduce the charges to a lesser offense at a sentence of less than life in prison in exchange for a guilty plea. It could be argued that this provision may result in acquittals in cases in which the state attorney is forced to go to trial where he or she would otherwise have attempted to reach a plea agreement.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES