

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 2052

INTRODUCER: Children, Families, and Elder Affairs Committee; Children, Families, and Elder Affairs Committee and Senator Lynn

SUBJECT: Sexually Violent Predators

DATE: February 2, 2012 **REVISED:** 02/08/12 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Farmer</u>	<u>Farmer</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>BC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill amends Florida law related to the Involuntary Civil Commitment of Sexually Violent Predators (“Jimmy Ryce Act”) by:

- Excluding sexually motivated misdemeanor acts from the definition of “sexually violent offense”;
- Requiring the Department of Children and Families (department) to prioritize written assessments and recommendations of persons convicted of a sexually violent offense who will be released from total confinement within one year;
- Extending the deadline in which the department’s multidisciplinary team is required to complete its assessment to the state attorney;
- Extending the deadline for the state attorney to file a petition to the circuit court alleging that a person is a sexually violent predator;
- Removing language related to the deportation of a sexually violent predator;
- Prohibiting the introduction, attempted introduction, or removal of certain items classified as contraband into any Jimmy Ryce facility;

- Subjecting an individual or vehicle entering the grounds of any Jimmy Ryce facility under these provisions to reasonable search and seizure of any contraband materials introduced into or upon the grounds of such facility for purposes of enforcement; and
- Creating a third-degree felony for the commission of such acts.

The bill also creates the Statewide Workgroup Force (workgroup) on the Conditional Release of Sexually Violent Predators. The purpose of the workgroup is to assess the appropriateness of placing sexually violent predators on conditional release and, based upon its assessment, make policy recommendations to the Governor and the Legislature. Duties of the workgroup include: collecting and organizing data concerning the practice of placing sexually violent predators on conditional release in Florida; identifying issues related to the use of conditional release in this state; and identifying procedures, if any, used by other states to release sexually violent predators into the community and the issue of supervising such persons while in the community.

This bill provides an effective date of July 1, 2012.

This bill substantially amends the following sections of the Florida Statutes: 394.912, 394.913, 394.9135, and 394.917. The bill creates section 394.933, Florida Statutes and creates an unnumbered section of the Florida Statute.

II. Present Situation:

Sexually Violent Predators¹

A sexually violent predator is a person who has been convicted of a sexually violent offense and who also suffers from a mental abnormality or personality disorder that makes him or her likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.² The Involuntary Civil Commitment of Sexually Violent Predators Act, also known as the Jimmy Ryce Act (Act), was enacted in 1998 to address the treatment needs of these offenders.³ The Act creates a civil commitment process for sexually violent predators that is similar to Baker Act procedures for involuntary commitment and treatment of mentally ill persons.

Referring agencies identify offenders who have been convicted of specified sexually violent offenses and notify the department's Sexually Violent Predator Program and the state attorney who prosecuted the offender. The Department of Corrections (DOC) makes the majority of these referrals, with others coming from the Department of Juvenile Justice (DJJ) and the department itself.

After a referral is made, a clinical specialist reviews information provided by the referring agency and gathers any additional information that is needed to complete the case file. Two licensed psychologists employed by the department independently screen the case file to determine if the offender meets the statutory sexually violent predator criteria. If the department

¹ Much of the information in this section was derived from the Office of Program Policy Analysis & Government Accountability, Florida Legislature, *The Delays in Screening Sexually Violent Predators Increase Costs; Treatment Facility Security Enhanced*, Report No. 08-10, p.2. (Feb. 2008)

² Section 394.912, F.S.

³ Sections 394.910-394.932, F.S.

psychologists find that the offender meets the criteria, an independent, contracted evaluator also reviews the case file and provides a recommendation to the department.

A multidisciplinary team that includes at a minimum two persons who are either a licensed psychiatrist or a licensed psychologist reviews the evaluation reports. From this review, they render an opinion as to whether the offender meets the sexually violent predator criteria. The department must then provide a written assessment and written recommendation to the state attorney within 180 days of receiving notice from the referring agency. The recommendation must include the multidisciplinary team's report.⁴

The timeframes for this process are drastically accelerated when a person who has been convicted of a sexually violent offense is to be immediately released for some reason. A person who has been released ahead of scheduled release is transferred to the custody of the department by the referring agency. The multidisciplinary team has 72 hours after the transfer to provide its written assessment and recommendation to the state attorney. In turn, the state attorney has 48 hours to petition the court for a determination that the person is a sexually violent predator.⁵

