

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/SB 2192

SPONSOR: Committee on Children and Families and Senator Klein

SUBJECT: Sexually Violent Predators

DATE: April 8, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barnes</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 2192 creates Part V of ch. 394, F.S., to relocate existing statutory provisions relating to the “Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act” currently found in chapter 916, F.S., relating to the mental health of criminal defendants. In addition to technical and conforming changes, it makes a number of substantive changes to clarify and revise the civil commitment process for a sexually violent predator, as follows:

- clarifying the duties of a public defender to include representation of sexually violent predators who are indigent in civil commitment proceedings and prohibiting representation of such persons in other civil or administrative matters;
- requiring that an offender serve all criminal sentences and detainers prior to civil commitment;
- designating which state attorney has jurisdiction over a qualifying person or offender based on whether the sexual offense conviction occurred in or out of Florida;
- providing information and records to the multidisciplinary team for evaluation and assessment purposes and the release and status of such confidential material to the team;
- applying the Florida Rules of Civil Procedure and Rules of Evidence to the extent that they are not in conflict with the Act
- providing exceptions to inadmissible evidence under the psychotherapy-patient privilege, “prior bad act” evidence, and hearsay rule, but prohibiting a civil commitment based solely on hearsay evidence;
- precluding the use of agency rules adopted as evidentiary predicate, as an exclusion or limitation on evidence or testimony, or as elements to a cause of action that the State must prove;
- clarifying the consequences of unanimous jury verdicts necessary for civil commitment and majority jury verdicts necessary for refiling a petition;
- revising the pre-release review process to begin at least 365 days prior rather than 180 days;

- providing an expedited civil commitment process for immediate or soon-to-be released offenders;
- directing the Department of Children and Family Services to notify the Department of Corrections and the Parole Commission of the upcoming release of a civilly committed person who still has an active term of probation, community control, conditional release, parole or other form of community supervision;
- requiring notification to be made to the victim, state attorney, Department of Corrections and the Parole Commission in cases of a person's escape from civil commitment;
- granting specific rulemaking authority to the Department of Children and Family Services;
- providing for state funding of costs of a mental health professional, if court-appointed, and costs and attorney fees of an appeal by an indigent person under the Act;
- directing the Department of Corrections to collect data in quarterly reports of released inmates who met the criteria of a sexually violent predator and referred under the Act; and
- directing the Office of Program Policy Analysis and Government Accountability to conduct a study and report to the Legislature on the implementation of the Act.

This bill amends transferred and renumbered sections of the Florida Statutes: 394.910, 394.912, 394.913, 394.914, 394.915, 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, and 394.929. This bill creates the following sections of the Florida Statutes: 394.911, 394.9135, 394.9155, 394.930,

II. Present Situation:

In 1998, the Legislature enacted the “Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act” (hereinafter referred to as the “Act”). The Act provides a procedure for the civil confinement of a sexual offender who is determined to be a “sexually violent predator” subsequent to his or her release from custody or upon expiration of his or her incarcerative sentence. *See* §§ 916.31-.49, F.S. (Supp.1998) As a “sexually violent predator,” such person is then 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 with a prior or current conviction for a sexually violent offense who are in custody, and to all persons convicted of a sexually violent offense in the future.

With the exception of a few unique provisions, the Act is a hybrid of most civil commitment laws throughout the United States. The standard for eligible offenders is closely modeled on provisions in Washington, Iowa, and North Dakota. The multidisciplinary team review is conceptually patterned on provisions in Washington, Kansas, Wisconsin, and Arizona. Like Florida, Arizona requires 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 parallels the standard applied in 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.

Nonetheless since its enactment, certain issues have arisen regarding the implementation of the Act as follows:

■ ***Statutory Placement and the Baker Act***

The unique nature of the civil commitment process continues to raise concerns regarding the appropriate view and treatment of persons under the Act, particularly as pertains to due process. The controversy surrounds whether the process is really civil in nature and founded on treatment or criminal in nature and founded on punishment. The statutory placement of the Act in chapter 916, F.S., relating to mentally deficient and mentally ill defendants in criminal cases, appears to have contributed to the ambiguity.

■ ***Multidisciplinary Team and Assessment***

There has also been ambiguity as to whether the Act required the establishment of one central statewide multidisciplinary team or several multidisciplinary teams located throughout the state. Additionally, the law is unclear whether the team membership requires two members or four members. Generally, it has been interpreted to require either two licensed psychiatrists, two licensed psychologists, or one licensed psychiatrist and one licensed psychologist.

The law also does not specify the individual and collective roles the team members have in assessing a person as a “sexually violent predator” under the Act. For example, although the multidisciplinary team evaluates and assesses the person for purposes of the Act, the law does not expressly require a face-to-face or personal interview. The failure to conduct a personal interview by both members of the multidisciplinary team resulted in the recent dismissal of a petition for involuntary civil commitment under the Act.

The multidisciplinary team has also had difficulty in receiving or accessing information and documentation needed to evaluate and assess a person under the Act, due in part to the confidential and public record exemption status as it pertains to records such as mental health and medical records. The record review or “paper review” is often considered the most important, and in most cases, the *only* materials that are used by the multidisciplinary team in making its evaluation and assessment, particularly when a personal interview was not conducted.

■ ***Definition and Location of “Appropriate Secure Facility”***

There is no definition for an “appropriate secure facility” under the Act other than the facility must be located in the county where a petition is filed. *See* §916.35, F.S. (Supp.1998) Thus, there is uncertainty as to whether that requires a designated secure facility in each of the 67 counties for purposes of placement of persons pending trials and commitment under the Act and whether the language implies that the county should be funding the program in some way. At the present time, if additional beds are needed, DCFS designates either new facilities or looks to county jails to find appropriate secure beds that do not combine criminal detainees and civil commitment detainees. The DCFS has a secure facility associated with the Martin County Correctional Institution to hold both pre-trial persons whose incarcerative sentences expired and persons who are committed to long-term treatment, care, and custody after a jury determination finding them to be sexually violent

■ ***Administrative Rule-making Authority***

DCFS has no express statutory rulemaking authority such that no rules have yet been adopted to implement the Act or guidelines developed to address matters such as:

- ▶ the qualification of persons serving on the multidisciplinary team
- ▶ the establishment of a procedure for processing persons from the time of receiving referrals through the time a verdict is rendered after trial
- ▶ the creation of specified criteria regarding basic treatment plans, authorized treatments, and the process in which treatments are authorized to be used in its facilities
- ▶ the protocol for informing qualifying persons subject to examination under the Act.

■ ***Notice to Persons Who Are Subject to Possible Civil Commitment and Representation***

The unique nature of the civil commitment procedure and the lack of certain protocol relating to the process has raised concerns regarding adequate notice and due process. Persons who would qualify for referral to DCFS for possible involuntary civil commitment as sexually violent predators often receive no or inadequate notice as to the purpose and the potential consequences of their evaluation and assessment by the multidisciplinary team. A person under the Act, however, is entitled to assistance of private or court-appointed counsel, if indigent, at all adversarial proceedings. *See* §916.35, F.S. (Supp.1998). The initial probable cause determination is not considered adversarial even though a petition has been filed, and may be held *ex parte* without representation of counsel. No timeline for appointment of a public defender as is provided in the Baker Act which requires an appointment within 1 working day of the filing of a petition for involuntary placement. *See* §394.467(4), F.S. The Act in chapter 916, F.S., does not expressly address the appellate representation of such persons by a public defender.

■ ***Profiles of Persons Who Committed Sexually Violent Offenses and Who May be Subject to Civil Commitment***

Complete data on the profile of qualifying offenders and offenses under the Act has not yet been collected or become available as the Act is still in its infancy. However, the Department of Corrections, in anticipation of quarterly reporting requirements in proposed legislation, has begun to compile data on its qualifying inmates. Based on the criteria in the Act, 441 inmates from the Department of Corrections (DOC) 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 provided below does not constitute a complete profile of offenders or offenses owing to the destruction of historical offense records and information from the courts, to incomplete or unavailable law enforcement data from other states, or to sealed or otherwise unobtainable juvenile records. The number of cases with missing data is specified for each data element in this profile but the percentages are based on known data only.

Eligibility Based Upon Prior or Current Offense:

Number	Percent	Category
344	80.4%	Current Offense
84	19.6%	Prior Offense Only

Number	Percent	Category
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%	Kidnaping-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
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

Number	Percent	Category
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

Number	Percent	Category
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.

III. Effect of Proposed Changes:

The bill creates Part V of ch. 394, F.S., to house the existing law relating to the involuntary civil commitment process for the long-term care and treatment of sexually violent predators. Due to

the nature of the bill, the following contains a specific review of the current law and a section-by-section analysis of the effects of the proposed changes within the context of the current law:

Legislative Findings and Intent, and Representation

Legislative findings and intent have been stated to reflect that sexually violent predators have certain personality features which do not render them appropriate for mental illness treatment and process under the part I of chapter 394, F.S., relating to the Baker Act, that prognosis for rehabilitation for these persons in prison is poor, that they need nontraditional and long-term treatment, and that a civil commitment procedure for the long-term care and treatment of sexually violent predators is to be established. *See* § 916.31, F.S. (Supp. 1998)

Effect of proposed changes:

Section 1 transfers the “Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act” from chapter 916, F.S. (Supp.1998), relating to mentally deficient and mentally ill criminal defendants, to chapter 394, F.S., relating to mental health. Part V is entitled the “Involuntary Civil Commitment of Sexually Violent Predators.” The transfer reflects the stated legislative intent and policy that such commitments are to be viewed and treated as and civil in nature and relating to mental health matters rather than as a criminal in nature and punitive in purpose.

Section 2 amends s. 27.51, F.S., to expand the duties of the public defender to include representation of sexually violent predators in involuntary placement proceedings. Current law provides that a public defender represent indigent persons: a) who are under arrest for, or charged with, a felony; b) under arrest or charged with a misdemeanor, or violation of a city or county ordinance, c) alleged to be a delinquent child, and d) mentally ill persons or persons with developmental disabilities being involuntarily placed or admitted to a facility. However, the bill expressly prohibits a public defender from representing such persons or mentally ill persons or persons with development disabilities, in any other action brought under state or federal rules of procedure, federal statutes, or the Administrative Procedure Act in chapter 120, F.S.

Section 3 transfers and renumbers s. 916.31, F.S. (Supp.1998), as s. 394.910, F.S., relating to legislative findings and intent. It clarifies that the Baker Act applies only to part I of chapter 394, F.S.

Section 4 creates s. 394.911, F.S., to add legislative intent. It states that 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.

Definitions

A definition section is currently included in the Act of which some of the key terms and phrases follow:

- “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.
- “Sexually violent offense” means a felony murder where the felony is sexual battery; kidnaping *or* false imprisonment of a minor child, 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 to commit 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 who 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.

See §916.32, F.S. (Supp.1998)

Effect of proposed changes:

Section 5 transfers and renumbers s. 916.32, F.S. (Supp.1998), as s. 394.912, F.S., relating to definitions. The definition for “sexually violent offense” is amended to change the age from 16 to 13 as pertains to a sexual violent offense involving the kidnaping of a child. This conforms with the criminal statute governing the “kidnaping of a child under the age of 13.”

The Agency Referral Process and the Multidisciplinary Teams

The Department of Children and Family Services is required to establish and designate members of a multidisciplinary team that must include two licensed psychiatrists or two psychologists, or one licensed psychiatrist and one licensed psychologist. The Attorney General serves as the legal counsel to the multidisciplinary team. The agency with jurisdiction over a person who has been convicted of a sexually violent offense is required to give written notice to the multidisciplinary team, and 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 a person who has been returned to confinement for less 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.

See § 916.33, F.S. (Supp.1998)

The agency must also provide the state attorney with information needed to proceed with a petition for civil commitment of a qualifying sexually violent offender, including 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. There is no expedited process provided for unforeseen or unanticipated immediate release of a sexually violent offender.

Effect of proposed changes:

Section 6 transfers and renumbers s. 916.33, F.S. (Supp.1998), as s. 394.913, F.S., relating to the establishment of a multidisciplinary team and notices to the state attorney and the multidisciplinary team.

Specifically, *subsection (1)* is revised to add that in those cases in which a qualifying person under the Act has never been convicted of a sexual offense in Florida, the agency with jurisdiction must provide written notice of the person's identity to the multidisciplinary team and state attorney of the circuit where that person was *last convicted of any offense* in Florida. In those cases in which a qualifying person under the Act was convicted or has a current conviction of a sexually violent offense in a non-Florida jurisdiction but is being incarcerated in Florida under the Interstate Compact, the agency with jurisdiction must provide written notice to the multidisciplinary team and to the state attorney of the circuit where such person plans to reside upon release, or where no state residence is planned, to the state attorney of the circuit where the facility from which the person is to be released is located.

The time period in which notice by the agency having jurisdiction over a qualifying person under the Act is given to the DCFS (or the multidisciplinary team) and the state attorney is expanded from 180 days to *at least 365 days prior* to the anticipated release or anticipated hearing for release. The time period for a person who was adjudicated delinquent and committed to the Department of Juvenile Justice is slightly modified to require notice no less than 90 days before the anticipated release or hearing.

Subsection (2) is amended to require the agency with jurisdiction over the impending release of a qualifying person under the Act to provide in addition to the information already required under law, the following, 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, all clinical records and notes concerning the person, and if a person is returned to

custody after a period of supervision, a written report of the person's adjustment during supervision and any treatment received.

