

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 1107 & HB 1351 PCSCB FOR HB 1107 & HB 1351 Sexual Offenders and Predators

**SPONSOR(S):** Safety & Security Council; Glorioso and Simmons

**TIED BILLS:** **IDEN./SIM. BILLS:**

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| REFERENCE                              | ACTION   | ANALYST      | STAFF DIRECTOR |
|--|----------|--------------|----------------|
| Orig. Comm.: Safety & Security Council | 9 Y, 0 N | Kramer/Davis | Havlicak       |
| 1) _____                               | _____    | _____        | _____          |
| 2) _____                               | _____    | _____        | _____          |
| 3) _____                               | _____    | _____        | _____          |
| 4) _____                               | _____    | _____        | _____          |
| 5) _____                               | _____    | _____        | _____          |

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**SUMMARY ANALYSIS**

Currently, several Florida statutes provide that certain offenders who have been convicted of a sexual offense are prohibited from residing within 1,000 feet of specified locations such as schools, day care centers, parks and playgrounds. In recent years, a large number of cities and counties throughout the state have passed local ordinances designed to restrict where people who have been convicted of a sexual offense can live. Generally, the ordinances appear to be modeled after state law but many extend the distance to 2,500 feet or more and include additional locations.

This bill expands the current statutory residency restrictions to 1,500 feet and will also make them applicable to people who have committed additional offenses. The bill also provides that the adoption of residency distance limitations for persons convicted of sexual offenses is expressly preempted to the state. The bill provides that the statutory provisions establishing residency distance limitations supersede the distance limitations in any municipal or county ordinances.

The bill provides that any person who has been convicted of kidnapping, false imprisonment or a specified sexual offense, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age and who loiters or prowls as proscribed in s. 856.021 within 300 feet of a place where children regularly congregate, including but not limited to, a school, designated public school bus stop, day care center, playground or park, commits a first degree misdemeanor.

The bill will prohibit certain offenders on supervision from wearing a Santa Claus, Easter Bunny or clown costume or distributing Halloween candy.

On March 14, 2008, the Criminal Justice Impact Conference determined that HB 1107 and HB 1351 which contained the provisions of this combined bill would each have an insignificant prison bed impact.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill expands certain residency restrictions in state law and preempts local ordinances on the subject.

#### B. EFFECT OF PROPOSED CHANGES:

*Sexual Predator/Offender Registration:* In very general terms, the distinction between a sexual predator and a sexual offender is based on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense and the date the offense occurred. A sexual predator or sexual offender is required to comply with a number of statutory requirements.<sup>1</sup>

*Notification:* Extensive procedures are provided for notifying communities about certain information relating to sexual predators, much of which is compiled during the registration process.<sup>2</sup> Within 48 hours of receiving notification of the presence of a sexual predator, the sheriff or police chief where the sexual predator resides is required to notify each licensed day care center and school within a 1-mile radius of the residence of the sexual predator. This bill requires that the sheriff or police chief provide such notification to a library within the 1-mile radius.

*Legislative findings:* Currently, section 775.21(3) provides legislative findings and legislative intent that sexual predators who are financially able must pay all or part of the costs of probation, community control or conditional release. This bill amends this to provide that only sexual predators who are found to be indigent may defer payment of costs of supervision by establishing a payment plan with the clerk of court pursuant to s. 28.246, F.S.<sup>3</sup>

*Probation and community control - generally:* Probation is a form of community supervision requiring specified contacts with probation officers, compliance with standard statutory terms and conditions, and compliance with any specific terms and conditions required by the sentencing court.<sup>4</sup> Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or non-institutional residential placement and specific sanctions are imposed and enforced.<sup>5</sup>

*Conditional release program:* Section 947.1405, F.S., creates the conditional release program. This program requires certain inmates that are nearing the end of their sentence to be released under close supervision.<sup>6</sup> Inmates who qualify for conditional release include: 1) those who have previously served time in a correctional institution and are currently incarcerated for one of a list of offenses<sup>7</sup> including

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<sup>1</sup> See ss. 775.21, 943.0435 and 944.607, F.S.

<sup>2</sup> Section 775.21(7), F.S.

<sup>3</sup> This section requires a clerk to enter into a payment plan with an individual who the court determines is indigent for costs.

<sup>4</sup> Section 948.001(5), F.S.

<sup>5</sup> Section 948.001(2), F.S.

<sup>6</sup> Section 947.1405(2), F.S.

<sup>7</sup> The relevant offenses are listed in categories 1, 2, 3 and 4 of Rule 3.701 of the Florida Rules of Criminal Procedure. Included in these categories are the offenses of murder, DUI and BUI manslaughter, sexual battery, lewd or lascivious offenses, incest, sexual misconduct by a psychotherapist, robbery, carjacking, home invasion robbery, aggravated assault, aggravated battery, aggravated stalking and resisting an officer with violence.

murder, sexual battery, robbery, assault or battery; 2) inmates sentenced as a habitual offender, a violent habitual offender or a violent career criminal; 3) inmates who were found to be a sexual predator. The Parole Commission sets the length and conditions of release after reviewing information provided by the Department of Corrections.<sup>8</sup> The Department of Corrections supervises the offender while on conditional release.

*Residency restrictions for probationers/community controllees/conditional releasees:* Currently, an offender who is on probation or community control for a specified sexual offense<sup>9</sup> committed on or after October 1, 1995 and therefore supervised by the Department of Corrections, is prohibited from living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate if the victim was under the age of 18.<sup>10</sup> The bill amends this section to expand the distance to 1,500 feet for a probationer or community controllee whose offense was committed on or after October 1, 2008.

Currently, the residency restrictions described above which apply to probationer or community controllees also apply to an offender on conditional release. In addition, a conditional releasee who has committed a specified sexual offense is prohibited from living within 1,000 feet of a designated public bus stop. The bill amends s. 947.1405(7), F.S. to expand the applicable distance to 1,500 feet for a conditional releasee whose offense was committed on or after October 1, 2008.

*Loitering or prowling:* Section 856.021, F.S. provides as follows:

- (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
- (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

A violation of this section is a second degree misdemeanor.

The bill creates s. 794.0701, F.S. which provides that any person who has been convicted of kidnapping, false imprisonment or a specified sexual offense,<sup>11</sup> regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age and who loiters or prowls as proscribed in s. 856.021 within 300 feet of a place where children regularly congregate,

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<sup>8</sup> The length of supervision cannot exceed the maximum penalty imposed by the court. (see s. 947.1405(6)).

<sup>9</sup> s. 948.30(1)(b), F.S. The specified offenses include sexual battery offenses (chapter 794), lewd or lascivious offenses (s. 800.04, F.S.), promoting sexual performance by a child (s. 827.071, F.S.) and selling or buying minors for child pornography (s. 847.0145, F.S.)

<sup>10</sup> Section 948.30(1)(b), F.S.

<sup>11</sup> The specified offenses include sexual battery offenses (chapter 794), lewd or lascivious offenses (s. 800.04, F.S.), promoting sexual performance by a child (s. 827.071, F.S.) and selling or buying minors for child pornography (s. 847.0145, F.S.)

including but not limited to, a school, designated public school bus stop, day care center, playground or park, commits a first degree misdemeanor.

*Unlawful place of residence for persons convicted of certain sex offenses:* Before the 2004 legislative session, there was no statutory prohibition on where a sexual predator or sexual offender who was no longer on supervision could live.<sup>12</sup> In other words, a sexual predator or sexual offender who was not on supervision could live wherever he or she wished but was required to report his or her residence to law enforcement. During the 2004 session, section 794.065, F.S. was created<sup>13</sup> which made it unlawful for a person convicted on or after October 1, 2004 (the effective date of the law) of a specified sexual battery or lewd or lascivious offense<sup>14</sup>, against a victim under the age of 16 from living within 1,000 feet of a school, day care center, park or playground. The offense is a third degree felony if the sexual offense for which the offender was previously convicted was classified as a first degree felony or higher. The offense is a first degree misdemeanor if the sexual offense for which the offender was previously convicted was classified as a second or third degree felony.

In recent years, a large number of cities and counties throughout the state have passed local ordinances designed to restrict where people who have been convicted of a sexual offense can live. According to the Department of Corrections, there are currently 126 such local ordinances. Generally, the ordinances appear to be modeled after section 794.065, F.S. but extend the distance from 1,000 feet to 2,500 feet or more. Many of the ordinances also prohibit an offender from living within a certain distance of places such as libraries, churches and bus stops that are not included in the state statute.

The bill amends s. 794.065, F.S. to provide that it will be unlawful for any person who has been convicted of kidnapping or false imprisonment or one of the sexual offenses currently specified in the section where the victim of the offense was less than 16 years of age, to reside within 1,500, (rather than 1,000), feet of any school, day care center, park or playground. This will apply to offenses committed on or after October 1, 2008.

The bill sets forth the method by which the distance from an offender's residence to a particular location will be measured. The distance will be measured in a straight line from the offender's place of residence to the nearest boundary line of the school, day care center, park or playground.

*Preemption of local ordinances:* The bill creates 775.215, F.S. which provides that the adoption of residency distance limitations for persons convicted of sexual offenses, is expressly preempted to the state. The provisions of sections 794.065, 947.1405 and 948.30, F.S. establishing such distance limitations supersede the distance limitations in any such municipal or county ordinances.

The bill provides that any ordinances adopted by a county or municipality prior to October 1, 2008, imposing distance limitations is repealed and abolished as of October 1, 2008.

*Employment restrictions:* Currently, a sexual predator whose qualifying offense was committed against a minor is prohibited from working, whether for compensation or as a volunteer, at any business, school, day care center, park, playground or other place where children regularly congregate. This offense is a third degree felony.<sup>15</sup> The conditional release and probation statutes prohibit a releasee or

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<sup>12</sup> In cases in which the victim was a minor, a sexual predator is prohibited from *working* in a business, school, day care center, park, playground or other place where children regularly congregate. s. 775.21(10)(b), F.S. If a sexual predator or sexual offender is working at or attending an institution of higher education, this fact must be disclosed to FDLE who then, in turn, must inform the institution of higher education. ss. 775.21(6)(a)1b, 943.0435(2)(b)2, F.S.

<sup>13</sup> See 2004-391, Laws of Florida.

<sup>14</sup> Included are ss. 794.011, 800.04, 827.071 and 847.0145, F.S.

<sup>15</sup> s. 775.21(10)(b), F.S.

probationer who has committed a specified sexual offense against a victim under the age of 18 from working or volunteering at a place listed above.<sup>16</sup> The bill adds libraries to the list of prohibited places of employment within the sexual predator and conditional release statutes.

*Duty of court to uphold laws:* Section 775.24, F.S. provides that if a person meets the sexual predator or sexual offender criteria, the court may not enter an order, for the purpose of approving a plea agreement or for any other reason which exempts the person from designation as a sexual predator or classification as a sexual offender or exempts such a person of the requirements of registration. This bill provides that a court may not exempt a person from the residency exclusions contained in ss. 794.065, 947.1405 and 948.30, F.S. or from the provisions of s. 794.0701, F.S., relating to loitering.

*Additional conditions of probation/community control/conditional release:* Currently, an offender who is on probation, community control or conditional release for a specified sexual offense<sup>17</sup> must comply with additional terms and conditions of supervision.<sup>18</sup> This bill provides that effective October 1, 2008, the court must order a prohibition on distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, wearing an Easter Bunny costume on or preceding Easter, entertaining at children's parties, or wearing a clown costume without prior approval from the court for certain offenders. This condition must be placed on the following group:

1. A probationer or community controllee who committed the offense of sexual battery, a lewd or lascivious offense, promoting sexual performance by a child or selling or buying a minor for child pornography when at the time of the offense, the victim was under 16 years of age and the offender was 18 years of age or older on or after October 1, 2008;
2. A probationer or community controllee who is designated as a sexual predator or is determined to be a sexually violent predator under chapter 394;
3. A probationer or community controllee designated as a sexual predator or subject to registration as a sexual offender who has committed an offense that would meet the criteria for the designation or the registration requirement where, at the time of the offense, the victim was under 16 years of age and the probationer or community controllee was 18 years of age or older, who commits a violation of s. 775.21 or s. 943.0435 on or after October 1, 2008 and who is not otherwise subject to this paragraph.

The bill also requires that this condition be placed on conditional releasees who meet the above criteria.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 775.21, F.S. relating to the Florida Sexual Predators Act.

Section 2. Creates s. 775.215, F.S. relating to residency distance limitations for persons convicted of certain sexual offenses; local ordinances preempted and repealed.

Section 3. Amends s. 775.24, F.S., relating to duty of the court to uphold laws governing sexual predators and sexual offenders.

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<sup>16</sup> s. 947.1405(7)(a)6, F.S.

<sup>17</sup> s. 948.30(1)(b), F.S. The specified offenses include sexual battery offenses (chapter 794), lewd or lascivious offenses (s. 800.04, F.S), promoting sexual performance by a child (s. 827.071, F.S.) and selling or buying minors for child pornography (s. 847.0145, F.S.)

<sup>18</sup> Sections 948.30(1)(b) and 947.1405(7)(a), F.S.

Section 4. Amends s. 794.065, F.S. relating to unlawful place of residence for persons convicted of certain sex offenses.

Section 5. Creates s. 794.0701, F.S. relating to loitering or prowling by persons convicted of certain sex offenses.

Section 6. Amends s. 947.1405, F.S. relating to conditional release program.

Section 7. Amends s. 948.30, F.S. relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 8. Provides effective date of October 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

See fiscal comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

See fiscal comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

On March 14, 2008, the Criminal Justice Impact Conference indicated that HB 1107 and HB 1351 which contained the provisions of this combined bill would each have an insignificant prison bed impact on the Department of Corrections.

Currently, within 48 hours of receiving notification of the presence of a sexual predator, the sheriff or police chief where the sexual predator resides must notify each licensed day care center and school within a 1-mile radius of the residence of the sexual predator. This bill requires that the sheriff or police chief provide such notification to a library within the 1-mile radius and may have a fiscal impact on local law enforcement.

The bill creates a first degree misdemeanor offense for a person who has been convicted of certain sexual offenses to loiter or prowl within 300 feet of certain places. This could have a county jail impact.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

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

##### 2. Other:

*Residency restrictions:* Section 794.065, F.S. which restricts the residence of a person who committed a sexual offense after October 1, 2004, was enacted during the 2004 session. There is no reported appellate decision challenging the constitutionality of the provision. There is no reported appellate case law in Florida on the constitutionality of restricting the residence of a person who is not under the supervision of the Department of Corrections based on a prior criminal conviction. The bill expands the distance that an offender must live from certain locations from 1,000 feet to 1,500 feet. It is possible that this provision will face constitutional challenge.

Because state statutes restricting the residency of sex offenders are of recent origin, there are a limited number of reported decisions nationwide on their constitutionality at this time. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) *cert denied* 126 S.Ct. 757 (2005), the court considered a challenge to an Iowa statute that prohibits a person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or registered child care facility. The court recognized that the “restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence.” *Id.* at 705.

The court considered and rejected appellees claim that the statute violated the substantive due process rights of sex offenders. The court held that although, in some cases, a sex offender would be unable to live at their family’s residence, the statute did not directly operate on the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute. The court also rejected the claim that the statute interfered with any right to travel. The court rejected the appellees call to recognize a “fundamental right ‘to live where you want’”. *Id.* at 713. The court thus concluded that the statute did not interfere with a fundamental liberty issue and did not require the application of a strict scrutiny test. The court further rejected appellees argument that the law did not rationally advance a legitimate governmental purpose because the legislature did not have scientific proof that excluding sex offenders from living in certain locations will enhance the safety of children and noted that this is “the sort of task for which the elected policymaking officials of a State, and not the federal courts, are properly suited.” *Id.* at 715. See also, *Iowa v. Seering*, 701 N.W.2d 655 (Iowa 2005) (Iowa Supreme Court case affirming statute); *Mann v. Georgia*, 603 S.E.2d 283 (Ga. 2004)(holding that statute which barred registered sex offender from living within 1,000 feet of child care facility, school or area where minors congregate did not affect a compensable taking and was not constitutionally overbroad or vague).

#### B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

The sponsors of the original bills did not submit a statement of the sponsor.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**