After receiving the department's assessment and recommendation, the state attorney can initiate commitment proceedings by filing a probable cause petition seeking a determination that the offender meets statutory criteria to be a sexually violent predator.⁶ There is no prescribed time limit for filing other than in an immediate release situation. If the judge finds that the petition sets forth probable cause, a civil trial must be conducted within 30 days. A decision that an offender is a sexually violent predator must be made by the judge or a unanimous jury based upon clear and convincing evidence.⁷

An offender who is found to be a sexually violent predator is committed to the department's custody upon completion of his or her criminal sentence and transferred to the Florida Civil Commitment Center in Arcadia. If the commitment process is not completed prior to the end of an offender's prison sentence, the offender is detained by court order and transferred to the commitment center to await the outcome of commitment proceedings. On June 30, 2011, the commitment center housed 677 civilly committed predators and 147 detainees awaiting completion of commitment procedures.⁸

Sexually violent predators who are committed to the state under the Jimmy Ryce Act are detained at the commitment center until the court determines that they are no longer a threat to public safety. The department currently contracts with GEO Group, Inc., to operate the center and provide all treatment and security services. The treatment program consists of four levels of

⁴ Section 394.913(3), F.S.

⁵ Section 394.9135, F.S.

⁶ Section 394.914, F.S.

⁷ Sections 394.916 and 394.917, F.S.

⁸ Criminal Justice Estimating Conference, *Involuntary Civil Commitment of Sexually Violent Predators – History and Forecast*, (Dec. 14, 2011), available at <http://edr.state.fl.us/Content/conferences/criminaljustice/workpapers.pdf> (last visited Jan. 17, 2012)

cognitive behavior modification and takes a minimum of six years to complete, with progress assessed annually by program staff.⁹

Federal Deportation Detainers

Section 394.917(2), F.S., requires commitment of a sexually violent predator to the department's custody only after expiration of the incarcerative sentence and disposition of all detainers, except federal detainers for deportation. Therefore, the department is required to provide long-term care and treatment of persons who would otherwise be processed for deportation.¹⁰

Contraband

The Act does not currently criminalize the unauthorized introduction or removal of dangerous contraband from the Florida Civil Commitment Center. The facility has instituted its own operating procedures to prohibit such activities, but these policies do not have the same deterrent effect achieved by the possibility of criminal sanction. Section 394.458, F.S., provides criminal penalties for the introduction or removal of certain articles from the grounds of state mental health hospitals, s. 916.1085, F.S., does so for state forensic facilities, and s. 944.47, F.S., does so for state correctional facilities.

Conditional Release and Stipulated Agreements¹¹

In October 2011, a review was conducted, at the request of the Legislature, by the Office of Program Policy Analysis and Government Accountability (OPPAGA) regarding the practice of stipulated agreements for the conditional diversion or release of offenders from the Sexually Violent Predator Program.

Stipulated agreements are negotiated civil contracts between a state attorney and an offender that allow the offender to be released into the community under specified terms and conditions. State attorneys' offices use these agreements in an effort to maintain public safety by providing some measure of accountability when an offender meets sexually violent predator criteria but it is unlikely that the state will prevail at the commitment trial or annual hearing.

As of September 2011, OPPAGA identified 153 stipulated agreements approved by Florida state courts. State attorneys' offices that use these agreements cite their broad prosecutorial discretion and authority to negotiate civil contracts as the legal basis for these agreements.

Sometimes state attorneys' offices use the agreements to require conditions for release from the Sexually Violent Predator Program because there is no re-entry phase to provide community-based treatment and supervision. Preempting trials also reduces court costs. However, some stakeholders question the legal basis and enforceability of the agreements. State attorneys'

⁹ Office of Program Policy Analysis & Government Accountability, Florida Legislature, *The Delays in Screening Sexually Violent Predators Increase Costs; Treatment Facility Security Enhanced*, Report No. 08-10, p.2.(Feb. 2008), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0810rpt.pdf> (last visited Jan. 18, 2012)

¹⁰ See Department of Children and Families, *Staff Analysis and Economic Impact for Senate Bill 2052* (January 23, 2012), p. 3 (on file with the Senate Committee on Children, Families, and Elder Affairs).

¹¹ Information contained in this portion of this bill analysis is replicated from the Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, *Conditional Release of Sexually Violent Predators Through Stipulated Agreements*, Research Memorandum (Oct. 21, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs)

offices are typically responsible for providing supervision to sexually violent predators released into the community under stipulated agreements; however, they do not have the ability to enforce many of the provisions of the agreements.

Almost half of sexually violent predators also had some type of Department of Corrections supervision at the time of their release. Of the 140 offenders released via stipulated agreement and in the community for at least one year, 31 have been convicted of new criminal charges, including 5 that were convicted of a felony sex offense and 3 others that were convicted of violent felonies. The remaining 23 were convicted of various misdemeanors and non-violent felonies.¹²

In addition, 18 offenders had been returned to the Florida Civil Commitment Center due to contract revocation. In 7 of these cases this was due to a new criminal conviction; in the other 11 cases it was due to a new criminal charge or a material violation of the stipulated agreement, such as non-compliance with the treatment plan or having unsupervised visitation with a minor.¹³

III. Effect of Proposed Changes:

The bill revises the Jimmy Ryce Act as described below.

Definition of Sexually Violent Offense

The bill amends s. 394.912, F.S., to exclude sexually motivated misdemeanor acts from the definition of “sexually violent offense.”

Prioritization of Assessment of Persons Convicted of a Sexually Violent Offense

The proposed bill amends s. 394.913, F.S., to require the Department of Children and Family Services (department) to prioritize the assessment of persons convicted of a sexually violent offense for a recommendation as to whether the person meets the definition of a sexually violent predator based on when such persons will be released. Specifically, of the persons convicted of a sexually violent offense and who have less than 365 days until their anticipated release, the department must give priority to the completion of the assessment and recommendation for the person having the earliest release date.

Extension of Deadlines

The bill amends s. 394.9135, F.S., to extend the deadlines for the department to provide its written assessment and recommendation to the state attorney and for the state attorney to file a commitment petition. The bill provides that if the 72-hour deadline for providing the recommendation to the state attorney falls after 5 p.m. on a work day or during a weekend or holiday, the recommendation may be provided by 5 p.m. the next work day. Similarly, if the state attorney’s 48-hour petition filing deadline falls after 5 p.m. or on a weekend or holiday, the commitment petition may be filed by 5 p.m. the next work day.

Use of the term “work day” could create some confusion in the application of the timeframes. Although it appears that the intent is to suggest after 5 p.m. on a weekday, some individuals

¹² *Id.*

¹³ *Id.*

“work” on Saturday or Sunday. The Legislature may wish to use another term such as “weekday.”¹⁴

Detainers for Deportation

The bill amends s. 394.917, F.S., to delete a requirement that a sexually violent predator be committed to the department for treatment before the person may be deported. This will allow federal authorities to process the sexually violent predator for deportation, as opposed to the current requirement that the deportable predator be committed to the Jimmy Ryce facility.

In discussing the merits of this proposal, the department notes that facilitating deportation of committed sexually violent predators would save the state the expense of providing long-term care and treatment to these persons. The criminal offense for which a sexually violent predator was convicted will almost certainly fall into the category of an “aggravated felony” under 8 U.S.C. s. 1101(a)(43). United States Immigration and Customs Enforcement (ICE) policy places aliens who have committed an aggravated felony in the first priority level for removal from the United States.¹⁵ Therefore, it is not likely that a sexually violent predator who is transferred to ICE would be released from federal custody while awaiting deportation.¹⁶

Contraband

The bill creates s. 394.933, F.S., to prohibit the introduction or removal of certain articles to or from a Jimmy Ryce facility; and to impose penalties for the commission of such acts. Specifically, the bill provides that, unless authorized by law or as specifically authorized by the person in charge of a Jimmy Ryce facility, a person is prohibited from introducing into, or take or attempt to take or send any of the following articles, which are declared to be contraband:

- An intoxicating beverage or beverage that causes or may cause an intoxicating effect;
- A controlled substance as defined by chapter 893, F.S.;¹⁷
- A firearm or deadly weapon; or
- Any other item designated by written facility policy to be hazardous to the welfare of clients or staff or to the operation of the facility.

These provisions are substantially the same as those in s. 916.1085, F.S., which applies to secure forensic facilities for the treatment of incompetent defendants or persons acquitted of crimes by reason of insanity. However, with regard to prohibited articles, neither s. 394.458, F.S. (relating to state hospitals) nor s. 944.47, F.S. (relating to state correctional facilities) includes a provision criminalizing the introduction of additional items as designated by written facility policy. The implications of this are discussed in the Constitutional Issues section of this analysis.

¹⁴ CS/SB 1314 (2010 Regular Session).

¹⁵ Immigration and Customs Enforcement Policy No. 10072.1, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011.

¹⁶ The department has previously noted that prosecutors handling sexually violent predator civil commitments have sometimes been reluctant to consider allowing deportation rather than civil commitment because of the potential for the individual to unlawfully return to the United States. In addition, some prosecutors have expressed reluctance to facilitate what may amount to the unsupervised release of a sexually violent predator in his country of origin. See Department of Children and Families, *Staff Analysis and Economic Impact for HB 1097* (January 4, 2012), p.2 (on file with the Senate Committee on Children, Families, and Elder Affairs).

¹⁷ Chapter 893, F.S., includes numerous controlled substances that are listed in Schedules I, II, III, IV, and V.

This section also prohibits a person from transmitting to, attempting to transmit to, or attempting to cause to be transmitted to or received by any client of any facility under the supervision or control of the department or agency, any item declared to be contraband at any place that is outside the grounds of the facility. An exception is made if the action is authorized by law or specifically authorized by the person in charge of the facility.

In addition, the bill subjects an individual or vehicle entering the grounds of any Jimmy Ryce facility to reasonable search and seizure of any contraband materials introduced into or upon the grounds of a facility. Under the bill, reasonable search and seizure may be enforced by institutional security personnel or by a law enforcement officer.

A person who introduces or attempts to introduce contraband into a facility or transmits or attempts to transmit contraband to a client of a facility is subject to punishment of a third-degree felony.¹⁸

Statewide Workgroup on the Conditional Release of Sexually Violent Predators

The bill creates the Statewide Workgroup on the Conditional Release of Sexually Violent Predators for the purpose of assessing the appropriateness of placing sexually violent predators on conditional release. Based upon the workgroup assessment, it will make policy recommendations to the Governor and the Legislature. The workgroup will be required to:

- Collect and organize data concerning the practice of placing sexually violent predators on conditional release in this state;
- Identify issues related to the use of conditional release in this state;
- Identify the procedures, if any, used by other states to release sexually violent predators into the community and the attendant issue of supervising sexually violent predators while in the community;
- Ascertain the costs of monitoring sexually violent predators in the community;
- Prepare policy recommendations for presentation to the Governor and the Legislature regarding the conditional release of sexually violent predators; and
- Complete its work by December 1, 2012 and submit its report and recommendations by February 1, 2013 to the Governor and the Legislature.

The workgroup will be comprised of the following members:

- A representative from the Department of Children and Families who shall be appointed by the Secretary of the department;
- A representative from the Department of Corrections who shall be appointed by the secretary of the department;
- A representative from the Florida Prosecuting Attorneys Association;
- A representative from the Florida Public Defender Association;
- A representative from the Florida Association for the Treatment of Sexual Abusers; and

¹⁸ A felony of the third-degree is punishable by a fine not to exceed \$5,000 or a term of imprisonment not exceeding 5 years. If the offender is determined to be an habitual offender, the term of imprisonment is not to exceed 10 years.

- A representative from the Florida Parole Commission.

Under the bill, members of the workgroup will serve without compensation but are entitled to receive reimbursement for per diem and travel expenses pursuant to s. 112.061, F.S, for their actual and necessary expenses incurred in the performance of their duties. The Department of Children and Families will provide the workgroup with staff support necessary to assist the workgroup in the performance of its duties.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 5 of the bill creates s. 394.933, F.S., to prohibit introduction of contraband into a civil commitment facility. The prohibited articles include three specified items (intoxicating substances, controlled substances, and firearms or deadly weapons) as well as “(a)ny other item designated by written facility policy to be hazardous to the welfare of clients or staff or to the operation of the facility.” The last provision raises concerns regarding unlawful delegation of legislative powers, and there is also a question of whether the statute provides for adequate notice of what activity is a criminal offense. The similar provision in s. 916.1085, F.S., which allows contraband items to be designated by written institutional policy has been in effect since the statute was created in 1985. However, there have been no reported cases challenging the constitutionality of the provision.

