

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1351 Public Safety

SPONSOR(S): Simmons

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

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--|--------|---------------|----------------|
| 1) <u>Committee on Homeland Security & Public Safety</u> | _____ | <u>Kramer</u> | <u>Kramer</u> |
| 2) <u>Safety & Security Council</u> | _____ | _____ | _____ |
| 3) <u>Policy & Budget Council</u> | _____ | _____ | _____ |
| 4) _____ | _____ | _____ | _____ |
| 5) _____ | _____ | _____ | _____ |

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.

The 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 600 feet of a place where children regularly congregate, including but not limited to, a school, designated public school bus stop, day care center, playground, park or library, commits a first degree misdemeanor.

Currently, a sheriff or police chief is required to provide information to each licensed day care center and school within a 1-mile radius of the residence of the sexual predator. The bill requires the law enforcement agency to provide information to a library within a 1-mile radius of the residence of the sexual predator. The bill prohibits a sexual predator from working at a library.

This bill expands the list of qualifying offenses under the conditional release statute to include sexual performance by a child, selling or buying of minors, kidnapping and false imprisonment. This will give the Parole Commission the authority

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STORAGE NAME: h1351.HSPS.doc
DATE: 3/9/2008

to place these offenders on electronic monitoring. The bill also requires electronic monitoring of offenders placed on probation for kidnapping or false imprisonment where the victim was under the age of 16 and the offender was 18 or older.

The Criminal Justice Impact Conference determined that this bill would 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.¹

Notification [Line 86]: Extensive procedures are provided for notifying communities about certain information relating to sexual predators, much of which is compiled during the registration process.² 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. HB 1351 requires that the sheriff or police chief provide such notification to a library within the 1-mile radius.

Legislative findings [Line 59-63]: 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.³

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.⁴ 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.⁵

Conditional release program [Lines 231-236; 321-322; 489-495]: 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.⁶ Inmates who qualify for conditional release include: 1) those who have previously served time in a correctional institution and are currently incarcerated for

¹ See ss. 775.21, 943.0435 and 944.607, F.S.

² s. 775.21(7), F.S.

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

⁴ Section 948.001(5), F.S.

⁵ Section 948.001(2), F.S.

⁶ s. 947.1405(2), F.S.

one of a list of offenses⁷ including 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.⁸ The Department of Corrections supervises the offender while on conditional release.

Section 12 of the Jessica Lunsford Act⁹ (JLA) created s. 947.1405(10), F.S. to provide that the Parole Commission must order electronic monitoring for a conditional releasee who committed a violation of ch. 794, F.S., s. 800.04(4), (5), or (6), F.S., s. 827.071, F.S., or s. 847.0145, F.S., where the unlawful activity involved a victim who was 15 years of age or younger and the offender is 18 years of age or older or for a conditional releasee who is designated as a sexual predator. This condition applies to offenders who committed one of the specified offenses on or after September 1, 2005.

The Jessica Lunsford Task Force,¹⁰ which was created by the JLA, and which was required by the JLA to examine the collection and dissemination of offender information within the criminal justice system and community, released its findings and recommendations on February 6, 2006.¹¹ The task force noted that while Section 12 of the JLA included sexual performance by a child (s. 827.071, F.S.) and selling or buying of minors (s. 847.0145, F.S.) as offenses requiring electronic monitoring if "the activity involved a victim who was 15 years of age or younger and the offender is 18 years of age or older," these are not offenses subject to conditional release supervision under the law. The task force recommended amending s. 947.1405(2), F.S. to list sexual performance, selling or buying of minors in the eligibility criteria for conditional release in order to allow the Parole Commission to comply with the JLA. The task force also recommended the inclusion of some other serious offenses in the eligibility criteria for conditional release.

This bill expands the list of qualifying offenses under the conditional release statute to include sexual performance by a child, selling or buying of minors, kidnapping and false imprisonment. This will allow the Parole Commission to have the authority to order electronic monitoring of releasees convicted of sexual performance by a child or selling or buying of a minor as required by the JLA. The bill also requires electronic monitoring for a releasee who commits a kidnapping or false imprisonment offense upon a victim less than 16 where the offender is 18 or older. This will apply to offenses committed on or after October 1, 2008.

The bill also provides that the Parole Commission may modify the conditions of supervision at any time.

Residency restrictions for probationers/community controllees/conditional releasees [Lines 361-371; 619-628]: Currently, an offender who is on probation or community control for a specified sexual offense¹² 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

⁷ 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

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

⁹ Ch. 2005-28, Laws of Fla

¹⁰ The task force was composed of the members of the Criminal and Juvenile Justice Information Systems Council.

¹¹ All discussion in this analysis of the task force and its findings and recommendations is from *Jessica Lunsford Task Force*, Criminal and Juvenile Justice Information Systems Council (February 6, 2005).

¹² 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.)

other place where children regularly congregate if the victim was under the age of 18.¹³ The bill amends this section to expand the distance to 1,500 feet.

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.

Defense [Lines 501-508]: The bill also amends ss. 947.141 and 948.063, F.S. to provide that in any hearing alleging a violation of conditional release or probation for failure to comply with the residency distance limitations, the inability of the probationer or releasee to locate a residence in compliance with the residency distance limitations will not be a defense to the finding of a violation.

