

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1314

INTRODUCER: Judiciary Committee and Senator Storms

SUBJECT: Sexually Violent Predators

DATE: April 14, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/2 amendments
2.	Treadwell	Maclure	JU	Fav/CS
3.			WPSC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill amends the Jimmy Ryce Act by revising the definition of “sexually violent offense” to include only felonies, allowing the Department of Children and Families to prioritize review of cases of offenders who are within one year of release from confinement. The bill also extends certain deadlines to the next working day when the deadline falls during non-working hours.

The bill also creates a third-degree felony for introducing delineated types of contraband items into any Jimmy Ryce facility, as well as acts done away from the facility in an attempt to transmit contraband into the facility.

The bill also:

- Enhances the punishment for the offense of loitering and prowling when it is committed by a person who has been convicted of certain sexual offenses and is knowingly within 300 feet of a school or child care facility during operating hours or a park, playground, or school bus stop while children are present.

- Creates a misdemeanor that applies to persons who have been convicted of certain sexual offenses and who approach a child at a public park or playground with the intent to engage in conduct or communication of a sexual nature.
- Requires a person who has been convicted of certain sexual offenses to notify officials before entering the building or grounds of a child care facility or school and requires the offender to be directly supervised while on school grounds.

The bill requires registration and notification of transient addresses in the same manner as is currently required for permanent or temporary addresses and provides that a sexual predator who vacates a temporary or transient residence, or who gives notice of intent to do so but does not, must provide notice in the same manner as is currently required for those vacating a permanent residence.

This bill substantially amends the following sections of the Florida Statutes: 394.912, 394.913, 394.9135, and 775.21, Florida Statutes. The bill creates sections 394.933 and 856.022, Florida Statutes.

II. Present Situation:¹

Sexually Violent Predators

A sexually violent predator is a person who has been convicted of a sexually violent offense and who also suffers from a mental abnormality or personality disorder that makes him or her likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.² The Involuntary Civil Commitment of Sexually Violent Predators Act, also known as the Jimmy Ryce Act (Act), was enacted in 1998 to address the treatment needs of these offenders.³ The Act creates a civil commitment process for sexually violent predators that is similar to Baker Act procedures for involuntary commitment and treatment of mentally ill persons.

Referring agencies identify offenders who have been convicted of specified sexually violent offenses and notify the Department of Children and Families' (department) Sexually Violent Predator Program and the state attorney who prosecuted the offender. The Department of Corrections makes 93 percent of these referrals, with others coming from the Department of Juvenile Justice and the department itself.

After a referral is made, a clinical specialist reviews information provided by the referring agency and gathers any additional information that is needed to complete the case file. Two licensed psychologists employed by the department independently screen the case file to determine if the offender meets the statutory sexually violent predator criteria. If the department psychologists find that the offender meets the criteria, an independent, contracted evaluator also reviews the case file and provides a recommendation to the department. A multidisciplinary team

¹ Much of the information in this section was derived from Office of Program Policy Analysis & Government Accountability, *The Delays in Screening Sexually Violent Predators Increase Costs; Treatment Facility Security Enhanced*, Report No. 08-10 (Feb. 2008), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0810rpt.pdf> (last visited Apr. 9, 2010).

² Section 394.912, F.S.

³ Sections 394.910-394.932, F.S.

that includes at a minimum two persons who are either a licensed psychiatrist or a licensed psychologist reviews the evaluation reports. From this review, they render an opinion as to whether the offender meets the sexually violent predator criteria. The department must then provide a written assessment and written recommendation to the state attorney within 180 days of receiving notice from the referring agency. The recommendation must include the multidisciplinary team's report.⁴

The timeframes for this process are drastically accelerated when a person who has been convicted of a sexually violent offense is to be immediately released for some reason. A person who has been released ahead of scheduled release is transferred to the custody of the department by the referring agency. The multidisciplinary team has 72 hours after the transfer to provide its written assessment and recommendation to the state attorney. In turn, the state attorney has 48 hours to petition the court for a determination that the person is a sexually violent predator.⁵

After receiving the department's assessment and recommendation, the state attorney can initiate commitment proceedings by filing a probable cause petition seeking a determination that the offender meets statutory criteria to be a sexually violent predator.⁶ There is no prescribed time limit for filing other than in an immediate release situation. If the judge finds that the petition sets forth probable cause, a civil trial must be conducted within 30 days. A decision that an offender is a sexually violent predator must be made by the judge or a unanimous jury based upon clear and convincing evidence.⁷

An offender who is found to be a sexually violent predator is committed to the department's custody upon completion of his or her criminal sentence and transferred to the Florida Civil Commitment Center in Arcadia. If the commitment process is not completed prior to the end of an offender's prison sentence, the offender is detained by court order and transferred to the commitment center to await the outcome of commitment proceedings. On June 30, 2009, the commitment center housed 447 civilly committed predators and 227 detainees awaiting completion of commitment procedures.⁸

Sexually violent predators who are committed to the state under the Jimmy Ryce Act are detained at the commitment center until the court determines that they are no longer a threat to public safety. The department currently contracts with GEO Group, Inc., to operate the center and provide all treatment and security services. The treatment program consists of four levels of cognitive behavior modification and takes a minimum of six years to complete, with progress assessed annually by program staff.⁹

⁴ Section 394.913(3), F.S.

⁵ Section 394.9135, F.S.

⁶ Section 394.914, F.S.

⁷ Section 394.916 and 394.917, F.S.

⁸ Criminal Justice Estimating Conference, *Involuntary Civil Commitment of Sexually Violent Predators – History and Forecast*, (Feb. 19, 2010), available at http://edr.state.fl.us/conferences/criminaljustice/Workpapers_2-19-10.pdf (last visited Apr. 7, 2010).

⁹ Office of Program Policy Analysis & Government Accountability, *supra* note 1, at 2.

Loitering and Prowling

“Loitering and prowling” is a second-degree misdemeanor prohibited by s. 856.021, F.S. The elements required for conviction are that the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warranted justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. Among circumstances that may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify him or herself, or manifestly endeavors to conceal him or herself or any object. Because it is a misdemeanor, all elements of the offense must be committed in the officer’s presence prior to arrest. An unusual requirement of the statute is that the law enforcement officer must give the suspect an opportunity to dispel any alarm or immediate concern by requesting the suspect to identify him or herself and to explain his or her presence or conduct.

Sexual Predators and Sexual Offenders

The distinction between a sexual predator and a sexual offender is based on the offense of conviction, the date the offense occurred or when sanctions were completed, and whether the person has previously been convicted of a sexual offense. Sexual predator status can only be conferred for offenses committed on or after October 1, 1993. Sexual offender status applies only if the person was released from the sanction for the designated offense on or after October 1, 1997. The list of designated offenses is not identical for sexual offenders and sexual predators, but commission of any of the following offenses would require registration as either a sexual offender or a sexual predator:

- Kidnapping, false imprisonment, or luring or enticing a child where the victim is a minor and the defendant is not the victim’s parent (ss. 787.01, 787.02, and 787.025(2)(c), F.S.).
- Sexual battery under ch. 794.011, F.S. (except false accusation of another under s. 794.011(10), F.S.).
- Sexual activity by a person who is 24 years old or older with a minor who is 16 or 17 years old (s. 794.05, F.S.).
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.).
- Selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.).
- Lewd or lascivious offenses upon or in the presence of a person under the age of 16 (s. 800.04, F.S.).
- Lewd or lascivious offenses upon an elderly or disabled person (s. 825.1025, F.S.).
- Enticing, promoting, or possessing images of sexual performance by a child (s. 827.071, F.S.).
- Distribution of obscene materials to a minor (s. 847.0133, F.S.).
- Computer pornography (s. 847.0135, F.S.) (except traveling to meet a minor under s. 847.0135(4), F.S.).
- Transmission of child pornography by electronic device (s. 847.0137, F.S.).
- Transmission of material harmful to minors to a minor by electronic device (s. 847.0138, F.S.).
- Selling or buying of minors for child pornography (s. 847.0145, F.S.).

- Sexual misconduct by a Department of Juvenile Justice (DJJ) employee with a juvenile offender (s. 985.701(1), F.S.).
- Violating a similar law of another jurisdiction.

A sexual predator or sexual offender is required to comply with a number of statutory requirements.¹⁰ During initial registration, a sexual predator or sexual offender who is not in the custody of the Department of Corrections (DOC), the DJJ, or a local jail is required to provide certain information including the “address of legal residence and address of any temporary residence, within the state or out of the state, including a rural route address and a post office box” to the sheriff’s department within 48 hours of sentencing or of establishing a residence. The sheriff’s office provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. The offender or predator must also register at a driver’s license office within 48 hours of the initial registration at the sheriff’s department.

Both sexual predators and sexual offenders must report any change of permanent or temporary residence within the state to the driver’s license office within 48 hours. If a new permanent or temporary residence is not established, the sheriff’s office must be given the address for the residence or other location that will be occupied until a new residence is established. Temporary residence is defined as:

a place where the person abides, lodges, or resides for a period of five or more days in the aggregate during any calendar year and which is not the person’s permanent address or, for a person whose permanent residence is not in this state, a place where the person is employed, practices a vocation, or is enrolled as a student for any period of time in this state.

The county sheriff or municipal police chief must notify child care centers and schools within a one-mile radius of the sexual predator’s permanent or temporary residence within 48 hours of the notification by the predator. In addition, the sheriff or police chief is required to notify the community of the presence of the predator in an appropriate manner, which is often by posting on the sheriff’s website. Both notices must include the predator’s address, including the name of the municipality or county.

III. Effect of Proposed Changes:

Section 1 of the bill amends the definition of “sexually violent offense” in s. 394.912, F.S. The current definition includes both specific crimes as well as any criminal act that was sexually motivated. The amendment specifies that only felonies may be considered in the “catch-all” category of offenses.

Section 2 amends s. 394.913, F.S., to allow the Department of Children and Families more flexibility in prioritizing its cases. The statute currently requires that the assessment and recommendation process be completed within 180 days of receiving notification from the referring agency. Therefore, the cases are prioritized based upon when notification is received.

¹⁰ The specific offender reporting requirements and law enforcement reporting and notification requirements are found in ss. 775.21, 943.0435, 944.606, 944.607, 985.48, and 985.4815, F.S.

The amendment adds a subparagraph 2. to s. 394.913(3)(e), F.S., to give priority to evaluation of the cases of persons who are within 365 days of release and for whom the written assessment and recommendation has not been completed. The department notes that the current system negatively effects management and its workflow and also sometimes results in assessments and recommendations being prepared too early to be used in a civil commitment trial.¹¹

Section 3 amends s. 394.9135, F.S., to provide for extension of the deadlines for the department to provide its written assessment and recommendation to the state attorney and for the state attorney to file a commitment petition. The bill provides that if the 72-hour deadline for providing the recommendation to the state attorney falls after 5 p.m. on a work day or during a weekend or holiday, the recommendation may be provided during the next work day. Similarly, if the state attorney's 48-hour petition filing deadline falls on after 5 p.m. or on a weekend or holiday, the commitment petition may be filed during the next work day.

Use of the term "work day" could create some confusion in the application of the timeframes. Although it appears that the intent is to suggest after 5 p.m. on a weekday, some individuals "work" on Saturday or Sunday. The Legislature may wish to use another term such as "weekday."

Section 4 creates s. 394.933, F.S., to provide penalties for introduction or removal of certain articles considered contraband into a Jimmy Ryce Facility. Under the bill, it is a third-degree felony to introduce delineated types of contraband items into any Jimmy Ryce facility, as well as acts done away from the facility in an attempt to transmit contraband into the facility. Items considered "contraband" include:

- Any intoxicating beverage or beverage that causes or may cause an intoxicating effect;
- Any controlled substance as defined under ch. 893, F.S.;¹²
- Any firearm or deadly weapon; or
- Any other item designated as contraband by rule of the department or the agency with jurisdiction based upon determination that the item is hazardous to the welfare of clients or the operation of the facility.

All individuals or vehicles entering the grounds of a Jimmy Ryce facility are subject to reasonable search and seizure of any contraband materials brought to the facility.

Section 5 amends s. 775.21, F.S., the sexual predator statute, to clarify the meaning of "temporary residence" and to add references to and a definition of "transient residence." The definition of "temporary residence" is amended to provide "vacation, business, or personal travel destinations in or out of" Florida as examples of temporary residences. "Transient residence" is newly defined as:

a place or county where a person lives, remains, or is located for a period of 5 or more days in the aggregate during a calendar year and which is not the person's permanent or temporary address. The term may include, but is not limited to, a

¹¹ Department of Children and Families, *Staff Analysis of Senate Bill 1314*, 2 (Jan. 22, 2010).

¹² Chapter 893, F.S., includes numerous controlled substances that are listed in Schedules I, II, II, IV, and V.

place where the person sleeps or seeks shelter and a location that has no specific street address.

This section of the bill also makes amendments throughout s. 775.21, F.S., to require registration and notification of transient addresses in the same manner as is currently required for permanent or temporary addresses. It also provides that a sexual predator who vacates a temporary or transient residence, or who gives notice of intent to do so but does not, must provide notice in the same manner as is currently required for those vacating a permanent residence.

Section 6 creates s. 856.022, F.S., which includes several new crimes classified as first-degree misdemeanors. The section applies only to persons who have previously been convicted of a crime that is a qualifying offense for designation as either a sexual offender or a sexual predator and whose victim was under 18 years of age. This includes offenders who are designated as a sexual offender or a sexual predator as well as those who are not so designated for a reason such as commission of the qualifying offense prior to the effective date of the designation laws. Persons who have been pardoned or whose conviction was set aside in a post-conviction proceeding are excepted from the statute.

The new misdemeanor of loitering or prowling by a person convicted of a qualifying sexual offense is an aggravated form of loitering and prowling, which is a second-degree misdemeanor prohibited by s. 856.021, F.S. In addition to proving the elements of loitering or prowling, conviction of the aggravated form of the offense requires proof that:

- The crime was committed by a person who had previously been convicted of one of the qualifying offenses; and
- The offender was knowingly within 300 feet of:
 - A child care facility or pre-K through 12 school, or on the facility's or school's property, when it was in operation; or
 - A park, playground, or bus stop while children are present and congregating in such a manner that a reasonable person would be aware of their presence.

The second new misdemeanor provides that it is unlawful for a person who committed one of the qualifying crimes and whose offense was committed on or after July 1, 2010, to:

Knowingly approach, contact, or communicate with a child under 18 years of age in any public park building or on real property comprising any public park or playground with intent to engage in conduct of a sexual nature, or to make a communication of any type containing any content of a sexual nature.¹³

The third new misdemeanor prohibits a person who committed one of the qualifying crimes from knowingly being in, or on the grounds of, a child care facility or pre-K through 12 school when it is in operation¹⁴ unless he or she:

¹³ This provision likely raises a First Amendment, freedom of speech, issue. See "Other Constitutional Issues" section of this analysis.

¹⁴ It is unclear if the reference to when the school "is in operation" encompasses after school activities, or merely contemplates regularly scheduled class time.

- Has given written notification of intent to be present to the school board, superintendent, principal, or child care facility owner;
- Has notified the owner or the principal's office when arriving and departing the premises; and
- Remains under direct supervision of a school official¹⁵ when in the vicinity of children.

An exception is made for voting and for picking up and dropping off the person's own children or grandchildren at the school or child care facility.

Section 7 provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Unlawful Delegation

In the bill, the Legislature delegates to the Department of Children and Families (DCF) or other agency with proper jurisdiction the authority to designate contraband by rule based upon a determination that the item is hazardous to the welfare of clients or to the operation of the Jimmy Ryce facility. This provision may raise unlawful delegation concerns.

It is generally recognized that the Legislature may not transfer or delegate to the governor or an executive branch any legislative powers.¹⁶ When a delegation of legislative power to the executive branch is provided in legislation, it should be lawful and reasonable.¹⁷ The reasonableness of the delegation must be determined within the practical context of the problem addressed by the delegation.¹⁸ Although the Legislature may not delegate its lawmaking powers, legislative delegations of authority to executive-branch agencies of government to promulgate rules and regulations to implement certain legislative

¹⁵ "School official" is defined under the bill as a principal, school resource officer, teacher or any other employee of the school, the superintendent of schools, a member of the school board, a child care facility owner, or a child care provider.

¹⁶ 10 FLA. JUR 2D *Constitutional Law* s. 199.

¹⁷ *Clark v. State*, 395 So. 2d 525 (Fla. 1981).

¹⁸ *Id.*

enactments have often been upheld by Florida courts if accompanied by adequate guidelines.¹⁹

It appears that the provision in the bill delegating power to DCF and other appropriate agencies may be determined “reasonable” by the court. A court could conclude that the portion of the contraband provision requiring a determination that the contraband item is hazardous to the welfare of the clients or to the operation of the facility would satisfy the “adequate guidelines” delegation requirement.

First Amendment Issues

The section of the bill that makes it a misdemeanor for a sexual offender to make a communication of any type containing any sexual content may raise concerns about violating the First Amendment of the United States Constitution. Prohibitions involving communication or the “intent to communicate” generally trigger first amendment review.²⁰ When a legislature attempts to infringe upon fundamental constitutional rights, such legislation is subject to a two-part test. First, the legislation at issue must be justified by a compelling state interest, and, second, the legislative enactment must be narrowly drawn to address only the legitimate state interests at stake. Obscenity is not protected by the first amendment. In those cases, the burden is on the government to prove that the speech appeals to the prurient interest, is patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value.²¹ Although making a “communication of any type containing any content of a sexual nature” could be considered overbroad because it likely covers more than “obscene” communication, in limited situations heightened protections have been allowed when children are involved.²²

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Additional employment costs could be incurred by child care facilities and schools that must provide direct supervision of persons who are subject to the restrictions against unsupervised contact with children in such facilities.

C. Government Sector Impact:

The bill would not require additional expense to the Department of Children and Families.²³ To the extent that it eliminates referral of persons who had been convicted

¹⁹ *Smith v. State*, 537 So. 2d 982 (Fla. 1989).

²⁰ *Wooley v. Maynard*, 430 U.S. 705, 713 n. 10 (1977).

²¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

²² *Miller v. California*, 413 U.S. 15 (1973); *but see Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

²³ Department of Children and Families, *supra* note 11, at 4.

only of a misdemeanor, there would be a reduction in the cost of processing such a referral. This is not a common type of referral, and any reduction would be insignificant. The Florida Department of Law Enforcement estimates that implementing the bill's changes in registration and notification requirements would cost a total of \$64,450 in the first year and \$900 in subsequent years. The first year estimate attributes \$37,800 to notification and documentation of registrants and \$26,650 to system programming and maintenance.²⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on April 13, 2010:

The committee substitute:

- Creates a new third-degree felony prohibiting introduction of contraband into the Jimmy Ryce facility, as well as acts done away from the facility in an attempt to transmit contraband into the facility;
- Specifies that “contraband” includes intoxicating beverages, controlled substances, firearms, or any other item that is designated as contraband by rule of the Department of Children and Families or another agency with jurisdiction because the item is hazardous to facility clients or to the operation of the facility;
- Provides that all individuals or vehicles entering the grounds of a Jimmy Ryce facility are subject to reasonable search and seizure of any contraband materials brought to the facility;
- Enhances the penalty for committing loitering and prowling to a first-degree misdemeanor when the offense is committed by a person who has been convicted of certain sexual offenses and who is knowingly within 300 feet of a school or child care facility during operating hours or a park, playground, or school bus stop while children are present;
- Prohibits a person who has been convicted of certain sexual offenses from approaching a child at a public park or playground with the intent to engage in conduct or communication of a sexual nature. Violation is a first-degree misdemeanor;
- Requires a person who has been convicted of certain sexual offenses to notify officials before entering the building or grounds of a child care facility or school,

²⁴ Florida Department of Law Enforcement, *Senate Fiscal Policy and Calendar Committee: SB 1284*, 2 (Feb 11, 2010).

and to be directly supervised while on school grounds. Failure to do so constitutes a first-degree misdemeanor;

- Amends the definition of “temporary residence” to provide vacation, business, or personal travel destinations in or out of Florida as examples of temporary residences;
- Provides a definition of “transient residences”;
- Requires registration and notification of transient addresses of sexual offenders and predators in the same manner as is currently required for permanent or temporary addresses; and
- Provides that a sexual predator who vacates a temporary or transient residence, or who gives notice of intent to do so but does not, must provide notice in the same manner as is currently required for those vacating a permanent residence.

B. Amendments:

None.