Article I, Section 3 of the Florida Constitution provides for separation of powers between the legislative, executive, and judicial branches. In *Clark v. State*, 395 So.2d 525 (Fla. 1981), the Florida Supreme Court recognized that the Legislature may at times delegate legislative power to the executive branch if the delegation is lawful and reasonable. The reasonableness of the delegation must be determined within the practical context of the problem addressed by the delegation.¹⁹ In *Clark*, the Legislature considered s. 944.47, F.S., which is the contraband statute relating to correctional institutions. The statute provided that introduction of specific items listed in the statute was a criminal

¹⁹ *Clark v. State*, 395 So. 2d 525 (Fla. 1981).

offense unless the officer in charge of the institution had authorized introduction of the item through regular channels. The court found that the discretion given to the officer in charge was not an unlawful delegation of legislative authority. However, it may be significant that the discretion examined in *Clark* allowed decriminalization of activity, not criminalization of activities not specifically included in statute.

With regard to criminalization of activity by written policy, in *B.H. v. State* the Florida Supreme Court held that the Legislature unconstitutionally delegated the power to define the elements of a crime when it created a third degree felony offense of escape from a residential commitment facility in restrictiveness level VI or above, and gave the former Department of Health and Rehabilitative Services complete discretion to define restrictiveness levels.²⁰ However, in *Avatar Development Corporation v. State*, the Court found that it was permissible for the violation of rules and permit conditions established by the Department of Environmental Protection for pollution control to be punishable as misdemeanors.²¹ It is unclear whether a court would deem the discretion given to the facility in the bill to be more like the statute in *B.H.* or the one in *Avatar Development Corporation*.

The statute may also be vulnerable to challenge on the grounds that it violates due process because it does not require prior notice of what activity is criminal. In *Avatar Development Corporation*, the Court gave some significance to the fact that the defendant had notice of the prohibited or required activity because it was set out on the permit that was issued. This potential infirmity could be cured by requiring some form of publication of the items that are prohibited by policy.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference determined that the bill would have an insignificant impact on the state prison population.

VI. Technical Deficiencies:

As noted in the discussion of the amendment to s. 394.9135, F.S., regarding extension of time limits, it may be appropriate to consider using the term “week day” or another term rather than the term “work day.”

²⁰ *B.H. v. State*, 645 So.2d 987 (Fla. 1994), *certiorari denied*, 515 U.S. 1132 (1995).

²¹ *Avatar Development Corporation v. State*, 723 So.2d 199 (Fla. 1998).

VII. Related Issues:

According to the department, the proposed changes in this bill will protect vulnerable citizens by helping to lower the chance that extremely dangerous sexual predators will “slip through the cracks” and avoid commitment because of technical violations of the statute as currently written. The revisions in this bill will also help prevent the introduction of dangerous contraband onto the grounds of any facility designated by the department to house and treat persons detained or committed. The prohibition of dangerous contraband and possible prosecution of persons violating these provisions will help safeguard staff members, visitors, and residents of such facilities.²²

The following comments were among those provided by the department in its analysis of the bill:

- Limiting sexually violent offenses to felony criminal acts will make statutory definitions consistent with legislative intent by improving efficiency in identifying only those offenders who are extremely dangerous sexual predators.
- Allowing the department to prioritize assessments by release date for persons within one year of release ensures adequate time for processing referrals and filing commitment petitions.
- Extending deadlines to the next working day when statutory time limits related to immediate release referrals end past business hours on a work day or on weekends or holidays would ensure there is sufficient time for making recommendations and filing commitment petitions. This prevents sexual predators from being released for technical reasons unrelated to public safety.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by the Children, Families, and Elder Affairs Committee on January 25, 2012:

The committee substitute:

- Changes the “task force” to “workgroup”;
- Changes the date of the workgroup’s organizational session from September 1, 2012 to August 1, 2012;
- Changes the completion deadline for the report from September 1, 2012 to December 1, 2012;
- Changes the due date of the required report to the Governor and the Legislature from January 1, 2014 to February 1, 2013; and
- Adds the Florida Parole Commission to the membership of the workgroup.

²² Department of Children and Families, *2012 Agency Proposal* (received via email on August 24, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