Subsection (3) is amended to clarify that there may be more than one multidisciplinary team and to add legislative directives relating to the multidisciplinary team. The team's basic membership remains unchanged by this bill, but is no longer limited to two psychiatrists or two psychologists, or one psychiatrist and one psychologist. Each team is specifically charged with the duty to assess and evaluate each person referred. It requires the assessment and evaluation of each person to 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 "sexually violent predator." It also adds new language to state that an assessment and evaluation may include, if warranted, a mental examination, including a personal interview to be conducted by a licensed psychiatrist or licensed clinical psychologist who is a member of the multidisciplinary team or otherwise designated by the DCFS.

The bill clarifies 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 a recommendation, both of which must be forwarded, by the DCFS, to the state attorney.

Section 7 creates s. 394.9135, F.S., to provide an expedited involuntary civil commitment process for a person whose release becomes imminent due to factors such as successful gain-time challenges and early release statutes. In such cases, the agency releasing the qualifying person from total confinement in a secure facility operated by the Department of Corrections, the Department of Juvenile Justice, and the Department of Children and Family Services is authorized to immediately transfer that person to the custody of the DCFS in an appropriate secure facility. Within 72 hours after the transfer, the multidisciplinary team must assess whether the person meets the definition of a sexually violent predator. If the person does not meet the definition, the person must be released. If the person does meet the definition, the multidisciplinary team must provide the designated state attorney with its written assessment and recommendation within the 72-hour period. If the 72-hour period falls on a weekend or holiday, the assessment and recommendation must be provided to the state attorney within the next working day thereafter.

The state attorney has 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 alleging that the person is a sexually violent predator must state facts sufficient to support the allegation. 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, the state attorney retains the discretion to file a petition at any later time against the person subject to the Act.

Filing of a Petition by State Attorney and Probable Cause Determinations

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 reserves the right to file or not file a petition to civilly commit a person. *See* §916.34, F.S. (Supp.1998)

When the state attorney files a petition, the judge must make a determination as to whether probable cause exists that the person is a sexually violent predator. *See* §916.35, F.S. (Supp.1998) If it is determined that probable cause exists, the person is to be taken into custody and held in an appropriate secure facility. After the state attorney files a petition for civil commitment and before a person whom the multidisciplinary team recommended for civil commitment is released from custody, the state attorney may further petition the court for an adversarial probable cause hearing.

In an 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, a person is afforded certain rights not otherwise available in the *ex parte* probable cause hearing (which is the only probable cause hearing that is actually *required* under the Act). The person has the right to notice, an opportunity to personally appear at the hearing; 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. If the court again concludes that there is probable cause to believe that the person is a sexually violent predator, the court must direct that the person be held in custody in an appropriate secure facility without opportunity for pretrial release or release during the trial proceedings.

Effect of proposed changes:

Section 8 transfers and renumbers s. 916.34, F.S. (Supp.1998), as s. 394.914, F.S., relating to the time for filing and the contents of a petition. It adds that no filing fee may be charged for the filing of a petition seeking involuntary civil commitment of a sexually violent predator.

Section 9 transfers and renumbers s. 916.35, F.S. (Supp.1998), as s. 394.915, F.S., relating to determination of probable cause, hearing, evaluation and custody. This section clarifies that a judge must order a qualifying person whose incarcerative sentence has expired to remain in custody and be immediately transferred to an appropriate secure facility. It also clarifies that it is upon the expiration of the incarcerative sentence and before the release from custody of a person recommended for civil commitment, that the state attorney may petition the court for an adversarial probable cause hearing, and that the court, upon concluding that there is probable cause, must order the person to be held in a secure facility. There is no longer the requirement that the secure facility be located in the county where the petition for a mental health evaluation was filed.

Section 10 creates s. 394.9155, F.S., to provide that the Florida Rules of Civil Procedure and Florida Rules of Evidence apply to proceedings under the Act unless otherwise specified in the Act. Specifically, this section provides the following:

Subsection (3) provides that the psychotherapist-patient privilege under s. 90.503, F.S., does not apply or exist for communications relevant to the involuntary civil commitment proceedings.

Subsection (4) allows the court to consider evidence of “prior bad acts” if the evidence is relevant to prove the person has a mental abnormality, personality disorder, or propensity to commit sexual offenses.

Subsection (5) also states that hearsay evidence is admissible unless the court finds that such evidence is not reliable. Hearsay evidence may include the report of a member of the multidisciplinary team or reports produced on behalf of the multidisciplinary team. However, hearsay evidence may not be used as the sole basis for commitment of a person under the Act.

Subsection (6) precludes the use of agency rules adopted as an evidentiary predicate for the admission of evidence or testimony, as an exclusion or limitation on evidence or testimony, or as elements to a cause of action that the State must otherwise prove.

Trial to Determine Whether a Person is a Sexually Violent Predator And Commitment

A trial must be conducted within 30 days after the determination of probable cause, to determine whether the person is a sexually violent predator. *See* §916.36, F.S. (Supp.1998) Upon the request of either party and a showing of good cause, or upon the court’s own motion, the trial may be “continued,” or postponed if the person will not be substantially prejudiced by the continuance or the postponement. A person subject to the act is entitled to assistance of counsel at all adversarial proceedings including trials and adversarial probable cause hearings. If the person is indigent, the court must appoint a public defender or, if a conflict exists, other counsel to assist the person in the involuntary civil commitment proceedings.

If a mental health examination is warranted, the person is allowed to retain experts or mental health professionals to conduct the 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 examination is necessary, the court must 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 and the state attorney have the right to demand a jury trial. The demand must be filed in writing at least 5 days before the trial. If no demand is made, the court decides the trial.

The court or jury in the trial must determine by *clear and convincing evidence* whether the person is a sexually violent predator. *See* §916.37, F.S. (Supp.1998) A unanimous jury verdict is needed for such determination. If the jury verdict is less than unanimous but the majority of the jury find the person to be a sexually violent predator, the state attorney may refile the petition. Any retrial must occur within 90 days after the previous trial, unless the subsequent proceeding is continued. The jury’s determination that a person is a sexually violent predator is appealable.

If the court or jury determines that the person is a sexually violent predator, the person is committed to the custody of the DCFS for control, care, and treatment until the person’s mental abnormality or personality disorder has changed such that it is safe for the person to be at large.

The sexually violent predator must be kept in a secure facility segregated from patients who are not committed under this section.

Effect of proposed changes:

Section 11 transfers and renumbers s. 916.36, F.S. (Supp.1998), as s. 394.916, F.S., relating to trial, counsel and experts, indigent persons, and juries. It adds that the state shall pay for the reasonable compensation of a mental health professional appointed by the court when the court determines an examination of a person is needed. It also adds that the jury must consist of 6 members.

Section 12 transfers and renumbers s. 916.37, F.S. (Supp.1998), as s. 394.917, F.S., relating to determination, commitment procedure, mistrials, and housing. The catchline is amended to reflect representation and costs in indigent appellate cases. Specifically, *subsection (1)* is revised to clarify that the court must declare a mistrial in the event of a less than unanimous jury verdict and must poll the jury. The bill does not change existing law which allows the state attorney to refile the petition and proceed again in those cases where the majority of the jury finds the person to be a sexually violent predator. In those cases, the retrial must still be held within 90 days unless otherwise continued.

Subsection (2) is revised to clarify that it is upon the expiration of the incarcerative portion of all the criminal sentences and disposition of any detainees other than deportation by the Immigration and Naturalization Services, that a person determined to be a sexually violent predator by a court or jury is to be committed to the DCFS.

Subsection (3) is added to require the appointment of a public defender on any appeal of an indigent person determined to be a sexually violent predator. The public defender may request that the person be represented on appeal by the public defender who handles criminal appeals for the circuit as designated under s. 27.51(4), F.S. 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 are 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. Presumably, the determination of a person's indigency would be made in accordance with s. 27.52, F.S.

Examination and Petition for Release

The sexually violent predator is required to have a mental examination at least annually. *See* § 916.38, F.S. (Supp.1998). The person may retain a qualified professional. The court must appoint a qualified profession if an indigent person requests. This professional must 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 his or her right to petition for release over the objection of the facility director where the person is housed. The

notice must contain a waiver of rights. The facility director 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 changed such 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 this 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 trial.

At the trial, the person is entitled to the benefit of all constitutional protections afforded the person at the initial commitment trial, except jury trial. The state attorney has the right to have the person examined by professionals chosen by the state. At the trial, the state must prove 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.

The Secretary of the DCFS or a designee may also petition for release of a committed person. See s. 916.39, F.S. (Supp.1998) The petition must be served on 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.

A person is not prohibited from filing a petition for release at any time. However, if a previously filed petition was filed without the approval of the secretary of the DCFS or designee *and* the petition was determined to be without merit, a subsequent petition will be denied unless there are new facts warranting a probable cause hearing. *See* §916.40, F.S. (Supp.1998)

Effect of proposed changes:

Section 13 and 14 transfer, renumber and technically amend the sections as follows:

- s. 916.38, F.S. (Supp.1998), as s. 394.918, F.S., relating to examinations, notice; court hearings for release of committed persons; burden of proof.
- s. 916.39, F.S. (Supp.1998), as s. 394.919, F.S., relating to the procedure for petition for release.

Section 15 transfers and renumbers s. 916.40, F.S. (Supp.1998), as s. 394.920, F.S., relating to petition for release. It also clarifies that although a person is not prohibited from filing a petition for release at any time, it is "any time after commitment."

Confidentiality and Release of Records

All relevant information and records that are otherwise confidential or privileged to the agency having jurisdiction or to the state attorney may be released 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. *See* §916.41, F.S. (Supp.1998). Some types of information may be released as part of the record but must be sealed and opened only under court order (i.e., psychological or psychiatric reports, drug and alcohol reports, treatment records, medical records, or victim impact statements submitted to the court or admitted into evidence). A number of other statutes provide for the confidentiality and the terms of release of certain records or communications. *See* §§ 394.4615, F.S. (relating to clinical records under the Baker Act), 397.501(7), F.S.

(Supp.1998)(relating to records of substance abuse patients), and 490.00515, F.S. (Supp.1998)(relating to public record exemptions for records of psychologists).

Effect of proposed changes:

Section 16 transfers and renumbers s. 916.41, F.S. (Supp.1998), as s. 394.921, F.S., relating to release of records to certain entities. This section adds that information and records may also be released to a multidisciplinary team for purposes of the act. It clarifies that a person, agency, or entity who receives information that is confidential and exempt from the s. 119.07(1), F.S., on behalf of either the agency with jurisdiction, the multidisciplinary team or the state attorney must maintain the confidentiality of that information. Furthermore, such information does not lose its confidentiality upon its release. Section 119.07(1), F.S., relates to the procedure for the inspection, examination, and duplication of records not otherwise exempt under the other subsections and other statutory provisions.

Miscellaneous

Sections 17, 18 and 19 transfer, renumber, and amend statutory cross-references, respectively as follows:

- s. 916.42, F.S. (Supp.1998), as s. 394.922, F.S., relating to constitutional requirements in the long-term control, care and treatment of sexually violent predators.
- s. 916.43, F.S. (Supp.1998), as s. 394.923, F.S., relating to immunity from civil liability for 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.
- s. 916.44, F.S. (Supp.1998), as s. 394.924, F.S., relating to a severability of any unconstitutional provision.

Section 20 transfers and renumbers s. 916.45, F.S. (Supp.1998), as s. 394.925, F.S., and clarifies that the Act applies to all persons convicted of a sexually violent offense and *sentenced to total confinement* in the future.

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 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 an address is known. *See* §916.46, F.S. Supp.1998) 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.

Effect of proposed changes:

Section 21 transfers and renumbers s. 916.46, F.S. (Supp.1998), as s. 394.926, F.S., relating to notice of release of committed person under the Act. Specifically, subsection (2) is added to

provide additional notice requirements in certain cases. In cases where a sexually violent predator is released from civil commitment and still 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' Office of Community Corrections in Tallahassee¹. In cases where a person is released from civil commitment 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.

Escapes

A person who is held in lawful custody pursuant to a judicial finding of probable cause under s. 916.35, F.S., or a sexually violent predator committed under s. 916.36, F.S., and who escapes or attempts to escape while in such custody commits a second degree felony (the same degree offense as an escape from a correctional facility or other supervision). *See* §916.47, F.S. An escapee could receive up to 15 years in prison. There is no current requirement to notify victims or other persons concerning escapes from facilities related to this Act.

Effect of proposed changes:

Section 22 transfers and renumbers s. 916.47, F.S. (Supp. 1998), as s. 394.927, F.S., relating to the felony offense of escape of a person held in custody under a judicial finding of probable cause or commitment under the Act. Specifically, subsection (2) is added to provide for certain notice requirements. 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 is required to immediately notify the victim of the escape and 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 is required to immediately notify the Department of Corrections' Office of Community Corrections in Tallahassee. 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, the DCFS is also required to immediately notify the Parole Commission.

Costs of Subsistence, Treatment, and Court Proceedings

Upon commitment as a sexually violent predator, that person must disclose all revenue and assets to DCFS and must pay some or all of the daily subsistence costs and treatment costs. Payment by a committed person 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

¹The office is the central office for the state and is responsible for the actual supervision of any offender who is subject to community supervision.

subsistence and treatment costs may survive against the person's estate. *See* §916.48, F.S. (Supp.1998)

DCFS is responsible for all costs relating to the evaluation and treatment of persons committed to the DCFS' custody as sexually violent predators. *See* §916.49, F.S. (Supp.1998) 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.

Effect of proposed changes:

Section 23 transfers and renumbers s. 916.48, F.S. (Supp.1998), as 394.928, F.S., relating to subsistence fees and costs of treatment of civilly committed persons under the Act. It also makes some technical conforming changes.

Section 24 transfers and renumbers s. 916.49, F.S. (Supp.1998), as s. 394.929, F.S., relating to DCFS' responsibility for evaluation and treatment costs of civilly committed persons under the Act. It also makes some technical conforming changes.

Rulemaking Authority and Reporting

The Act provides no express rulemaking authority for the Department of Children and Family Services or formal reporting requirements on the civil commitment process and status of sexually violent predators.

Effect of proposed changes:

Section 25 creates s. 394.930, F.S., to give express rulemaking authority to the Department of Children and Family Services, for the following:

- The necessary qualifications to designate and contract with a psychiatrist or psychologist to serve on a multidisciplinary team;
- Assessment and evaluation procedures to be followed by the multidisciplinary teams;
- Criteria for recommendations by a multidisciplinary team to a state attorney to file a petition for involuntary commitment of a person under the Act;
- The designation of secure facilities for sexually violent predators who are subject to involuntary commitment under the act;
- The general treatment plan for all committed persons under this part and all other authorized treatment, or procedures for obtaining approval from the department for treatment that is not delineated or described in the rules of the department for sexually violent predators who are committed under the act; and
- 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.

Section 26 directs the Department of Corrections to collect information and to produce quarterly reports beginning October 1, 1999, on inmates released the previous quarter who meet the criteria of a sexually violent predator under part V, chapter 394, F.S., and who were referred to the Department of Children and Family Services. The reports must contain, at a minimum: information as to 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.

Section 27 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 study must include, but not be limited to: 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.

Section 28 provides for the act to take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill provides for the release of certain confidential and exempted information and records exempted under s. 119.07(1), F.S. However, since the released information is being 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 expressly provides that such information retains its confidential status even after its release.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

- A similar sexually violent predator law in Kansas was upheld by the U.S. Supreme Court in 1997². However, based on a comparison of comparable involuntary commitment laws

²The first constitutional challenge was made to a sexual predator law in Kansas in 1997. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997). In a 5-4 decision, the U. S. Supreme Court upheld the law as it addressed three major issues: 1) whether civil commitment of certain sexually violent predators based on a "mental abnormality," rather than a "mental illness," violated substantive due process, 2) whether Hendricks' commitment under Kansas' law amounted to double punishment in violation of double jeopardy, and 3) 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 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 Court determined that civil commitment of sexual violent predators under Kansas' law did not amount to a "punishment" based on the following: a) retribution or deterrence is not implicated (Kansas' law does not require a conviction); b) Kansas' law requires a prediction of dangerousness, not *mens rea*; c) sexually violent predators are committed under conditions similar to those of patients, not

such as the Baker Act under chapter 394, F.S., and the Forensic Client Services Act under chapter 916, F.S., the Act may still raise some constitutional issues. The underlying issues are not necessarily new but are continuing issues related to the Act, even as amended by the bill, and some of which are currently under review in pending litigation. For example,

- ▶ The bill creates an expedited civil commitment process for those persons who are to be immediately released which may lack available procedural safeguards such as notice of examination, transfer and confinement, and right of representation in subsequent adversarial proceedings. A person may be detained up to 96-hours while the assessment is made within 72 hours and the decision whether to file the petition is made with 48 hours thereafter. If the petition is not filed within that time, the person must be released.
- ▶ The Act, as amended by the bill does not address protocol or minimum guidelines for the assessment of a person under the Act, for criteria or guidelines as to establishment of a long-term care and treatment plan, for informed consent as to the plan and for other rights that the person may have while in commitment as is found in other involuntary civil commitment laws. The *Hendricks* case did not address the issues of whether there had to be a bona fide treatment effort or plan to satisfy any other due process concerns.
- The bill may also involve an unconstitutional delegation of legislative authority to the Department of Children and Family Services by granting the department authority to adopt rules for the qualifications of the multidisciplinary team, the assessment and evaluation procedures, the criteria for recommendation of commitment, the designation of secure facilities, the general treatment plan, and the protocol for informing a person subject to examination under the Act without providing minimum criteria or guidelines. The Florida Constitution expressly prohibits delegation of powers from members of one branch to members of another branch. *See* Art. I, § 9, Fla. Const. The Legislature's constitutional power is to make fundamental policy decisions and any legislation providing for the administration of legislative programs to implement those policy decisions must contain sufficient guidance to the agency to establish rules in accordance with the Legislature's intent. *See Avatar Dev. Corp. v. State*, 723 So.2d 199 (Fla. 1998). "The specificity of the guidelines will depend on the complexity of the subject and the degree of difficulty involved in articulating finite standards." *Id.*, citing to *Askew v. Cross Key Waterways*, 372 So.2d 913, 918 (Fla. 1978).

prisoners; and d) 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 e) 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may create more opportunities for psychologists and psychiatrists, and others to serve on multidisciplinary teams to evaluate and assess persons referred to DCFS.

