

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Criminal Justice Committee

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BILL: CS/SB 1216

SPONSOR: Criminal Justice Committee and Senators Argenziano, Fasano, and Klein

SUBJECT: High Risk Offenders

DATE: April 7, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson/Cannon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	<u>Withdrawn</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	<u>WM</u>	_____
5.	_____	_____	<u>RC</u>	<u>Withdrawn</u>
6.	_____	_____	_____	_____

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## I. Summary:

The Jessica Lunsford Act:

- Mandates lifetime imprisonment or lifetime supervision with electronic monitoring for persons convicted of lewd and lascivious molestation of a child under 12 (currently there is no life-time supervision mandate).
- Expands from 20 years to 30 years the period of time before someone can petition to have the sexual predator designation removed.
- Creates a new aggravating circumstance to qualify a murdering sexual predator for a death sentence.
- Creates a new 3rd degree felony for harboring a registered sex offender/predator.
- Requires the Florida Department of Law Enforcement (FDLE) to provide information to local law enforcement officials about sexual predators and sexual offenders who fail to register or fail to respond to address verification attempts or otherwise abscond from registration requirements.
- Requires the Department of Corrections (DOC) to purchase and operate fingerprint-reading equipment for probation officers to better track probationers when they are rearrested.
- Increases the penalty for the failure of a sex offender or sexual predator to register.

- Enhances the penalty for lewd and lascivious molestation of a child younger than 12 years of age from a 1st degree felony to a life felony.
- Requires county misdemeanor probation officials to search the sex offender/predator registry.
- Requires contracts with private misdemeanor probation providers to include procedures for accessing criminal history records of probationers.
- Requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the registry and report findings to the Legislature.
- Almost triples the funding of electronic monitoring units used by state probation officials.
- Creates a task force within FDLE to examine the collection and dissemination of criminal history records.
- Directs DOC to review and report serious offenses committed by probationers.
- Directs DOC to develop a risk assessment and alert system to monitor high risk offenders and to provide cumulative histories to the court on high risk offenders.
- Requires DOC to notify the court and other officials of the number and type of available electronic monitoring devices.
- Prospectively mandates that the Parole Commission order electronic monitoring for persons who are leaving prison on conditional release and who have been convicted of various unlawful sex acts against a child 12 years of age or younger.
- Retroactively requires the court to electronically monitor registered sex offenders and sexual predators whose victims were 12 years of age or younger and who violate their probation or community control and the court imposes a subsequent term of probation and community control.
- Prospectively mandates the court to order electronic monitoring for persons placed on probation or community control who: are convicted or previously convicted of various unlawful sex acts against a child 12 years of age or younger; or are registered sexual predators.

This CS amends ss. 775.21, 775.082, 800.04, 921.0022, 921.141, 943.043, 943.0435, 944.607, 947.1405, 948.012, 948.11, 948.15, 948.30, F.S. The CS creates unnumbered sections and creates ss. 943.04352, 948.061, 948.062, 948.063, F.S.

## **II. Present Situation:**

### **High-Profile Cases**

On February 1, 2004, a car wash security camera recorded the abduction of 11-year old Carlie Brucia as she walked home from a friend's house in Sarasota, Florida. A suspect was apprehended in part as a result of public response to the dissemination of the video and pictures by the media. Tragically, Carlie's body was discovered five days after her abduction.

It was quickly learned that the suspect, Joseph P. Smith, was a convicted felon who was on felony drug offender probation at the time of the crime. Smith has a significant criminal history and there were indications that he had violated the conditions of his probation by using drugs and failing to meet court-ordered financial obligations. If a court had found that Smith violated his probation in a material respect, it could have revoked his probation and returned him to custody. Therefore, some media portrayed the case as a failure of the system, or of individuals in the system, to properly carry out the duty of protecting the public. In the 2004 Legislative Session, bills responding to this case were introduced, debated, and passed in each respective chamber of the Legislature, but neither failed to pass both chambers.

Approximately 13 months after the tragic death of Carlie Brucia, 9-year old Jessica Lunsford, of Homosassa, Florida was abducted from her home while sleeping, sexually assaulted, and murdered. The man accused of the murder, John Couey, had a significant and prolonged criminal history, is a registered sex offender, and was on misdemeanor probation at the time of the crime. There were indications that misdemeanor probation officials were unaware of Couey's criminal history and his status as a designated sex offender and Couey failed to notify law enforcement of his residency change. In this case as well, some of the media, the victim's family, and a citizen's group portrayed the case as a failure of the criminal justice system to properly carry out the duty of protecting the public from sex offenders.

### **Penalty for Life Felony**

Section 775.082(3)(a)3., F.S., provides that a person who has been convicted of a life felony committed on or after July 1, 1995, must be sentenced to a term of imprisonment for life or for a term of years not exceeding life imprisonment.

### **“Sexual Predator” Definition**

Section 775.21(4), F.S., provides that an offender must be designated by a court as a “sexual predator,” who is subject to registration and community and public notification, if the offender has one current qualifying offense, one current qualifying offense and one prior qualifying offense under the sexual predator criteria, or has been determined to be a sexually violent predator pursuant to a civil commitment proceeding under ch. 394, F.S.

An offender is designated as a sexual predator if the offender was convicted of the current offense, the offender committed or attempted to commit the offense on or after October 1, 1993, and the offense is any of the following capital, life, or first-degree felony offenses:

- Kidnapping (s. 787.01, F.S.) or false imprisonment (s. 787.02, F.S.) where the victim is a minor and the defendant is not the victim's parent;
- Sexual battery (ch. 794, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age (s. 800.04, F.S.);
- Selling or buying of minors for portrayal in a visual depiction of the minor engaging in sexually explicit conduct (s. 847.0145, F.S.); or
- A violation of a similar law of another jurisdiction.

An offender is also designated as a sexual predator if the offender was convicted of the current offense, the offender committed or attempted to commit the current offense on or after October 1, 1993, the current offense is a qualifying offense, and the offender has a prior qualifying offense. A current qualifying offense is any of the following offenses:

- Kidnapping or false imprisonment where the victim is a minor and the defendant is not the victim's parent;
- Luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (s. 787.025, F.S.);
- Sexual battery (under ch. 794, F.S., but excluding s. 794.011(10), F.S., and s. 794.0235, F.S.);
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age;
- Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult (s. 825.1025(2)(b), F.S.);
- Sexual performance by a child (s. 827.071, F.S.);
- Selling or buying of minors for portrayal in visual depiction engaging in sexually explicit conduct; or
- A violation of a similar law of another jurisdiction.

To qualify as a prior qualifying offense the offender must have previously been convicted of or found to have committed or pled nolo contendere or guilty to, regardless of adjudication, the offense and the offense must be any of the following offenses:

- Kidnapping or false imprisonment where the victim is a minor and the defendant is not the victim's parent;
- Luring or enticing a child where the victim is a minor and the defendant is not the victim's parent;
- Sexual battery on a person less than 12 years of age (s. 794.011(2), F.S.); sexual battery on a person 12 years of age or older with threat of deadly weapon or physical force (s. 794.011(3), F.S.), under various circumstances (s. 794.011(4), F.S.), or without physical force or violence likely to cause serious personal injury (s. 794.011(5), F.S.); or soliciting a person less than 18 years of age to engage in sexual battery or committing sexual battery upon a person less than 12 years of age, if the person soliciting or engaging in the sexual battery is in a position of familial or custodial authority over the person;
- Unlawful sexual activity with certain minors (s. 794.05, F.S.);

- Procuring a person less than 18 years of age for prostitution (s. 796.03, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age;
- Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult;
- Providing obscene material to a minor (s. 847.0133, F.S.);
- Computer pornography (s. 847.0135, F.S.);
- Selling or buying of minors for portrayal in a visual depiction of the minor engaging in sexually explicit conduct; or
- A violation of a similar law of another jurisdiction.

A prior qualifying offense must also be a felony that resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony. If the offender's prior enumerated felony was committed more than 10 years before the primary offense, it is not considered a prior if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later.

### **Sexual Predator Registration**

Section 775.21, F.S., provides that a designated sexual predator who is in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is in the custody of a private correctional facility, must register with the DOC and provide specified information.

If the sexual predator is not in the custody or control of, or under the supervision of, the DOC, or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially register in person at a Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community, including a predator under the DOC's supervision, must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements.

Registration procedures are also provided for sexual predators who are under federal supervision, in the custody of a local jail, designated as a sexual predator (or a similar designation) in another state and establish or maintain a residence in this state, or are enrolled, employed, or carrying on a vocation at an institution of higher education in this state.

Procedures are provided for notifying communities about certain information relating to sexual predators, much of which is compiled during the registration process. The law directs how information collected by the DOC, the DHSMV, and others, is to be provided to the FDLE. Extensive procedures are also provided for verification of sexual predator's addresses.

A sexual predator's failure to comply with registration requirements of s. 775.21, F.S., is a 3rd degree felony. s. 775.21, F.S. A sexual predator who has been convicted of one of a list of enumerated offenses when the victim of the offense was a minor is prohibited from working or volunteering at any business, school, day care center, park, playground, or other place where children regularly congregate. A violation of this provision is a 3rd degree felony.

A sexual predator is required to maintain registration for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding. A sexual predator who was designated as a sexual predator by a court before October 1, 1998, and who has been released from confinement or supervision for at least 10 years and has not been arrested for any felony or misdemeanor offense since release, may petition the criminal division of the circuit court in the circuit where the sexual predator resides for removal of the sexual predator designation. For a person who was designated a sexual predator on or after October 1, 1998, a 20-year waiting period applies.

### **“Sexual Offender” Definition**

Section 943.0435, F.S., requires that certain persons who meet the definition of “sexual offender,” as provided in s. 943.435(1), F.S., register as such according to the registration requirements of the section. Section 943.0435(4), F.S., provides that, as used in the section, “sexual offender” means any of the three described persons:

- A person who has been released on or after October 1, 1997, from the sanction imposed in this state or any other jurisdiction for a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the following offenses proscribed in this state or similar offenses in another jurisdiction:
  - Kidnapping or false imprisonment where the victim is a minor and the defendant is not the victim's parent;
  - Luring or enticing a child where the victim is a minor and the defendant is not the victim's parent;
  - Sexual battery (under ch. 794, F.S., but excluding s. 794.011(10), F.S. and s. 794.0235, F.S.);
  - Procuring a person less than 18 years of age for prostitution;
  - Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age;
  - Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult;
  - Sexual performance by a child;
  - Providing obscene material to a minor;
  - Computer pornography;
  - Electronic transmission of child pornography (s. 847.0137, F.S.);

- Electronic transmission to minors of material harmful to them (s. 847.0138, F.S.);
  - Selling or buying of minors for portrayal in a visual depiction of the minor engaging in sexually explicit conduct; or
  - Any similar offense committed in this state which has been redesignated from a former statute number and is one of the offenses previously described.
- A person who establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction.
  - A person who establishes or maintains a residence in this state and who is in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the offenses previously described or any similar offense in another jurisdiction.

Section 944.607(1), F.S., requires the DOC to notify the FDLE of information regarding certain persons who meet the definition of “sexual offender” in s. 944.607(1), F.S. Section 944.607(1), F.S., provides that, as used in the section, “sexual offender” means either of the following persons:

- A person who is in the custody or control of, or under the supervision of, the DOC or is in the custody of a private correctional facility on or after October 1, 1997, as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the offenses previously described in the explanation of s. 943.0435(1), F.S.
- A person who is in the custody or control of, or under the supervision of, the DOC or is in the custody of a private correctional facility and who establishes or maintains a residence in this state and has not been designated as a sexual predator by a court of this state but has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction.

### **Sexual Offender Registration**

Sections 943.0345 and 944.607, F.S., require a sexual offender to report and register in a manner similar to the registration of a sexual predator under s. 775.21, F.S. Section 944.607, F.S., pertains to the sexual offender who is under the custody or control of the DOC, or under its supervision, or in the custody of a private correctional facility.

Failure of a sexual offender (under s. 943.0435, F.S., or s. 944.607, F.S.) to comply with the registration requirements is a third degree felony.

## **Search of Registration Information Regarding Sexual Predators and Sexual Offenders Required Prior to Appointment or Employment**

Section 943.04351, F.S., provides that a state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the FDLE under s. 943.043, F.S. The agency or governmental subdivision may conduct the search using the Internet site maintained by the FDLE. This section does not apply to those positions or appointments within a state agency or governmental subdivision for which a state and national criminal history background check is conducted.

## **Lewd Molestation**

Section 800.04(5)(a), F.S., provides that a person who intentionally touches in a lewd or lascivious manner<sup>1</sup> the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

Section 800.04(5)(b), F.S., provides that an offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a first degree felony. If the offender is less than 18 years of age and the victim is less than 12 years of age, or the offender is 18 years of age or older and the victim is 12 years of age or older but less than 16 years of age, the lewd molestation is a second degree felony.<sup>2</sup> If the offender is less than 18 years of age and the victim is 12 years of age or older but less than 16 years of age, the lewd molestation is a third degree felony.<sup>3</sup>

The lewd molestation offense in s. 800.04(5)(b), F.S., is ranked in Level 9 of the Criminal Punishment Code offense severity ranking chart.

## **The Criminal Punishment Code**

Under the Criminal Punishment Code,<sup>4</sup> Florida's sentencing code for felony offenses, except capital offenses, committed on or after October 1, 1998, there are 10 offense ranking levels. All felony offenses, excluding capital offenses, are either specifically ranked in a ranking level of a ranking chart<sup>5</sup> or, if not specifically ranked in the chart, are ranked by a "default" provision<sup>6</sup> based on the felony degree of the offense. Sentencing points accrue based on the level ranking of

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<sup>1</sup> The term "lewd" and the term "lascivious" are not defined in the section, but their meanings are understood by the courts. "The terms lewd and lascivious are indicative of sexual conduct, and are 'synonyms that connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.'" *Fretwell v. State*, 852 So.2d 292, 293 (Fla. 4th DCA 2003), quoting *Chesebrough v. State*, 255 So.2d 675, 677 (Fla.1971).

<sup>2</sup> s. 800.04(5)(c)1. and 2., F.S.

<sup>3</sup> s. 800.04(5)(d), F.S.

<sup>4</sup> ss. 921.002 – 921.0027, F.S.

<sup>5</sup> s. 921.0022, F.S.

<sup>6</sup> s. 921.0023, F.S.



a felony offense. The higher the level ranking of the offense, the greater the number of sentencing points for the offense. These points, along with points accrued for other factors, are used in a mathematical formula that determines a lowest permissible sentence.<sup>7</sup> This formula not only determines if the lowest permissible sentence scored will be a prison sentence or may be a nonprison sanction, but also determines the length of a lowest permissible sentence of imprisonment.

If the lowest permissible sentence scored is a prison sentence,<sup>8</sup> the sentencing court must impose at least the lowest permissible sentence, unless there are mitigating grounds (most of which are specified in statute<sup>9</sup>) for imposing a lesser sentence. However, the court is free to impose a greater sentence within a range<sup>10</sup> consisting of the lowest permissible sentence scored up to and including the maximum penalty imposed for the felony degree of the offense before the court for sentencing.

If the lowest permissible sentence scored is a non-prison sanction, the sentencing court is free to impose a non-prison sanction for the offense before the court for sentencing. However, the court may impose a prison sentence up to and including the maximum penalty for the offense before the court for sentencing.<sup>11</sup>

### **Aggravating Factors in a Capital Case**

When a defendant is convicted of a capital felony resulting in a death, a separate sentencing proceeding is required after the finding of guilt. Section 921.141(1), F.S., states: “In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).”

Section 921.141(5), F.S., sets forth the following aggravating factors:

- The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or

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<sup>7</sup> s. 921.0024, F.S.

<sup>8</sup> Any sentence to state prison must exceed one year. s. 921.0024(2), F.S.

<sup>9</sup> s. 921.0026, F.S.

<sup>10</sup> A sentence may be appealed on the basis that it departs from the Code only if the sentence is below the lowest permissible sentence (i.e., a mitigated sentence) or it is one of the grounds for an appeal by a defendant that are specified in s. 924.06(1), F.S., such as an appeal from an illegal sentence or a sentence that exceeds the maximum penalty in s. 775.082, F.S., for the offense, unless otherwise provided by law. s. 921.002(1)(h), F.S.

<sup>11</sup> In a very limited number of cases, the lowest permissible sentence scored actually exceeds the maximum penalty provided in s. 775.082, F.S., for the felony degree of the offense before the court for sentencing. This typically happens when the offender has an extensive number of prior serious felonies, which score sentencing points, and/or the offense resulted in a death for which sentencing points accrue. Florida law addresses these cases by making the lowest permissible sentence scored both the minimum penalty (absent mitigation) and the maximum penalty. s. 921.0024(2), F.S.

- attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
  - The capital felony was committed for pecuniary gain.
  - The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
  - The capital felony was especially heinous, atrocious, or cruel.
  - The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
  - The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
  - The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
  - The victim of the capital felony was a person less than 12 years of age.
  - The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
  - The capital felony was committed by a criminal street gang member, as defined in s. 874.03, F.S.

Section 921.141(6), F.S., sets forth the following mitigating circumstances:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.
- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

After hearing the evidence by counsel, the jury (unless the jury is waived by the defendant) makes a sentencing recommendation to the court for either life or death. This recommendation is decided by a majority vote. Section 921.141(2), F.S., requires that the advisory sentence be based upon the following factors:

- Whether sufficient aggravating circumstances exist

- Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The court may or may not follow the recommendation of the jury. Section 921.141(3), F.S., provides that, notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- That sufficient aggravating circumstances exist<sup>12</sup> as enumerated in subsection (5), and
- That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

### **Electronic Monitoring of Felons**

The DOC uses three different types of electronic monitoring of offenders on supervision. The primary differentiation between electronic monitoring approaches is whether it uses radio frequency technology or GPS technology. GPS-based electronic monitoring is further divided into active GPS monitoring and passive GPS monitoring. All varieties of electronic monitoring require the offender to wear an electronic device on his or her body.

Radio frequency monitoring essentially provides a curfew check to verify whether an offender is within an area to which he or she has been restricted. Most commonly, RF monitoring is used to determine whether an offender on house arrest is in the home. The offender must wear a small transmitter, which can weigh as little as an ounce, that transmits a radio signal to a small receiving unit. The broadcast range of the transmitter is typically about 150 feet, but many systems allow the range to be adjusted depending upon individual circumstances. The receiving unit is linked to a telephone line. If the receiving unit does not receive the radio signal from the transmitter, it causes a telephone alert to be sent to the monitoring station. In turn, the monitoring station notifies the probation officer that the signal has been lost and the offender may have left the restricted area.

RF monitoring systems can be programmed to account for periods when the offender is permitted to be away from the restricted area, such as to go to work or to attend religious services. However, RF monitoring does not provide any information about the offender's location when the offender moves outside the range at which the receiver can detect the radio transmission.

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<sup>12</sup> While multiple aggravating factors may apply, "doubling" of aggravating factors is impermissible. This doubling occurs where the factors are not "separate analytical concepts" that "can validly be considered to constitute two circumstances." *Provence v. State*, 337 So.2d 783, 786 (Fla.1976)). It also occurs where the factors "rely on the same essential feature or aspect of the crime." *Banks v. State*, 700 So.2d 363, 367 (Fla.1997). It also occurs where the factors are not "separate and distinct" but rather "merely restatements of one another" (e.g., murder committed during a robbery and murder committed for pecuniary gain). *Id.*

The cost for this form of RF monitoring is approximately \$2.75 per day, the least expensive of all forms of electronic monitoring.

Passive GPS monitoring systems require the monitored offender to wear a small radio transmitter on his or her body and to wear or carry a device that includes a radio receiver, a GPS receiver, and a storage unit. The transmitter and receiver combination ensures that the offender remains close to the GPS receiver. As is the case with RF monitoring systems, the transmitter is attached to the offender with a bracelet that has some type of tamper-resistant and/or tamper-alert technology.

Unlike RF monitoring, a passive GPS system is not restricted in range to a base location. It detects the offender’s movements as he or she moves about. The device can record that the offender left an area and can pinpoint the offender’s location during the day. Because the defendant’s location can be accurately determined, the system parameters can be set to determine that the offender entered an area from which he or she is legally excluded, such as when a sex offender goes within 1000 feet of a school. The system is referred to as passive because it records the information for later examination by the probation officer. At the end of a specified interval, normally daily, the offender must download the information from the GPS receiver to another device. Depending on the sophistication of the system, the information can either be sent to the monitoring station by telephone or stored for future retrieval. When the data is compared against a set of known locations, such as a map with GPS coordinates, an analyst can determine where the offender was at any particular time.

Passive GPS monitoring is relatively inexpensive at approximately \$4 per day. Active GPS monitoring uses the same basic technology as passive GPS monitoring, but provides near real-time reporting of the offender’s location. Active GPS monitoring incorporates a cell phone into the equipment in order to transmit the offender’s location coordinates to a monitoring station. The system is designed to provide an alert to the probation officer when the offender either leaves an area to which he or she is restricted or enters an area from which he or she is barred. Because of the additional expense for cell phone service and 24-hour monitoring, active GPS monitoring systems cost approximately \$9 per day.

For either type of GPS monitoring system, the department or its contractor maintains an archive of the GPS data points (locations) of offenders on either type of GPS monitoring. Therefore, a law enforcement agency can request a search of the database to determine whether a monitored offender was in the area when a crime was committed.

According to statistics from the DOC, in January 2005, the following number of offenders on supervision were electronically monitored:

	Sex Offenders	Other	Total
Radio Frequency	27	158	185
Passive GPS	13	10	23
Active GPS	224	275	499
Total	264	443	707

Section 948.11, F.S., governs the department’s use of electronic monitoring devices.

**Conditional Release (Operated by the Parole Commission)**

Section 947.1405, F.S., creates the conditional release program. This program requires an inmate convicted of repeated violent offenses that is nearing the end of his or her sentence to be released under DOC supervision for the remainder of their sentence. This period of post-release community supervision is typically short (about a year) since the statutory mandate for inmates to serve 85 percent of their court imposed sentence leaves only a short period of time (15 percent of their sentence) remaining for conditional release supervision prior to the expiration of the sentence.

The Parole Commission sets the length and conditions of release while the DOC supervises the offender while on conditional release. There is a list of required conditions of release set forth in the section. For a releasee whose sexual offense was committed on or after October 1, 1997, the commission is statutorily authorized to order electronic monitoring.

**Community Supervision (Operated by DOC)**

As of December 31, 2004, there were 146,692 offenders on some form of community supervision in Florida. This number fluctuates as offenders are added to supervision, are released from prison onto supervision, have their supervision revoked and are sent to prison, or successfully complete their term of supervision.

The following table illustrates the types of supervision and the number of offenders who are on probation or community control, the most common types of community supervision:

Probation (active and active suspense)	122,477
Standard probation	99,609
Drug offender probation	17,711
Sex offender probation	3,221
Administrative probation	1,936
Community Control	10,908
Standard community control	10,615
Sex offender community control	293

Felony probationers and community controllees are under the jurisdiction of the circuit court, and are supervised by the DOC.

People who are found to have committed crimes can be placed on some form of community supervision, such as probation or community control, by any court having jurisdiction over criminal actions. The statute recommends community supervision for offenders who appear not likely to reoffend and who present the lowest danger to the welfare of society. Generally, this means those offenders whose sentencing guidelines score sheet does not recommend incarceration under the Criminal Punishment Code. There is also the possibility that a person can be diverted to a pretrial intervention program without having to go to trial or enter a plea.

Approximately one-fourth of the offenders on probation or community control committed theft, forgery, or fraud as their most serious offense. Another one-fourth are on community supervision for committing a drug offense. Murder/manslaughter, sexual offenses, robbery, and other violent crimes account for another one-fourth of the community supervision population. Of those placed on probation, 63 percent have no prior community supervision commitments and 87 percent have never been sentenced to prison. Of those placed into community control, 39 percent have no prior community supervision commitments and 82 percent have never been sentenced to prison.

***Felony Probation*** – Probation is a term or sentence imposed by the court with standard statutory conditions as well as special conditions that may be imposed by the court. Probation lasts for a specific period of time that cannot exceed the maximum sentence for the offense. The first two conditions that apply to probation and all forms of supervision require the probationer to report to his or her correctional probation officer and permit the officer to visit the probationer at work, home, or elsewhere. This requirement ensures that contact is maintained throughout the term of probation.

***Sex Offender Probation and Sex Offender Community Control*** – Section 948.30, F.S., specifies additional terms and conditions for those felony probationers and community controlees who have committed certain sex offenses.

Sex offender probation and sex offender community control require intensive supervision that emphasizes treatment. As with any form of community control, it may also include electronic monitoring. Like drug offender probation, officers with specific training or experience and with limited case loads are assigned to supervise sex offenders. Each offender in this program has an individualized plan of treatment. The standard terms and conditions of probation or community control apply to persons on sex offender probation, along with additional terms and conditions specified in the statutes. These conditions restrict the sex offender in terms of where he or she may live, work, and visit; with whom he or she may associate; and when he or she may be outside the residence. The statute also requires DNA samples, polygraph testing, and active participation in sex offender treatment.

***Community Control*** – Community control is a community-based punishment alternative to incarceration or regular probation. It includes supervised house arrest, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is intended for felons who are unsuitable for regular probation because of their criminal background or the seriousness of their crime, but for whom the court deems imprisonment to be unnecessary. It may also be appropriate for some felony probation or parole violators who commit technical or misdemeanor violations. A correctional probation officer is statutorily restricted from having more than 25 community controlees on his or her caseload. Violation of any community control condition may result in revocation by the court and imposition of any sentence which might have been imposed originally.

As with other forms of supervision, all the standard terms and conditions of standard probation apply to persons on community control. In addition to those conditions, the statute permits the court to impose more contact with correctional probation officers, confinement to the residence except during work hours, mandatory public service, and electronic monitoring. Some sex

offenders are placed on sex offender community control for heightened supervision, and the additional sex offender conditions discussed in the section on sex offender probation are applied.

Electronic monitoring is often used in community control cases to track the offender's movement or monitor compliance with terms of confinement to the residence. Section 948.03(3)(a)1, F.S., gives the department the discretion to place community controllees on electronic monitoring. However, the department does not exercise this discretion because of substantial case law that an offender's failure to submit to electronic monitoring ordered by the department cannot be a basis for revocation of community control.

### **Violation of Community Supervision**

Chapter 948, F.S., includes an extensive list of terms of probation or community control which may be imposed by a sentencing court, as well as mandatory conditions that must be imposed for certain offenses. Under s. 948.06, F.S., whenever there are reasonable grounds to believe that a probationer or community controllee has violated the terms imposed by the court in a material respect, the offender may be arrested without warrant by any law enforcement officer or parole and probation supervisor who is aware of his or her status as a probationer or community controllee. The court may also issue an arrest warrant based upon reasonable cause that the conditions have been violated. In either case, after arrest the offender is returned to the court that imposed the sentence.

Once brought before the court for an alleged violation, the offender is advised of the charge. If the charge is not admitted, the court may commit the offender to jail to await a hearing, release the offender with or without bail, or dismiss the charge. If the offender admits the charge or is determined to have committed the violation after a hearing, the court may revoke, modify, or continue the probation or community control. If probation or community control is revoked, the court must adjudge the offender guilty of the offense for which he or she was on community supervision, and may impose any sentence which it might have originally imposed before placing the offender on probation or into community control.

### **Misdemeanor Probation**

Misdemeanor probationers are under the jurisdiction of the county court, and are supervised by either county probation officers or by a private entity under contract with the county. The Salvation Army is the largest provider of private misdemeanor probation services in Florida.

Section 948.15, F.S., authorizes a board of county commissioners or the court to contract with a private entity for the delivery of misdemeanor probation services. The statute specifies the terms of the contracts.

### **Split Sentences Specifying Imprisonment Followed by Probation**

Subsection (1) of s. 948.012, F.S., authorizes the court to impose a split sentence with the offender serving a period of time in prison followed by a period of time on probation. The period of probation commences immediately upon release from prison. Under current law the imposition of a split sentence is at the sole discretion of the court.

### III. Effect of Proposed Changes:

Provided is a section-by-section analysis of Committee Substitute for Senate Bill 1216:

**Section 1** names the legislation the Jessica Lunsford Act.

**Section 2** amends s. 775.21, F.S., to:

- Allow an offender who has been designated by the court as a sexual predator after October 1, 2005, who has been released from supervision or sanction for at least 30 years, and has not been arrested for any offense since release, to petition the court in the circuit in which the predator resides for the purpose of removing the sexual predator designation.
- Create a 3rd degree felony that applies to a person who knows that a sexual predator or offender is not complying with registration and reporting requirements and, with intent to assist the predator or offender in eluding a law enforcement agency that seeks to question or arrest the predator or offender for non-compliance, withholds or does not notify the law enforcement agency about the non-compliance (and the whereabouts of the predator or offender, if known), harbors or hides the predator or offender, or provides false information to the law enforcement agency.

**Section 3** amends s. 775.082, F.S., to provide an exception to the current penalty provision relevant to life felonies. Requires the court to impose lifetime supervision for lewd and lascivious molestation of a child under 12 if the court does not sentence the offender to life in prison, but rather a finite term of years. Cross-references s. 948.012(4) and s. 800.04 (5)(b), F.S.

**Section 4** amends s. 800.04, F.S., to increase the penalty for lewd and lascivious molestation of a child under 12 from a 1st degree felony to a life felony.

**Section 5** amends s. 921.022, F.S., to:

- Increase the offense severity ranking from level 6 to a level 7 for a sexual predator's or sexual offender's failure to comply with registration and reporting requirements, and for a sexual predator working where children regularly congregate.
- Rank in level 7 currently unranked (level 1) offenses involving sexual offenders' failure to report vacating residence and failure to take digitized photo.
- Rank in level 7 currently unranked (level 4) offense of sexual offenders' failing to report remaining in state after indicating intent to leave.
- Rank newly created 3rd degree felonies for intentionally harboring a registered sexual predator or offender in level 7 of the ranking chart.
- Amend the felony reference in the ranking chart to lewd and lascivious molestation of a child under 12 to reflect that the offense is now a life felony.

**Section 6** creates s. 921.141(5)(o), F.S., which provides an additional aggravating circumstance that may be applied in the determination of whether to sentence a defendant to death: the capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21, F.S., or a person previously designated as a sexual predator who has had the designation removed.



In some circumstances, it appears likely that this aggravator will not be applied with certain other aggravators in order to prevent impermissible doubling of aggravators.

**Section 7** amends s. 943.03, F.S., to provide that the FDLE shall share information with local law enforcement agencies about sexual predators and sexual offenders who fail to respond to address verification attempts or otherwise abscond from registration requirements. The FDLE shall also use analytical resources to assist local law enforcement agencies to determine the potential whereabouts of these predators or offenders. The FDLE shall also review and analyze all available information about these predators and offenders and provide the information to local law enforcement agencies to assist them in locating and apprehending these predators and offenders.

**Section 8** amends s. 943.0435, F.S., to create a 3rd degree felony that applies to a person who knows that a sexual offender is not complying with registration and reporting requirements and, with intent to assist the offender in eluding a law enforcement agency that seeks to question or arrest the offender for non-compliance, withholds or does not notify the law enforcement agency about the non-compliance (and the whereabouts of the offender, if known), harbors or hides the offender, or provides false information about the offender to the law enforcement agency.

**Section 9** creates s. 943.04352, F.S., to require county probation officials to search the sex predator and offender registries.

**Section 10** amends s. 944.607, F.S., to create a 3rd degree felony that applies to a person who knows that a sexual offender is not complying with registration and reporting requirements and, with intent to assist the offender in eluding a law enforcement agency that seeks to question or arrest the offender for non-compliance, withholds or does not notify the law enforcement agency about the non-compliance (and the whereabouts of the offender, if known), harbors or hides the offender, or provides false information about the offender to the law enforcement agency.

**Section 11** amends 947.1405, F.S., to prospectively mandate that the Florida Parole Commission order electronic monitoring for persons who are leaving prison on conditional release and who have been convicted of various unlawful sex acts (violations of chapter 794, s. 800.04, s. 827.071, or s. 847.0145) against a child 12 years of age or younger.

**Section 12** amends s. 948.012, F.S., to prospectively mandate lifetime probation with electronic monitoring for persons convicted of lewd and lascivious molestation of a child under 12 by requiring a split sentence when life imprisonment is not imposed.

**Section 13** creates s. 948.061, F.S., which requires the DOC to develop a graduated risk assessment and alert system that continuously identifies, assesses, and monitors offenders who: (1) have previously been placed on community supervision and have a history of committing multiple community supervision violations, or have previously been incarcerated; and (2) have experienced more than one of the following risk factors that could make the offender more likely to pose a danger to other persons:

- Attempted suicide or severe depression
- Marital instability or history of domestic violence

- History of substance abuse
- Unemployment or substantial financial difficulties
- History of violence or sex acts against children, particularly if it involved strangers
- Any other risk factor identified by the department

Because offenders with these risk factors may pose a serious threat to the community, the department must place them on an elevated alert status and provide the highest level of supervision available until the department believes that the offender no longer poses an increased threat. Methods of increasing supervision include more frequent office and home visits; more contact with employers, families, and the neighborhood; increased referrals to community mental health facilities and assistance programs; and development of emergency plans to facilitate detention and apprehension if necessary.

Section 12 also requires a correctional probation officer to provide the court with certain criminal history and background information on high-risk offenders in each report submitted to the court and at each hearing before the court. The required information includes a clear, complete, and concise cumulative and integrated chronology of the offender's criminal history and prior terms of community supervision, including all violations of community supervision.

The department is given the authority to adopt rules that are necessary to implement this provision of the CS which requires the development of risk assessments and the elevated alert system, and reporting to the court on a violator's history.

In monitoring the location of high risk offenders, the department is required to, no later than October 1, 2006, have fingerprint-reading equipment and capability.

**Section 14** creates s. 948.062, F.S., which codifies a significant portion of the DOC's rules which were in place at the time of Carlie Brucia's death. The procedure and proposed statutory change require the department to review the circumstances of any violation of probation or community control in which any supervised offender was arrested for:

- Murder
- Sexual battery
- Sexual performance by a child
- Kidnapping, false imprisonment, or luring of a child
- Lewd and lascivious battery or lewd and lascivious molestation
- Aggravated child abuse
- Robbery with a firearm or other deadly weapon, home invasion robbery, or carjacking
- Aggravated stalking

The review and report requirement also applies to an arrest of a supervised offender for:

- A forcible felony if the supervised offender is designated as a sexual predator
- DUI manslaughter or vehicular or vessel homicide, if the offender was under supervision for an offense involving death or injury resulting from a driving incident

The review must document whether the supervision met rules, policies, and procedures and whether supervision practices were followed. The reviews are to be provided to the OPPAGA and the OPPAGA must analyze the reviews and provide a written report to the President of the Senate and the Speaker of the House of Representatives by March 1, 2006. The OPPAGA's report must include any systemic deficiencies that are identified in the management of high-risk offenders, including any patterns of non-compliance by correctional probation officers. The report must also include any recommendations for improving the community supervision program.

**Section 15** creates s. 948.063, F.S., to retroactively require the court to electronically monitor registered sex offenders and sexual predators whose victims were 12 years of age or younger and who violate their probation or community control and the court imposes a subsequent term of probation and community control.

**Section 16** amends s. 948.11, F.S., to require the DOC to notify the court and other officials of the number and type of electronic monitoring devices available to the court. The bill specifies the type of electronic monitoring system to use for violent and sex offenders. Specifically, the bill requires the department to use a system that actively, and in real time, monitors and identifies the offender's location and timely reports or records the offender's presence near or within a crime scene or in a prohibited area or departure from specified geographic limitations.

**Section 17** amends s. 948.15, F.S., to require contracts with private misdemeanor probation providers to include procedures for accessing criminal history records of probationers.

**Section 18** amends s. 948.30, F.S., to prospectively mandate that the court order electronic monitoring for persons placed on probation or community control who:

- are convicted, or previously convicted of various unlawful sex acts (violation of chapter 794, s. 800.04, s. 827.071, or s. 847.0145) against a child 12 years of age or younger; or
- are registered sexual predators.

**Section 19** creates a task force within the FDLE to examine the collection and dissemination of offender information and criminal history records. The task force shall consist of the membership of the Criminal Justice Information Systems Council set forth in s. 943.06, F.S. The task force is charged with studying and taking testimony on:

- collection and dissemination of offender records at first appearance hearings and at all subsequent hearings;
- dissemination of information to county officials;
- monitoring of registered sex offenders and sexual predators by local law enforcement agencies; and
- dissemination of missing-persons information.

The task force is required to submit a report 30 days before the first day of the 2006 regular session.

**Section 20** requires the OPPAGA to study the sex offender/predator registry and report findings to the Legislature.

**Section 21** provides for a \$5.2 million appropriation for the purpose of increasing the number of active GPS units by 1,200.

**Section 22** provides an effective date of October 1, 2005.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Several sections in the bill may have a fiscal impact on the Department of Corrections and on the Florida Department of Law Enforcement:

- Sections 2, 4, 5, 8 and 10 create and/or enhance criminal penalties which may result in the need for addition prison beds;
- Sections 3 and 12 mandate a split sentence for certain sex offenders which may result in imprisonment for some sex offenders who are currently placed on community supervision and longer terms of imprisonment for other sex offenders;
- Section 7 requires FDLE to assist local law enforcement in locating sex offenders who fail to respond to mailed address verification attempts;
- Section 13 requires DOC to have fingerprint-reading equipment and capability at their probation offices;



<b>Department of Law Enforcement</b>									
15. Research and Analytical Resources	5.00	267,465			274,152			281,005	
<b>TOTALS</b>	<b>9.00</b>	<b>4,599,798</b>	<b>3,204,864</b>	<b>15.00</b>	<b>6,142,590</b>	<b>1,280,632</b>	<b>32.00</b>	<b>8,748,711</b>	<b>648,364</b>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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