SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/CS/SB 2192

SPONSOR: Fiscal Policy, Judiciary, and Children and Families Committees, and Senator Klein

SUBJECT: Sexually Violent Predators

DATE: April 15, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Barnes	Whiddon	CF	Favorable/CS
2.	Matthews	Johnson	JU	Favorable/CS
3.	Mannelli	Hadi	FP	Favorable/CS
4.				
5.				

I. Summary:

Committee Substitute for Committee Substitute for Committee Substitute for Senate Bill 2192 would create a Part V of ch. 394, F.S., to embody Florida's laws relating to the civil commitment of sexually violent predators. The bill would transfer ss. 916.31-.49, F.S. (Supp. 1998), which was legislatively designated as the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act," to the new Part V of ch. 394, F.S.

In addition to some technical changes, substantive changes incorporated into CS/CS/CS/SB 2192 are designed to refine the implementation of the civil commitment process for sexually violent predators at the state agency level and at the trial level. The bill also clarifies provisions of the law where it was determined that prior legislative intent was ambiguous.

The provisions of the bill would take effect upon becoming a law.

This bill substantially amends, creates, or transfers the following sections of the Florida Statutes: 394.910, 394.911, 394.912, 394.913, 394.9135, 394.914, 394.915, 394.9155, 394.916, 394.917, 394.918, 394.919, 394.920, 394.921, 394.922, 394.923, 394.924, 394.925, 394.926, 394.927, 394.928, 394.929, 394.930, 916.31, 916.32, 916.33, 916.34, 916.35, 916.36, 916.37, 916.38, 916.39, 916.40, 916.41, 916.42, 916.43, 916.44, 916.45, 916.46, 916.47, 916.48, and 916.49.

II. Present Situation:

A. The Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act of 1998

Sections 916.31-.49, F.S., 1998 Supp., also known as the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act" (hereinafter referred to as "Jimmy Ryce Act," "civil commitment act," or "act") provide for the civil confinement of a group of sexual offenders who, pursuant to civil proceedings, have been found to be "sexually violent

predators." As a result of being found to be a sexually violent predator, such persons are committed to the Department of Children and Family Services for long-term residential treatment, care, and custody in a secure facility.

The act applies to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in the act, as well as to all persons convicted of a sexually violent offense in the future.

1. Legislative Findings and Intent

Section 916.31, F.S., 1998 Supp., provides the following legislative findings and intent:

- A small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment under ss. 394.451-.4789, F.S., the Baker Act;

- In contrast to persons appropriate for civil confinement under the Baker Act, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities, and these features render them likely to engage in criminal, sexually violent behavior;

- The likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high;

- The existing involuntary commitment procedures under "Baker Act" for the treatment and care of mentally ill persons are inadequate to address the risk these sexually violent predators pose to society commitment process is inadequate to address the special needs and risks to society posed by these sexually violent predators;

- The prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different from the traditional treatment modalities for people who are appropriate for commitment under the Baker Act; and

- It is, therefore, the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.

2. Definitions

For purposes of construing the law under the Jimmy Ryce Act, s. 916.32, F.S., 1998 Supp., provides definitions of terms and phrases. They are defined under current law as follows.

- "Agency with jurisdiction" means the agency that releases, upon lawful order or authority, a person serving a sentence in the custody of the Department of Corrections (DOC), a person adjudicated delinquent and committed to the custody of the Department of Juvenile Justice (DJJ), or a person who was involuntarily committed to the Department of Children and Family Services (DCFS) upon an adjudication of not guilty by reason of insanity.

- "Convicted of a sexually violent offense" means a person who has been:
  - Adjudicated guilty of a sexually violent offense after a trial, guilty plea, or plea of nolo contendere;
  - Adjudicated not guilty by reason of insanity of a sexually violent offense; or
  - Adjudicated delinquent of a sexually violent offense after a trial, guilty plea, or plea of nolo contendere.
- "Department" means the Department of Children and Family Services (DCFS).
- "Likely to engage in acts of sexual violence" means that the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.
- "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses.
- "Person" means an individual *18 years of age or older* who is a potential or actual subject of proceedings under the act.
- "Sexually motivated" means that one of the purposes for which the defendant committed the crime was sexual gratification.
- "Sexually violent offense" means:
  - Felony murder where the felony is sexual battery;
  - Kidnapping *or* false imprisonment of a child under 16 years of age *and*, in the course of either of those offenses, the person commits sexual battery or a lewd, lascivious, or indecent assault or act upon or in the presence of a child;
  - Sexual battery;
  - A lewd, lascivious, or indecent assault or act upon or in the presence of a child;
  - An attempt, criminal solicitation, or conspiracy of a sexually violent offense;
  - Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to these sexually violent offenses or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or
  - Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings under the act, has been determined beyond a reasonable doubt to have been sexually motivated.

- "Sexually violent predator" means any person who:
  - Has been convicted of a sexually violent offense; *and*
  - Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
- "Total confinement" means that the person is currently being held in any physically secure facility being operated or contractually operated by the DOC, the DJJ, or the DCFS.

3. The Agency Referral Process and the Multidisciplinary Teams

The Secretary of the DCFS was required under the law that passed in 1998 to establish and designate members of a multidisciplinary team that includes two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist. By statute, the Attorney General serves as legal counsel to the multidisciplinary team.

Section 916.33, F.S., 1998 Supp., requires the agency with jurisdiction over a person who has been convicted of a sexually violent offense to give written notice to the multidisciplinary team, and a copy of that notice to the state attorney of the circuit where that person was last convicted of a sexually violent offense, *180 days or, in the case of an adjudicated delinquent, 90 days before*:

- The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who have been returned to confinement for no more than 90 days, written notice must be given as soon as practicable following the person's return to confinement; or
- The anticipated hearing regarding the possible release of a person who has been found not guilty by reason of insanity or mental incapacity of a sexually violent offense.

In order for the state attorney to obtain the necessary information to go forward with a petition seeking civil commitment of a person who has a *qualifying* sexually violent offense, the agency with jurisdiction who has custody of the person must provide the state attorney with the following information:

- Name;
- Identifying characteristics;
- Anticipated future residence;
- The type of supervision the person will receive in the community, if any;
- Offense history; and

- Documentation of institutional adjustment and any treatment received, and, in the case of an adjudicated delinquent committed to the DJJ, copies of the most recent performance plan and performance summary.

4. Filing of a Petition by State Attorney and Probable Cause Determinations

Notice provisions in the section are not jurisdictional. As an overriding rule, failure to comply with the provisions pertaining to the agency referral process and failure to comply with the provisions pertaining to the assessment and recommendation by the multidisciplinary teams does not prevent the state attorney from petitioning for the civil commitment of a person who is determined by the state attorney to meet the criteria of a "sexually violent predator." The state attorney always retains the right to file a petition to seek involuntary commitment if the state attorney has a good faith belief that the person is a sexual predator and that the state attorney can prove by clear and convincing evidence that the person is a sexually violent predator.

Current law requires that within 45 days after receiving notice from the agency with jurisdiction, the multidisciplinary team must assess whether the person meets the sexually violent predator criteria and is required to provide the state attorney with its written assessment and recommendations.

Section 916.34, F.S., 1998 Supp., provides that, following receipt of the written assessment and recommendation from the multidisciplinary team, the state attorney in the judicial circuit where the person committed the sexually violent offense may file a petition with the circuit court alleging that the person is a sexually violent predator and stating facts sufficient to support this allegation. Regardless of what is actually "recommended" by the multidisciplinary team, the state attorney always makes the final determination as to whether a petition to civilly commit a person will be filed.

Section 916.35, F.S., 1998 Supp., provides that, when the state attorneys files a petition, the judge must make a determination as to whether probable cause exists that the person is a sexually violent predator. If the judge determines that probable cause exists, the law requires the judge to direct that the person be taken into custody and held in an appropriate secure facility. Before a person whom the multidisciplinary team recommends for civil commitment is released from custody, but after the state attorney files a petition under s. 916.33, F.S., 1998 Supp., the *state attorney* may further petition the court for an adversarial probable cause hearing. In an adversarial probable cause hearing, if requested by the state attorney, a person is afforded many more rights than in an *ex parte* probable cause hearing, which is the only probable cause hearing that is *required* under the Jimmy Ryce Act.

At the adversarial probable cause hearing, the judge is directed to:

- Receive evidence and hear arguments from the person and the state attorney; and

- Determine whether probable cause exists to believe that the person is a sexually violent predator.

At the adversarial probable cause hearing, the person who is subject to the possible civil commitment has the right to:

- Be provided notice of, and an opportunity to appear at the hearing in person;
- Be represented by counsel;
- Present evidence;
- Cross-examine any witnesses who testify against the person; and
- View and copy all petitions and reports in the court file.

After an adversarial probable cause hearing, if the court again concludes that there is probable cause to believe that the person is a sexually violent predator, the court shall direct that the person be held in custody in an appropriate secure facility without opportunity for pretrial release or release during the trial proceedings.

5. Trial to Determine Whether a Person is a Sexually Violent Predator

Within 30 days after the determination of probable cause, the court is required to conduct a trial to determine whether the person is a sexually violent predator under s. 916.36, F.S., 1998 Supp., The trial may be "continued," or postponed, upon the request of either party and a showing of good cause, or by the court on its own motion in the interests of justice, when the person will not be substantially prejudiced.

At all adversarial proceedings under the act, such as in trials and adversarial probable cause hearings, the person subject to the act is entitled to the assistance of counsel, and, if the person is indigent, the court appoints a public defender or, if a conflict exists, other counsel to assist the person in involuntary civil commitment proceedings.

If a person is subject to a mental health examination under ch. 916, F.S., the person is allowed to retain experts or mental health professionals to perform an examination. If a person wishes to be examined by a professional of the person's own choice, the examiner must be provided reasonable access to the person, as well as to all relevant medical and mental health records and reports. If the respondent is indigent, the court, upon the person's request, must determine whether such an examination is necessary. If the court determines that such an examination is necessary, the court is statutorily directed to appoint a mental health professional and determine the reasonable compensation for the professional's services.

Both the person who is the subject of the civil commitment proceedings or the state attorney have the right to demand that the trial be before a jury. A demand for a jury trial must be filed in writing at least 5 days before the trial. If no demand is made, trials are to be decided by the court.

Section 916.37, F.S., 1998 Supp., designates that the standard of proof is clear and convincing evidence. Therefore, the court or jury must determine by *clear and convincing evidence* whether the person is a sexually violent predator. If the jury determines the person is a sexually violent

predator, the decision must be unanimous. If a majority of the jury finds that the person is a sexually violent predator, but the decision is not unanimous, the state attorney may refile the petition and proceed according to the provisions of the act. Any retrial must occur within 90 days after the previous trial, unless the subsequent proceeding is continued. The jury's determination is appealable.

6. Civil Commitment and Subsequent Reviews

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the DCFS for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that it is safe for the person to be at large. At all times, sexually violent predators who are committed for control, care, and treatment by the DCFS under this section must be kept in a secure facility segregated from patients who are not committed under this section.

A person committed as a sexually violent predator is required to have an examination of the person's mental condition once every year or more frequently at the court's discretion under s. 916.38, F.S., 1998 Supp. The person may retain or, if the person is indigent and so requests, the court may appoint a qualified professional to examine the person. This professional shall have access to all records concerning the person. The results of the examination must be provided to the court that committed the person. Upon receipt of the report, the court shall conduct a review of the person's status.

The DCFS provides each committed person with an annual written notice of each person's right to petition the court for release over the objection of the director of the facility where the person is housed. The notice must contain a waiver of rights. The director of the facility must forward the notice and waiver form to the court. At that time, the court must hold a limited hearing to determine whether there is probable cause to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged. The person has the right to be represented by counsel at such a probable cause hearing, but he or she does not have the right to be present. If the court finds that probable cause exists, the court will set a trial before the court on the issue.

At the trial, the person is entitled to the benefit of all constitutional protections afforded the person at the initial trial, except trial by jury. The state attorney represents the state and has the right to have the person examined by professionals chosen by the state. At the hearing, the state bears the burden of proving, by clear and convincing evidence, that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence.

Related to the treatment of persons who are committed under this act, s. 916.42, F.S., 1998 Supp., states that long-term control, care, and treatment of sexually violent predators must conform to constitutional requirements. Section 916.44, F.S., 1998 Supp., provides for the severability of any provision in the act that may be declared unconstitutional.

7. Petitions for Discharge from Commitment

Section 916.39, F.S., 1998 Supp., allows the Secretary of the DCFS or the Secretary's designee at any time during commitment to petition the court for release to authorize the person to petition the court for release if it is determined that the person is not likely to commit acts of sexual violence if conditionally discharged. The petition by the "confinee" must be served upon the court and the state attorney. Upon receipt of the petition, the court must order a bench trial within 30 days, unless the trial is continued for good cause. At a trial afforded pursuant to a petition for release that is filed by the secretary of the DCFS, the person is afforded the constitutional protections delineated above including the exception of a jury trial. The state must also meet the same burden of proving the person's mental condition has not changed to allow the person to be released.

A person is not prohibited from filing a petition for discharge at any time. However, if the person has previously filed a petition without the approval of the secretary of the DCFS or the secretary's designee *and* the court has determined that the petition was without merit, a subsequent petition shall be denied unless there are new facts warranting a probable cause hearing pursuant to s. 916.40, F.S., 1998 Supp.

Section 916.41, F.S., 1998 Supp., provides for the release of all relevant information and records that are otherwise confidential or privileged to the agency having jurisdiction or to the state attorney for the purpose of meeting the notice requirements under the act and determining whether a person is or continues to be a sexually violent predator. Psychological or psychiatric reports, drug and alcohol reports, treatment records, medical records, or victim impact statements submitted to the court or admitted into evidence under the act are to be part of the record but must be sealed and may be opened only pursuant to a court order.

8. Immunity from Civil Liability

Section 916.43, F.S., 1998 Supp., provides immunity from civil liability for good faith conduct under the act by:

- The agency with jurisdiction, its officers, and its employees;
- The state attorney and the state attorney's employees; and
- Those involved in the evaluation, care and treatment of sexually violent predators committed under the act, which would include members of the multidisciplinary teams.

9. Notice of Releases to Victims

If a committed person is going to be released, the DCFS is required to give written notice of the release of a person committed under the act as soon as practicable to any victim of the committed person who is alive and whose address is known to the DCFS or, if the victim is deceased, to the victim's family if their address is known to the DCFS. However, failure to provide notification is not a reason for postponement of release. Additionally, the failure to meet notification

requirements under the act does not create a cause of action against the state or an employee of the state acting within the scope of the employee's employment.

10. Escapes

Escape of a person who is subject to the proceedings or commitment under this act is also addressed. A person who is held in lawful custody pursuant to a judicial finding of probable cause under s. 916.35, F.S., or pursuant to a commitment as a sexually violent predator under s. 916.36, F.S., and who escapes or attempts to escape while in such custody commits a second degree felony. This would make an escape that is related to this act the same type of criminal offense as escapes from correctional facilities or other supervision. An escapee could receive up to 15 years in prison. It is notable, however, that there is no specific requirement to notify victims or other persons concerning escapes from facilities related to this act.

11. Costs of Subsistence, Treatment, and Court Proceedings

Upon committing a person as a sexually violent predator, the court is authorized to require that person disclose all revenue or assets to the DCFS and to require the person to pay some or all of the daily subsistence costs and treatment costs. Payment by a committed predator is limited where such income is exempt by state or federal law and based upon the person's ability to pay, liability or potential liability to the victim or the guardian or estate of the victim exists, or the needs of the person's dependents require the person's assets to provide support to them. The person subject to paying such subsistence and treatment costs is entitled to reasonable advance notice of the assessment and should be afforded an opportunity to present reasons for opposing the assessment. To ensure payment, an order directing payment of subsistence and treatment costs may survive against the person's estate.

The act itself specifically states that the DCFS is responsible for all costs relating to the evaluation and treatment of persons committed to the DCFS' custody as sexually violent predators. Furthermore, consistent with a heightened legislative sensitivity to Article V costs, a county is *not obligated* to fund costs for psychological examinations, expert witnesses, and court-appointed counsel, or other costs required by the act. Instead, such costs are to be paid from state funds appropriated by general law.

B. Profiles of Persons Who Committed Sexually Violent Offenses and May be Subject to Civil Commitment

The Department of Corrections has compiled data on 441 inmates who qualified under the "Jimmy Ryce Act" and were referred to the Department of Children and Family Services and the appropriate local state attorney, from January 1, 1999 to March 8, 1999. The data reflects information only on sexual offenses qualifying under the act.

This data, which is provided below, is not a complete profile of offenders and offenses because old offense data is sometimes not available due to destruction of historical records, information from the courts and law enforcement is not always complete, information from other states is not always available, and juvenile records are sealed or otherwise not obtainable. However, the number of cases with missing data is specified for each data element in this profile. Percentages

are computed based on known data only; this does not necessarily mean that the percentages would remain the same if all of the data were known.

Eligibility Based Upon Prior or Current Offense:

Number	Percent	Category
344	80.4%	Current Offense
84	19.6%	Prior Offense Only
13	n/a	Data Unknown

Most Serious Offense Conviction:

Number	Percent	Category
139	32.0%	Lascivious Act on Child Under 16
70	16.1%	Sexual Battery By Adult on Victim Under 12
39	9.0%	Sexual Assault and Battery-Unspecified
39	9.0%	Sexual Battery With Physical Force
34	7.8%	Sexual Battery With Threat With Deadly Weapon
22	5.1%	Lewd Assault With Sexual Battery-Victim Under 16
21	4.8%	Sexual Battery-Coerce Child By Adult
12	2.8%	Sexual Offense-Unspecified
9	2.1%	Sexual Battery-Coerces By Threat
8	1.8%	Sexual Battery-Unspecified
5	1.2%	Kidnapping-Commit to Facilitate Felony
4	0.9%	False Imprisonment
3	0.7%	Sexual Battery By Juvenile With Victim Under 12
3	0.7%	Sexual Battery Against Physically Helpless or Unable to Resist
2	0.5%	Strong Armed Rape
2	0.5%	Sexual Assault Other/Other State

Number	Percent	Category
2	0.5%	Sexual Battery-Coerces By Retaliation
2	0.5%	Sexual Battery-Victim Drugged
2	0.5%	Sexual Battery-Carnal Intercourse Under 18
16	3.6%	Other Offenses
7	n/a	Data Unknown

Total Number of Distinct Sexual Victims:

Number	Percent	Category
291	83.4%	One
35	10.0%	Two
19	5.4%	Three
4	1.2%	Four or More
92	n/a	Data Unknown

Whether Victims Were Known to the Offender:

Number	Percent	Category
272	77.9%	All Victims Known to the Offender
77	22.1%	At Least One Victim is a Stranger
92	n/a	Data Unknown

Of the 77 Cases Involving Stranger Victims, the Number of Victims:

Number	Category
58	One Stranger Victim
13	Two Stranger Victims
6	Three or More Stranger Victims

Youngest Age of Sexual Victim:

Number	Percent	Category
120	38.2%	11 and Under
159	50.6%	12 to 15 Years Old
35	11.1%	16 and Older
127	n/a	Data Unknown

Highest Level of Violence (Not Including the Sexual Offense Itself):

Number	Percent	Category
165	52.5%	No Violence
47	15.0%	Threat of Injury or Death
83	26.4%	Minor Injury
19	6.1%	Severe Injury
0	0.0%	Death
127	n/a	Unknown

Type of Weapon Used - Most Serious:

Number	Percent	Category
272	84.0%	None
22	6.8%	Knife
16	4.9%	Gun
14	4.3%	Other Weapon
117	n/a	Data Unknown

Psychological Grade Prior to Prison Release:

Number	Percent	Category	Grade
372	88.8%	No Impairment Noted	Grade = 1
13	3.1%	Mild Impairment	Grade = 2
32	7.6%	Moderate Impairment	Grade = 3
2	0.4%	Severe Impairment or CHU or CMHI	Grades 4 and 5
22	n/a	Data Unknown	

Offender Age at Time of First Sexual Offense:

Number	Percent	Category
62	16.6%	17 and Under
91	24.3%	18-24 Years
83	22.2%	25-29 Years
92	24.6%	30-39 Years
28	7.5%	40-49 Years
18	4.8%	Over 50 Years
67	n/a	Data Unknown

Total Number of Prior and Current Sexual Convictions Based on Distinct Sentencing Events:

Number	Percent	Category
407	92.3%	One
27	6.1%	Two
6	1.4%	Three
1	0.2%	Four

Total Number of Prior and Current Sexual Convictions Based on Each Offense Charge and Count:

Number	Percent	Category
322	73.0%	One
65	14.7%	Two
24	5.4%	Three
13	2.9%	Four
5	1.1%	Five
9	2.0%	Six to Ten
1	0.2%	Ten to Twenty
2	0.4%	Twenty or More

Years* Since Date of Most Recent Sexual Offense:

Number	Percent	Category
38	9.7%	2 Years or Less
111	28.3%	3-5 Years
142	36.2%	6-10 Years
56	14.3%	11-15 Years
32	8.2%	16-20 Years
13	3.3%	21 or More Years
49	n/a	Data Unknown

*This measure includes any incarceration time. Length of time is computed from the most recent sexual offense date to January 1, 1999.

C. Issues Surrounding the Implementation of the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act of 1998

1. Statutory Placement

As was litigated in the *Hendricks* case, punishment versus treatment has been the controversy over Florida's Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act of 1998. Although original thought by legislative members who sponsored the 1998 legislation was to place the law in the mental health chapter of the *Florida*

Statutes, the law was ultimately placed in ch. 916, F.S., which pertains to mentally deficient and mentally ill defendants in criminal cases. As a result of its placement, many persons, such representatives of the DCFS, DOC, the defense bar, and state attorneys, have expressed a concern over the viability of the law in light of the legislative placement of the law. In order to withstand judicial scrutiny, many state attorneys and other persons involved in the process have opined that double jeopardy and *ex post facto* challenges would have a better chance of being thwarted if this civil procedure was not intermixed with other laws in a statutory chapter that pertain to criminal defendants.

2. Applicability of "Least Restrictive Alternatives"

In actually taking cases under the "Jimmy Ryce Act" to trial, a common source of confusion was the civil commitment of sexually violent predator law under the "Jimmy Ryce Act" being separate and distinctly different from the civil commitment of persons under the Baker Act, which is statutorily placed in Part I of ch. 394, F.S. Many defendants have argued that the law requires there be a finding that there is not a "least restrictive alternative" that is appropriate and available for the subject of the involuntary commitment. This was not the intent of the Legislature in passing this act. Section 916.31, F.S., 1998 Supp., states that sexually violent predators have antisocial personality features which render them likely to engage in criminal, sexually violent behavior, rendering them not amenable to existing procedures for *short-term* commitment under the Baker Act, which is "inadequate." The Legislature stated its intent was to create a civil commitment procedure for the *long-term* care and treatment of sexually violent predators.

3. Multidisciplinary Team(s)

Throughout the sexual predator civil confinement law, *a* multidisciplinary team and *the* multidisciplinary team are referenced. Because of these references in the statute being in the singular, there were questions, especially from judges, regarding whether it was intended that there be only *one* multidisciplinary team that staffs every person who is referenced as a person with a conviction for a sexually violent offense for purposes of applying the procedures of the act. Given the number of persons who have a conviction for a qualifying offense, sheer numbers of cases would make it difficult for there to be only *one team* unless the team consisted of a large number of members that were spread throughout the state geographically.

For the most part, the Department of Children and Family Services interpreted the statutes to authorize multidisciplinary *teams*; the statute was seen as being in the plural. It was further interpreted that the composition of the teams consisted of two members: two licensed psychiatrists, two licensed psychologists, or one licensed psychiatrist and one licensed psychologist. Confusion still remains in the courts as these cases move through the process, however, because there is not agreement as to what these persons must do collectively and what they may do individually in providing its assessment and diagnosis that the person has a personality disorder or mental abnormality making it likely that the person would engage in acts of sexual violence if he or he was released into society.

4. Multidisciplinary Teams' Access to Information

The multidisciplinary teams have ostensibly not been receiving all of the information that is helpful in evaluating and assessing the person. The need for multidisciplinary teams to have access to more information that was not being provided to them by the agencies have jurisdiction and the courts have been raised by both prosecutors and the DCFS. According to some persons in the process, such as persons serving as members on multidisciplinary teams, the record review or "paper review" is the most important, and in most cases, the *only* materials that are utilized by members of the team to conduct the team's evaluation to make an assessment. This is because in the professional opinion of team members, a personal interview of the person was not needed in order to accurately "evaluate and assess" the person.

Confidentiality was an impediment in getting the information the multidisciplinary team needed because much information, such as mental health and medical records, were not subject to the public records law. Therefore, the confidentiality of such information barred access to persons who found the information critical to their evaluations and assessments under this law.

5. Face-to-Face Evaluations

A recurring question that was raised in the courts was whether a face-to-face evaluation was required under the law, and, if so, whether both persons on the multidisciplinary team were required to conduct it. This issue actually resulted in a Jacksonville court dismissing a petition where the court found that face-to-face interviews were not conducted by *both members* of the multidisciplinary team. It is argued that the law is ambiguous that the Legislature intended that the personal interviews were optional, and that if a personal interview was conducted, both members of the team did not have to conduct the personal interview in order for the team to make an assessment. This lack of clarity has posed problems that have been difficult to overcome in courts across the state. With the provision of more clarity, it has been most adamantly argued that the ability to use professional judgement as to whether a personal interview should be conducted in order to make an assessment should remain an *option*, and not become a mandate, for team members.

6. Definition and Location of "Appropriate Secure Facility"

The definition and location of an "appropriate secure facility" has posed a problem for the implementation of the act. Section 916.35, F.S., 1998 Supp., which relates to the determination of probable cause and taking a respondent into custody, references an appropriate secure facility "in the county where the petition was filed." This caused a tremendous problem because it could be argued that there needs to be 67 secure facilities, one designated in each county for purposes of placement of persons pending trials and commitment under the Jimmy Ryce Act.

The DCFS has a secure facility in Martin County that is associated with the Martin Correctional Institution to hold pre-trial persons whose incarcerative sentences expired and persons who are committed to long-term treatment, care, and custody after a trial verdict finding them to be sexually violent predators. At the present time, it has been determined that there is not a need for there to be a an "appropriate secure facility" that is designated by the DCFS in *each* county. If there was the need for additional beds, it is likely that the DCFS would designate new facilities or

it would have to look to county jails to find appropriate secure beds that did not combine criminal detainees and civil commitment detainees. Some persons, such as assistant state attorneys and representatives of the DCFS, claim the language "in the county where the petition was filed" contradicts the provision in the act that stated counties are not obligated to provide funding for this act. It is surmised that in such cases, the state would have contracted with counties for separate jail beds.

7. Administrative Rules

Currently, there are no administrative rules that have been promulgated by Department of Children and Family Services to implement this act. The department has taken the position that it does not have the statutory authority it needs to promulgate rules in accordance with the Administrative Procedures Act. It would be beneficial to provide such authority to the department. The department should develop guidelines for standard qualifications for a person to serve on a multidisciplinary team. The person must be able to testify as an "expert" in court proceedings. In order to comply with the statutory time frames, it would also be beneficial to have the department develop rules establishing the procedure in which cases are processed from the time of receiving referrals through the time team members testify in trials and a verdict is rendered.

8. Treatment Plans

Subsequent to a verdict finding a person is a sexually violent predator, the DCFS must maintain such persons in a secure facility for long-term residential treatment, care, and control. The law does not mandate that the department develop a treatment plan for committed offenders, although the department would obviously do so. Current treatment plans and the manner in which treatments to be used are authorized by the department, which is the state agency that is charged with providing all treatment, care, and custody to persons committed under this act, are unknown to the public and persons subject to this act. For purposes of notice, however, basic treatment plans, authorized treatments, and the process in which treatments are authorized to be used in its facilities, should be developed and provided by rule.

9. Notice to Persons Who Are Subject to Possible Civil Commitment

Many persons in the system that have a conviction for a sexually violent offense that would qualify them for referral to the Department of Children and Family Services are not aware that they are being assessed and evaluated for possible involuntary commitment for an indeterminate period of time. It has been reported by some persons who legally represent persons who have been referred for evaluation and assessment under this act that multidisciplinary team members have conducted personal interviews with their clients without informing their clients why they are talking to them. As a result, this has been a point of contention in courts that has taken up judicial time. Although the person is technically not facing criminal charges in these civil commitment cases, it has been still argued that a Fifth Amendment right to not testify against one's self is still at stake. In the interest of fundamental fairness, the DCFS should develop protocol which would serve to put persons on notice that they are facing possible involuntary civil commitment as a sexually violent predator.

D. A Brief History of Civil Confinement Laws and the *Kansas v. Hendricks* Case

In 1998, the Washington State Institute for Public Policy wrote a comprehensive report of laws providing for the civil confinement of certain sexual offenders. The report includes a brief discussion of the historical evolution of current laws providing for civil commitment of "sexually violent predators," the term coined by the Washington State Legislature for serious sexual offenders. The report states:

> Legislative interest in identifying and containing dangerous sex offenders has a long history in the United States. Starting in the 1930s, serious sex offenders became the focus of special legislation in Michigan, and by 1939 three states had passed laws targeting this group of offenders. Various terms were used to describe the targeted group of sex offenders, including "psychopathic offenders," and most typically, "sexual psychopaths." The underlying assumption of sexual psychopath legislation was that individuals were "mad, not bad," should receive treatment, and once cured could be safely released.
>
> By the late 1960's, over half the states had special statutes authorizing civil commitment for sexual psychopaths. However, the legislative and public support for these laws diminished over time, and by the 1990's, only 13 states and the District of Columbia retained sexual psychopath statutes. Arguments to repeal the statutes were centered on the many horrific offenses committed by program graduates, a desire to have dangerous sex offenders behind bars for significant periods of time, as well as appellate court decisions that certain features of the laws infringed on offenders' civil liberties.

Sexual predator statutes enacted in the 1990's differ from the earlier sexual psychopathy laws in several ways. Key distinctions include the following:

- Predator commitment *follows* a criminal sentence; psychopathy commitment served as an alternative to criminal sentencing.

- Predator laws generally target repeat sexual offenders; psychopathy statutes could be used on individuals convicted of sex offenses for the first time. Lieb & Matson, *Sexual Predator Commitment Laws in the United States: 1998 Update*, Washington State Institute for Public Policy, pp. 1-2 (September 1998).

According to a Washington State study, "[t]he current spate of legislation directed at sexual predators began with passage of the Community Protect Act in Washington State in 1990 . . ." *Id.* at p. 1. "The Washington legislation focused on 'a small but extremely dangerous group' of offenders who lack a mental disease or defect making them appropriate candidates for the state's involuntary treatment act and who are highly likely to reoffend sexually." *Id.*

There have been several other states that have enacted laws similar to Washington's law, such as Kansas' law, which was the first civil commitment of sexual predator law to be challenged at the level of the United States Supreme Court. In 1997, the U.S. Supreme Court upheld Kansas' law in the case of *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997).

Three issues were raised and argued in the *Hendricks* case. The first issue was whether civil commitment of certain sexually violent predators based on a "mental abnormality," rather than a "mental illness," violates substantive due process. The second issue was whether Hendricks' commitment under Kansas' law amounts to double punishment in violation of double jeopardy. The third issue was whether Kansas' law is an *ex post facto* law because it was passed after Hendricks' last conviction and purportedly increased the punishment for his criminal behavior.

The U. S. Supreme Court in the *Hendricks* case upheld Kansas' law in a five-to-four holding. The Court found that a traditionally defined "mental illness" is not a prerequisite to a civil commitment. The Court stated that as a prerequisite to delving into the issues of double jeopardy and *ex post facto*, the conduct must be found to constitute a punishment. The double jeopardy and *ex post facto* issues were resolved in Kansas' favor after the Court determined that civil commitment of sexual violent predators under Kansas' law did not amount to a "punishment."

The Court's reasons for finding that civil commitment is not a punishment were that:

- Retribution or deterrence is not implicated (Kansas' law does not require a conviction);
- Kansas' law requires a prediction of dangerousness, not *mens rea*;
- Sexually violent predators are committed under conditions similar to those of patients, not prisoners;
- The prospect of indefinite commitment indicates that the commitment is until the person's mental condition is altered and not until a fixed amount of time is served; and
- The elaborate and detailed procedural aspects accompanying the civil commitment process are not indicative that a punishment is being prescribed, but rather are indicative that Kansas intended to narrowly define the class of sexually violent predators.

The Court did not specifically indicate whether civil commitment under Kansas' law requires a bona fide effort to treat the sexually violent predator's underlying mental disorder. Some comments of Justice Thomas, the author of the opinion, suggest that all that is required is that treatment be a legislatively-pronounced, ancillary goal in order to satisfy federal due process concerns. However, most civil confinement laws, including Florida's law, require treatment. Further, nothing precludes a state court from addressing a "right to treatment" claim under Florida law.

Since the *Hendricks* opinion, several states, including Florida, Illinois, Iowa, North Dakota, and South Carolina, have enacted civil commitment laws. In all, legislative proposals to enact a sexual predator civil commitment law were introduced in 21 states in 1998. Prior to the *Hendricks* opinion, some researchers have claimed that civil commitment laws showed little individuality; however, they believe that post-*Hendricks* civil commitment laws will show more individuality. *Id*. at p. 2.

E. A Comparison of the Jimmy Ryce Act and Some Other States' Civil Confinement Laws

Contrary to some recent reports regarding the features of Florida's 1998 Jimmy Ryce Act, few of the provisions of the act are unique. The Florida law is, in almost all respects, a hybrid of other states' laws.

The standard for eligible offenders is closely modeled on the laws of Washington, Iowa, and North Dakota. The multidisciplinary team review provisions is conceptually patterned on the laws of Washington, Kansas, Wisconsin, and Arizona. Arizona and Florida require that the sexually violent predator be at least 18 years of age when he or she committed the sexually violent offense. The probable cause hearing, trial, release hearing, and annual review of the person's mental condition are features of all civil confinement laws. The "clear and convincing" standard of proof is a feature of the laws of Florida, Minnesota, New Jersey, and North Dakota. The absence of a conditional release mechanism is found in several states' laws. Florida, like virtually every other state with a civil confinement law, requires treatment for sexually violent predators.

Provided in the chart below is a comparison of some of the main features of states' laws providing for civil confinement of sexually violent predators:

State	Eligible Offenders/ Offenses	Responsible Agency	Setting	Standard of Proof	Jury Trial	Duration	Release Authority
AZ	18 yrs. or older with two or more victims. Standard: likely to engage in sexual violence.	Health Services	Hospital	Beyond a reasonable doubt	Yes	Indeter-minate	Court
CA	18 years or older with two or more victims. Standard: danger to health & safety of others because of sexually violent behavior.	Mental Health	Hospital	Beyond a reasonable doubt	Yes; unani-mous	2 yrs.; can be extended by court with additional petition & trail	Court
FL	18 yrs. or older. Standard: likely to engage in acts of sexual violence.	Children and Family Services	Secure treatment facility	Clear and convincing evidence	Yes; unani-mous	Indeter-minate	Court
IL	Can include juveniles. substantially probable that the person will engage in acts of sexual violence.	Human Services	Secure facility	Beyond a reasonable doubt	Yes	Indeter-minate	Court

State	Eligible Offenders/ Offenses	Responsible Agency	Setting	Standard of Proof	Jury Trial	Duration	Release Authority
IA	Standard: likely to engage in predatory acts constituting sexually violent offenses.	Human Services	Forensic Mental Health Unit within Correct.	Beyond a reasonable doubt	Yes; unani-mous	Indeter-minate	Court
KS	Standard: likely to engage in acts of sexual violence.	Social and Rehab. Services	Correc. Mental Health facility	Beyond a reasonable doubt	Yes; unani-mous	Indeter-minate	Court
MN	Standard: likely to engage in acts of harmful sexual conduct.	Human Services	Hospital	Clear and convincing evidence	No	Indeter-minate	Comm'r
NJ 1994	Relies on mental health commitment law with specific direction that mental illness is not limited to those with psychosis. Standard: likely to engage in acts of sexual violence.	Mental Health	Hospital	Beyond a reasonable doubt	No	Indeter-minate	Court
NJ 1998	18 yrs. or older. Standard: has a mental disorder that makes the person likely to engage in sexual violence.	Human Services	Secure facility operated by Correct. and separate offend.	Clear and convincing evidence	No	Indeter-minate	Parole Board
ND	Standard: likely to engage in further acts of sexually predator conduct.	Human Services	Hospital	Clear and convincing evidence	No	Indeter-minate	Court
SC	Standard: likely to engage in acts of sexual violence.	Mental Health	Secure facility	Beyond a reasonable doubt	Yes; unani-mous	Indeter-minate	Court

State	Eligible Offenders/ Offenses	Responsible Agency	Setting	Standard of Proof	Jury Trial	Duration	Release Authority
WA	Meet definition of "predatory" which is "acts directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." For individuals living in the community, an overt act is required. Standard: likely to engage in predatory acts of sexual violence.	Social and Health Services	Mental Health facility within Correct.	Beyond a reasonable doubt	Yes; unani-mous	Indeter-minate	Court
WI	Can include juveniles. Standard: substantially probable that the person will engage in acts of sexual violence.	Social Services	Hospital	Beyond a reasonable doubt	Yes	Indeter-minate	Court

Source: Lieb & Matson, *Sexual Predator Commitment Laws in the United States: 1998 Update*, Washington State Institute for Public Policy, Table 3 (with minor modifications), (September 1998).

III. Effect of Proposed Changes:

A Part V of ch. 394, F.S., would be created to embody the Florida's laws relating to the civil commitment of sexually violent predators. The bill would transfer ss. 916.31-.49, F.S., 1998 Supp., which was legislatively designated as the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act," to this new Part V of ch. 394, F.S. It is anticipated that by moving this act into the mental health chapter of Florida's laws, the state is viewing and treating such commitments as mental health issues that are treatment-oriented and not matters of punishment or cases that are criminal in nature. By removing the act from ch. 916, F.S., confusion is lessened with regard to such cases being civil in nature and not criminal.

In moving the involuntary civil commitment of sexual predators law into the Mental Health chapter of the *Florida Statutes*, an additional statutory provision would be added to clarify the legislative intent that in doing so, less restrictive alternatives pertaining to the Baker Act under part I of ch. 394, F.S., do not apply to sexually violent predators who are subject to involuntary commitment under Part V of ch. 394, F.S.

Chapter 27, F.S., would be clarified to specifically designate public defenders as legal counsel for indigent persons who are subject to proceedings under the Jimmy Ryce Act. Subsection 27.51 (1), F.S., would require public defenders to provide representation to indigent persons who are "involuntarily placed" as "a sexually violent predator." Unless specifically authorized by statute, the bill would expressly limit this mandate by prohibiting public defenders from representing any person who is a plaintiff in a civil action, as defined in the Florida Rules of Civil Procedure, the Federal Rules of Civil Procedure, or the Federal Code. Additionally, public defenders would be expressly prohibited from representing a petitioner in an administrative proceeding challenging a rule under chapter 120, F.S.

A definition of "secretary" would be provided for Part V to mean the Secretary of the Department of Children and Family Services.

The definition of a "sexually violent offense" would remain the same, except that the offense of "kidnapping of a child under the age of 16" would be changed to "kidnapping of a child under the age of 13" to parallel the Florida statute that designates the criminal offense of "kidnapping of a child under the age of 13." It was determined that the age of "16" was inadvertently taken from a sexual predator statute in another state where its law uses the age of 16 rather than 13, which is the law in Florida.

The definition of "total confinement" would be clarified. Persons who qualify for a referral to the Department of Children and Families because of a conviction for a sexually violent offense, may be temporarily housed in a local detention facility or other secure facility while technically serving an incarcerative sentence under the custody of the Department of Corrections (DOC) or Department of Juvenile Justice (DJJ). In the event a qualifying person comes close to the expiration of his or her sentence while housed in a facility other than a facility operated by DOC or DJJ, a person cannot circumvent the involuntary civil commitment process on a mere technicality. By clarifying the definition, the law would expressly require DOC and DJJ to refer such persons to DCFS for evaluation and assessment for possible civil commitment under the act. Furthermore, the law would expressly provide that persons who are serving incarcerative sentences under the custody of DOC or DJJ, but are being released for expiration of sentence from a different secure facility, must be subject to detention pending determination of probable cause and subsequent trial as provided in the act.

The law would be clarified as to which state attorney would be the designated state attorney in cases where a person has never been convicted of a sexually violent offense in Florida. The bill would provide that the state attorney of the circuit where the person was *last convicted of any offense* in Florida would be the state attorney that would be given a copy of the written notice of the identification of a qualifying person. Because of a prior conviction for a sexually violent offense in some jurisdiction other than Florida, it would trigger the Department of Children and Family Services or the multidisciplinary team to be noticed of the necessity to determine whether the person is a sexually violent predator. This change in the law would designate the state attorney of the circuit where the person was last convicted of any crime as having jurisdiction over a case for possible civil commitment of a sexually violent predator in cases where the qualifying sexually violent offense was not committed in Florida.

The bill would also clarify which state attorney has jurisdiction over cases where a person is being incarcerated in Florida pursuant to interstate compact, but was convicted for the qualifying sexually violent offense in a non-Florida jurisdiction. The agency with jurisdiction would give a copy of the written notice to the state attorney of the judicial circuit where the person plans to reside upon release. In cases where an out-of-state inmate is being incarcerated in Florida pursuant to interstate compact and the qualifying inmate does not plan to reside in Florida upon release, the state attorney in the circuit where the facility from which the person to be released is located is the state attorney that must be noticed for having jurisdiction over the case.

The time frame in which the agency having jurisdiction over a person who has a conviction for a sexually violent offense must give notice to the DCFS (or the multidisciplinary team) and state attorney would be changed. Rather than 180 days before the anticipated release from total confinement or anticipated hearing regarding possible release of a qualifying person, notice must be given *at least 365 days prior* to the anticipated release or anticipated hearing for release. The time frame for a person who was adjudicated delinquent committed to the Department of Juvenile Justice would remain at 90 days.

The practical effect of extending the time frame in which notice must be given is that the process must begin earlier. The most positive effect this would have to the state is that it would greatly diminish the need to place a person who would otherwise be released from criminal incarceration in an "appropriate secure facility" that is operated by DCFS pending civil commitment. If there is not enough time to obtain a judicial determination for civil commitment prior to expiration of an incarcerative criminal sentence, the state must continue to hold such persons if a judge has determined that probable cause exists to believe he or she is a sexually violent predator. The need to detain persons in an appropriate secure facility is alleviated if there is still time remaining on a criminal sentence to be served subsequent to a final determination to civilly commit a sexually violent predator.

When DCFS or the multidisciplinary team is notified by an agency with jurisdiction regarding the impending release of a qualifying person, certain information is to accompany the notification. The bill would require that additional information be provided to the multidisciplinary team. It would require the following additional information be provided, if available: the person's criminal history, police reports, victim statements, pre-sentence investigation reports, post-sentence investigation reports, any other documents containing facts of the person's criminal incidents, mental health records, mental status records, medical records, and all clinical records and notes concerning the person. The bill also specifies that if a person is returned to custody, the multidisciplinary team would receive a written report of his or her adjustment while in custody and any treatment received during that period.

The bill provides clarity on the legislative directives concerning the multidisciplinary team. The bill would specifically authorize multidisciplinary *teams* that are established by the Secretary of the Department of Children and Family Services. The composition of the members of the teams would remain the same as under current law. Each team would be specifically charged with the duty to assess and evaluate each person who is referred to the team. It would be required that the assessment and evaluation of each person include a review of the person's institutional history and treatment record, if any, the person's criminal background, and any other factor that is relevant to the determination of whether such person is a sexually violent predator.

Clarity would be provided on the issue of whether a personal interview with the person subject to the sexually violent predator civil commitment law is required. A personal interview would be *offered* to any person that meets the definition of a sexually violent predator and is recommended by a multidisciplinary team to the state attorney to be the subject of a petition for civil commitment. The personal interview can only be offered to a person and cannot be conducted without the cooperation of the interviewee. Therefore, the opportunity for a person to be interviewed is extended to a person who qualifies. The bill does not require the offer to be made in person. Subsequent to the offer, if the person is willing to be personally interviewed, a team member or other person who is a licensed psychiatrist or licensed psychologist will conduct the personal interview. If a person refuses to be interviewed, the multidisciplinary team may proceed with a recommendation to the state attorney to file a petition without a personal interview of the person who is subject to involuntary commitment.

It would be clarified that the multidisciplinary team must evaluate and prepare a *written* assessment as to whether the person meets the definition of a sexually violent predator and provide that written assessment and recommendation to the state attorney. The bill specifies that the written recommendation must be provided by the Department of Children and Family Services and must include the written report of the multidisciplinary team. Upon receiving the recommendation, the state attorney will continue to have the discretion as to whether a petition seeking civil commitment will be filed. With such discretion, even in cases where DCSF, or the multidisciplinary team, does not make a recommendation to the state attorney to file a petition against a person, the state attorney maintains the authority to still file a petition on that person if there is a good faith belief that the state attorney can prove by clear and convincing evidence that the person is a sexually violent predator.

A new statutory section relating to immediate releases from total confinement would be created. This section would help the DCFS and the state attorneys to expedite cases where, because of unforeseen circumstances, it is anticipated that a person's release from total confinement will become immediate. This section, s. 394.9135, F.S., would assist in dealing with cases such as when inmates successfully challenge gain-time and early release statutes and win early judicially mandated release from prison.

If such a scenario arises, CS/CS/CS/SB 2192 would provide authority for the agency releasing the qualifying person to instead immediately transfer that person to the custody of the DCFS to be held in an appropriate secure facility. The multidisciplinary team would then have 72 hours after the transfer to assess whether the person meets the definition of a sexually violent predator. If the team determines that the person does not meet the definition of a sexually violent predator, the person must be released. If the team determines that the person meets the definition of a sexually violent predator, the team must provide the appropriate state attorney with its written assessment and recommendation with the 72-hour period. The authority also provides that if the 72-hour period ends on a weekend or a holiday, then the assessment and recommendation must be provided to the state attorney within the next working day thereafter.

The state attorney would then have 48 hours after the receipt of the written assessment and recommendation from the multidisciplinary team to file a petition with the circuit court. The petition must allege that the person is a sexually violent predator and must state facts sufficient to support such an allegation. Upon the filing of the petition, if the judge determines that there is

probable cause to believe that the person is a sexually violent predator, the judge must order the person to be maintained in custody and held in an appropriate secure facility for further proceedings through a trial. If the state attorney does not file a petition within 48 hours after receipt of the written assessment and recommendation from the team, the person must be immediately released from custody. However, simply because a person is released from custody because the petition was not filed within 48 hours does not mean that it would be dispositive of the case. Rather, the state attorney may still file a petition in the case and follow the procedures set out in the act to involuntarily commit a sexually violent predator. It is anticipated that if the person is released because the state attorney did not file a petition within 48 hours, a person could be taken back into custody and be held in an appropriate secure facility until there is a trial verdict if the judge finds probable cause on a late-filed petition.

Express language in CS/CS/CS/SB 2192 would provide that the state attorney would not be charged a filing fee in circuit court for filing a petition seeking involuntary civil commitment of a sexually violent predator.

The bill would clarify that a judge is to order that a person remain in custody and be immediately transferred to an appropriate secure facility if the person's incarcerative sentence expires; otherwise the person is to remain in incarceration on his or her criminal sentence. The bill would also help to make obvious that there would be no need for a state attorney to request an adversarial probable cause hearing if the person is still incarcerated for a criminal sentence. It would allow the state attorney to request an adversarial probable cause hearing before the release from custody to be accomplished prior to the expiration of a person's incarcerative sentence. If a person must be held in an "appropriate secure facility" because his or her incarcerative sentence has expired, the bill would remove the requirement that the "appropriate secure facility" be in the county where the petition was filed.

It would be expressly provided in CS/CS/CS/SB 2192 that the Florida Rules of Civil Procedure would apply to proceedings under this act unless other sections in the act specify something different. The Florida Rules of Evidence would also apply unless the act specifies something different.

Some evidentiary provisions would be created giving the state attorney the authority to compel testimony or present evidence that would otherwise be excluded in a court proceeding. For instance, the state attorney would be able to present testimony relating to communications between the subject of the proceedings and his or her psychotherapist, which would otherwise be excluded as privileged information under the psychotherapist-patient privilege under s. 90.503, F.S. This testimony would be admissible if the state attorney convinces the court that the communications are relevant to an issue in the proceedings to involuntarily commit a person.

Another exception in these proceedings that would be created is evidence of "prior bad acts." The court would expressly be allowed to consider evidence of prior behavior by a person who is subject to proceedings for involuntary civil commitment if the evidence is relevant to proving the person is a sexually violent predator. Therefore, the relevance of evidence of prior behavior would be guided by the definition of "sexually violent predator" in s. 916.32 (9), F.S. (Supp. 1998), in current law, or s. 394.912 (10), F.S., as provided in this bill. Therefore, evidence of prior behavior

would be admissible if the court determines the prior behavior by the person is relevant to proving:

- the person has been convicted of a sexually violent offense, or

- the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Hearsay evidence would also be admissible unless the court finds that such evidence is not reliable. The bill expressly states that hearsay evidence may not be used as the sole basis to involuntarily commit a person. Hearsay evidence includes reports of a member of the multidisciplinary team or reports produced on behalf of the multidisciplinary team. This may assist state attorneys with regard to the admissibility of reports of the multidisciplinary team in jurisdictions where the judge is requiring the testimony of both team members before the team's report may be admitted into evidence.

To avoid confusion, the evidence section created in this bill would clarify that the administrative rules promulgated pursuant to this bill are not to be construed as creating an evidentiary predicate for the admission of any physical evidence or testimony in any judicial proceedings under the Jimmy Ryce Act. The bill states that the rules must also not be used as a basis for excluding or otherwise limiting the presentation of any physical evidence or testimony in judicial proceedings under the act. To further clarify the inapplicability in judicial proceedings, the CS/CS/CS states the rules must not be construed to constitute elements of the cause of action for involuntary civil commitment that the state must allege or prove in judicial proceedings under the act.

In proceedings under the Jimmy Ryce Act, expert testimony constitutes a substantial amount of the evidence that is presented to the court and juries. A provision would be included in the evidence section that would place the state and the respondent (a person who is subject to possible civil commitment) on the same level with regard to offering expert testimony. Paralleling Rule 3.202 (e), *Florida Rules of Criminal Procedure*, if a respondent refuses to be interviewed by or fully cooperate with members of the multidisciplinary team or any state mental health expert who is trying to evaluate and assess the respondent, the court would have the authority to limit expert testimony offered by the respondent on the respondent's behalf. The court could prohibit the person's mental health experts from testifying concerning mental health tests, evaluations, or examinations of the respondent. If a person refuses to be interviewed or cooperate, the court could also use its discretion to order the person to allow multidisciplinary team members or any state mental health experts to review all mental health reports, tests, and evaluations by the respondent's mental health expert or experts.

In cases of a trial by jury, once a trial has been conducted and the jury deliberates, the jury would be required to return a unanimous *verdict*. The law is clarified as to what would occur if the verdict was not unanimous. If the jury is unable to reach a unanimous verdict, the court would have to declare a mistrial and poll the jury. The law would remain the same if a majority of the jury would find the person is a sexually violent predator. In those instances, the state attorney would be allowed to refile the petition and begin the process over again through to a new trial. The retrial would still have to be within 90 days.

In cases where the court or the jury finds that the person is a sexually violent predator, it is clarified that the person will be committed to the custody of the Department of Children and Family Services upon the expiration of the incarcerative portion of all of his or her criminal sentences and the disposition of any detainers other than detainers for deportation by the United States Immigration and Naturalization Services.

In cases on appeal, the public defender of the circuit in which the person was determined to be a sexually violent predator would be appointed to represent him or her. The public defender of that circuit may request that the public defender who handles criminal appeals for the circuit in accordance with s. 27.51(4), F.S., represent the person on appeal. If the public defender is unable to represent the person on appeal because of a conflict, the court must appoint other counsel who would be compensated at a rate not less than that of appointed counsel in criminal cases. Filing fees for indigent persons would be waived and costs and fees relating to appeals such as records, transcripts, and compensation of appointed counsel, would be authorized by the trial court and paid from state funds appropriated for that purpose.

Multidisciplinary teams would have express authority to receive information and records that are otherwise confidential or privileged in order to determine whether a person is or continues to be a sexually violent predator. This language would allow team members to have access to records at the time of initial evaluation and assessment, but also after the person has been committed to the DCFS after a trial and is seeking to be released. Access to this information would be provided with the acknowledgment that the information is otherwise confidential and exempt from the public records law under ch. 119, F.S., and that such information would not lose its confidential status simply because it is released to the multidisciplinary team.

In cases where a person is being released from a secure facility under civil confinement as a sexually violent predator, or such a person escapes from a secure facility, CS/CS/CS/SB 2192 would add notice requirements. In cases where a person is being released from commitment after treatment, the bill would require that if the person at the time of release has an active or pending term of probation, community control, parole, conditional release, or other court-ordered or post-prison release supervision, the DCFS must immediately notify the Department of Corrections. The bill would require this notice to actually be provided directly to the Office of Community Corrections in Tallahassee, which is the central office for the state. This would provide the Department of Corrections with the notice needed to make immediate contact with the person in the community because the Department of Corrections is responsible for the actual supervision of any offender who is subject to community supervision. In cases where a person is being released from commitment after treatment and the person has an active or pending term of parole, conditional release, or other post-prison release supervision that is administered by the Parole Commission, the DCFS must also immediately notify the Parole Commission.

If a person is being held in custody because probable cause was found or the person was actually committed as a sexually violent predator and that person escapes while in custody, the DCFS would be required to immediately notify the victim of the escape. The bill would also require the department to notify the state attorney who filed the petition for civil commitment. If the escapee has an active or pending term of probation, community control, parole, conditional release, or other court-ordered or post-prison release supervision, the DCFS would be required to immediately notify the Department of Corrections' Office of Community Corrections in

Tallahassee. The DCFS would also be required to immediately notify the Parole Commission if the escapee has an active or pending term of parole, conditional release, or other post-prison release supervision that is administered by the Parole Commission.

Section 394.930, F.S., would be created to provide legislative authority to the Department of Children and Family Services to develop and adopt rules for the operation, management, and procedures to be followed to administer the civil commitment of sexually violent predators program in the department. The DCFS would be given express rulemaking authority for the following:

- Procedures that must be followed by members of the multidisciplinary teams when assessing and evaluating persons subject to the act.

- The criteria that must exist in order for a multidisciplinary team to recommend to a state attorney that a petition should be filed to involuntarily commit a person under the act. The criteria must include, but are not limited to:

  - the person has a propensity to engage in future acts of sexual violence;

  - the person should be placed in a secure, residential facility; and

  - the person needs long-term treatment and care.

- The designation of secure facilities for sexually violent predators who are subject to involuntary commitment under the act.

- The components of the basic treatment plan for all committed persons under the act.

- The protocol to inform a person that he or she is being examined to determine whether he or she is a sexually violent predator under the act.

CS/CS/CS/SB 2192 directs the Department of Corrections to collect information and compile quarterly reports beginning on October 1, 1999, of inmates released the previous quarter who meet the criteria of a sexually violent predator under part V, chapter 394, F.S., and were referred to the Department of Children and Family Services. The bill specifies the minimum information that must be collected for inclusion in the reports such as whether the qualifying offense was the current offense or the prior offense, the most serious sexual offense, the total number of distinct victims of the sexual offense, whether the victim was known to the offender, whether the sexual act was consensual, and whether the sexual act involved multiple victims.

The bill directs the Office of Program Policy Analysis and Government Accountability to conduct a study and to submit a report to the Legislature by March 1, 2000, on the implementation of the act by the Department of Children and Family Services. The following includes some of the issues to be included in the study: procedures used in assigning persons to a multidisciplinary team and assigning a team to a case for evaluation and assessment, activities performed by the multidisciplinary team in conducting evaluations and assessments, average length of time between the referral by an agency with jurisdiction to DCFS and the department's recommendation to the

state attorney, and a profile of the number of cases and the location of cases that are assigned to the persons who are serving as members of the multidisciplinary team.

The provisions of CS/CS/CS/SB 2192 would take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None. The provision of information to multidisciplinary teams that is excluded from public record will expressly *remain* confidential and will not lose its confidential status. Because the released information is provided to an agency-designated team for the limited purpose of meeting the state's purpose of evaluation and assessment of the person for possible civil commitment as a sexually violent predator, the bill would specifically provide that release of confidential information does not make the information subject to public record.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There should be an increased opportunity for more psychologists and psychiatrists to be assigned to a multidisciplinary team to evaluate and assess persons referred to DCFS.

C. Government Sector Impact:

CS/CS/CS/SB 2192 primarily makes modifications to the Jimmy Ryce Act which are technical or clarifying in nature and does not have a significant adverse fiscal impact upon state and local governmental entities.

By changing the referral from the agency with jurisdiction to the DCFS (or ultimately the multidisciplinary team) from *at least 180 days* to *at least 365 days* before the anticipated release from total confinement, this bill could have a positive fiscal impact on the department. Currently, DCFS is paying the costs associated with detaining a prospective civil commitment during the time prior to trial. This change should allow for this pre-trial period to coincide

with the last days of the person's incarcerative sanction and eliminate or significantly reduce detention costs.

The bill clarifies that counties are not obligated to fund costs for psychological examinations, expert witnesses, and court-appointed counsel, or other costs required by the act. These costs as well as costs for DCFS to deal with the potential civil commitment of incarcerated persons with prior convictions for sexually violent offenses outside the state of Florida are to be paid from state funds appropriated by general law. The bill adds that the state must also pay for the services of mental health professionals appointed, as needed, and requires the state to fund costs and fees associated with appeals under this act by indigent persons.

The DCFS may incur additional costs to promulgate rules and the Office of Program Policy Analysis and Government Accountability may incur some costs related to the report on the implementation of the Act by DCFS, but the amount of those costs are indeterminate. Additionally, the Department of Corrections may incur some costs related to the collection of data on inmates released the previous quarter who meet the criteria of a sexually violent predator and who were referred to DCFS. Those costs are also indeterminate, but the Department of Corrections has already begun to collect such data.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.