The bill may provide more protection for victims of sexually violent offenders by including more notice requirements to alert victims of the release or escape of a civilly committed sexually violent predator.

It is uncertain whether the provisions of the bill relating to the admission of privileged psychotherapist-patient communications will deter otherwise inclined persons from seeking any potentially effective rehabilitative treatment.

C. Government Sector Impact:

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 are to be paid from state funds appropriated by general law. The bill adds that the state must also pay for the services of a mental health professional appointed, as needed, and requires the state to fund costs and fees associated with appeals under this act by indigent persons.

The bill may result in some cost for the Department of Children and Family Services to deal with the addition of potential civil commitment of incarcerated persons with prior convictions for sexually violent offenses outside the state of Florida. Additionally, the DCFS will have to promulgate rules that are mandated or authorized by this bill to implement the act. It is indeterminate whether the negative fiscal impact is significant or may otherwise be absorbed through existing fiscal resources.

The DCFS, however, may experience some cost benefit with the expansion of more time to conduct the evaluation and assessment of offenders and the subsequent civil proceedings. This bill allows more time for a person who is subject to the civil commitment law to move through the civil proceedings before they have finished serving his or her criminal sentence in incarceration. Since the referral from the “agency with jurisdiction” to the DCFS (or ultimately the multidisciplinary team) must now occur *at least 365 days before the anticipated release from total confinement*, the need for custody in an “appropriate secure facility” is reduced if a person has a significant amount of time he or she still has to serve in incarceration. Therefore, the pre-trial demand on beds in a DCFS treatment facility is decreased leaving the majority of the demand for post-commitment treatment beds.

The Office of Program Policy Analysis and Government Accountability may incur some costs related to the mandated study and legislative report on the implementation of the Act by the Department of Children and Family Services.

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 under part V, chapter 394, F.S., and who were referred to the Department of Children and Family Services. The Department of Corrections has already begun to collect such data. The reports must contain, at a minimum, 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 changes made in CS/SB 2192 are not anticipated to have any fiscal impact upon the Department of Corrections or the Department of Juvenile Justice.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- Section 6 (*See* § 394.913(3)(b)-(c), F.S., as amended by the bill)
 - ▶ The basic membership of the multidisciplinary team is not changed except that the membership is no longer restricted to two licensed psychiatrists or psychologists. No limitations or guidelines are provided for whom else could be appointed to the team. However, the Department is directed to adopt rules relating to this issue.
 - ▶ Additionally, a personal interview (if warranted) may be conducted only by a licensed psychiatrist or licensed *clinical* psychologist who is a member of the team or designated by the department. However, the Department is directed to adopt rules relating to this issue.
 - ▶ As stated, the assessment and evaluation may include, “. . .if warranted, a mental health examination, including a personal interview.” It is unclear whether the personal interview is an automatic part of the mental health examination and as such, whether the option actually goes to the mental health examination, the personal interview, or both. However, the Department is directed to adopt rules relating to this issue.
- Section 10 (*See* § 394.99155, F.S., as amended by the bill)
 - ▶ The bill provides for three broad exceptions to traditionally inadmissible evidence, if relevant to an issue, in all civil commitment proceedings (which implies its application even in the initial *ex parte* probable cause determination³): 1) inapplicability of the psychotherapist-patient privilege under s. 90.503, F.S., for communications, 2) evidence of prior bad acts, and 3) hearsay evidence if not otherwise excluded by the court. These types of evidence, especially hearsay evidence, are traditionally excluded for prejudicial effect, unreliability and lack of opportunity to cross-examine any person, information or document submitted.

³There is no requirement that the *ex parte* determination order be based on sworn testimony or other reliable source.

The inapplicability of the psychotherapist-patient privilege would appear to allow a psychotherapist or other person participating in therapy with the qualifying person, to disclose relevant formerly privileged communications without the consent of the patient. *See* §491.0147, F.S. (relating to confidentiality and privileged communications with a licensed or certified person providing clinical, counseling and psychotherapy services) Under the current Evidence Code, such privilege can only be asserted by the patient, the guardian, or the personal representative. The psychotherapist can only assert the privilege with the consent of the patient. There are three current exceptions to the privilege, as follows: a) when communications are relevant to an issue in the proceeding to compel hospitalization for mental illness, b) when communications are made in the course of court-ordered mental or emotional examination, and c) when communications are relevant to an issue in the proceedings in which the mental or emotion state is an element of a claim or defense. *See* § 90.503, F.S.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