Loitering or prowling [Lines 206-218]: 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,¹⁴ 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 600 feet of a place where children regularly congregate, including but not limited to, a school, designated public school bus stop, day care center, playground, park or library, commits a first degree misdemeanor.

Unlawful place of residence for persons convicted of certain sex offenses [Lines 160-203]: 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.¹⁵ 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

¹³ Section 948.30(1)(b), F.S.

¹⁴ 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.)

¹⁵ 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.

his or her residence to law enforcement. During the 2004 session, section 794.065, F.S. was created¹⁶ 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 offense¹⁷, 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. 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, playground, library or other business or place where children regularly congregate.

Preemption of local ordinances [Lines 12-132]: The bill creates 775.215, F.S. which provides that the adoption of residency distance limitations for persons convicted of sexual offenses¹⁸, is expressly preempted to the state. The provisions of ss 794.065, 947.1405 and 948.30 establishing such exclusions 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 residency exclusions for the residences of persons subject to the provisions of s. 794.065, s. 947.1405 or s. 948.30 is repealed and abolished as of October 1, 2008.

Employment restrictions [Line 114 & 463]: 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.¹⁹ The conditional release and probation statutes prohibit a releasee or 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. The bill adds libraries to the list of prohibited places of employment within the sexual predator and conditional release statutes.

Electronic monitoring for kidnapping/false imprisonment offenses: The bill amends s. 948.30, F.S. to provide that the court must order electronic monitoring of a probationer or community controllee whose

¹⁶ See 2004-391, Laws of Florida.

¹⁷ Included are ss. 794.011, 800.04, 827.071 and 847.0145, F.S.

¹⁸

¹⁹ s. 775.21(10)(b), F.S.

crime was committed on or after October 1, 2008 who has previously been convicted of a kidnapping or false imprisonment offense and the unlawful sexual activity involved a victim under 16 years of age.

Bail [Line 550-551]: Section 948.06, F.S. provides that when a probationer or community controllee is under supervision for a sexual offense and is arrested for a violation of supervision, the court must make a finding that the probationer or offender is not a danger to the public prior to release with or without bail. The section lists a number of factors that may be considered by the judge in making this determination. The bill adds the factor of whether or not the probationer is currently subject to electronic monitoring to the list.

Duty of court to uphold laws [Lines 148-150; 588-594]: 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.

Conditional release followed by probation [Lines 264-266; 288-294]: Section 947.1405, F.S. provides that if an offender that is placed on conditional release supervision is also subject to probation or community control, DOC will supervise the person and the Parole Commission will defer the conditional release supervision. This bill provides that if any inmate required to register as sexual predator or sexual offender is placed on conditional release supervision and is also subject to probation or community supervision, the period of probation or community control will not be substituted for conditional release supervision and must follow the term of conditional release.

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.

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. 947.141, F.S. relating to violations of conditional release, control release, or conditional medical release or addiction-recovery supervision.

Section 8. Amends s. 948.08, F.S. relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

Section 9. Amends s. 948.063, F.S. relating to violations of probation or community control by designated sexual offenders and sexual predators.

Section 10. Amends s. 948.30, F.S. relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 11. 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:

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.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Parole Commission indicated that the fiscal impact of the bill would be insignificant.

On March 14, 2008, the Criminal Justice Impact Conference determined that the bill would have an insignificant prison bed impact on the Department of Corrections.

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).

Failure to find residence defense: The bill provides that the inability of a conditional releasee or probationer to locate a residence in compliance with the residence restrictions of those sections shall not be a defense to the finding of a violation of conditional release or probation. This may conflict with the following standard used by courts in determining whether an offender has violated his or her probation:

Trial courts must consider each violation on a case-by-case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence. In other words, the trial court must review the

evidence to determine whether the defendant has made reasonable efforts to comply with the terms and conditions of his or her probation.

State v. Carter, 835 So.2d 259, 261 (Fla. 2002). *Burse v. State*, 724 So.2d 596, 598 (Fla. 2d DCA 1998)(“Where a probationer makes a good faith attempt to comply with a condition of probation, any violation is not willful.”)

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 9: On lines 618-625, the bill provides that “effective for a probationer or community controllee whose crime was committed on or after October 1, 2007, who has previously been convicted of a violation of s. 787.01(3) or s. 787.02(3) and the *unlawful sexual activity* involved a victim under 16 years of age...the court must order, in addition to any other provision of this section, mandatory electronic monitoring as a condition of the probation or community control supervision.” This apparently would require electronic monitoring to be ordered when an offender is on probation for any offense and has previously been convicted of a kidnapping or false imprisonment offense. However, the bill refers to a victim under the age of 16 and the subsections referred to by the bill only apply to a victim under the age of 13. [Similar language is on line 491.] Also, a violation of these subsections does not necessarily involve unlawful sexual activity. Further, this language requires a probationer who has a prior kidnapping or false imprisonment offense to be electronically monitored if they are on probation for any offense but does not require electronic monitoring for a person who is on probation *for* a kidnapping or false imprisonment offense.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES