

STORAGE NAME: h3327.flc

DATE: February 27, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Family Law and Children
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3327

RELATING TO: Involuntary civil commitment for sexually violent predators.

SPONSOR(S): Representative Villalobos

COMPANION BILL(S): Identical S 788; Similar H 1671, S 398, CS/ S 646

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) Family Law and Children
 - (2) Health and Human Services Appropriations
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

HB 3327 creates the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act." The Act establishes legal procedures by which sexually violent predators may be committed to the Department of Children and Family Services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Several statutes provide for the involuntary commitment of individuals with the Department of Children and Family Services for care, custody and control.

- F.S. 985.223 provides that every child who is adjudicated incompetent to proceed may be involuntarily committed to DCF for treatment upon a finding by the court of clear and convincing evidence that:
 - i)the child is mentally ill or mentally retarded and because of the mental illness or retardation the child is manifestly incapable of surviving, and without treatment the child is likely to either suffer from neglect or refusal to care for self, and the neglect or refusal poses a real and present threat of substantial harm to the child's well being; OR there is a substantial likelihood that in the near future the child will inflict serious bodily harm on self or others as evidenced by recent behavior; AND
 - ii)all available less restrictive alternatives are inappropriate.
- F.S. 916.13 provides that every person adjudicated incompetent to stand trial or incompetent for sentencing may be involuntarily committed for treatment upon a finding by the court of clear and convincing evidence that:
 - iii)the person is mentally ill or mentally retarded and because of the mental illness or retardation the person is manifestly incapable of surviving alone or with the help of family or friends, and without treatment the person is likely to suffer from neglect or refuse to care for self, and such neglect or refusal poses a real and present threat of substantial harm to his or her well being; OR there is a substantial likelihood that in the near future the person will inflict serious bodily harm on self or another person, as evidenced by recent behavior; AND
 - iv)all available less restrictive treatment alternatives which would offer an opportunity for improvement of the person's condition have been judged to be inappropriate.
- F.S. 945.12 provides that a prisoner who has been determined by DCF and the Department of Corrections to be amenable to rehabilitative treatment for sexual deviation, and who has voluntarily agreed to participate in such rehabilitative treatment, may be transferred to DCF, provided appropriate bed space is available.
- F.S. 393.11 provides that when a person is mentally retarded and requires involuntary admission to residential services provided by DCF, the circuit court has jurisdiction to hold a hearing and enter an order involuntarily admitting the person in order that the person may receive the care, treatment, habilitation, and rehabilitation which the person needs. The court must find that:
 - v)the person is mentally retarded;
 - vi)placement in a residential setting is the least restrictive and most appropriate alternative; and
 - vii)because of the person's degree of mental retardation the person lacks sufficient capacity to give express and informed consent , and lacks basic survival and self-care skills to such a degree that close supervision is necessary and if not provided, would result in a real and present threat of

substantial harm to the person's well being; OR is likely to physically injure others if allowed to remain at liberty.

- F.S. 394.467 (commonly known as "The Baker Act") provides for involuntary placement for treatment upon a finding of the court by clear and convincing evidence that:
 - viii)the person is mentally ill and because of the mental illness has refused voluntary placement; or is unable to determine for self whether placement is necessary; and is manifestly incapable of surviving alone or with the help of family and friends, and without treatment is likely to suffer from neglect or refuse to care for self, which poses a real and present threat of substantial harm to well being; or
 - ix)there is substantial likelihood that in the near future the person will inflict serious bodily harm on self or others, as evidenced by recent behavior; AND
 - x)all available less restrictive alternative treatment alternatives which would offer an opportunity for improvement have been judged to be inappropriate.

SEXUAL PREDATORS

Florida's Sexual Predators Act (F.S. 775.21), is designed to track sex offenders during and after completion of their sentences. Designation as a sexual offender is mandatory for qualified offenders and requires an order from the court at sentencing. A sexual predator is defined as anyone convicted of specified capital, life or first degree felonies or specified second-degree felonies AND the offender has previously been convicted of another specified crime. The sexual predator is required to register directly with the Florida Department of Law Enforcement, provide certain information, and be fingerprinted. In lieu of initially registering with FDLE, the sexual predator may register with the Department of Corrections or any law enforcement agency. Each sexual predator who is residing permanently or temporarily in the state outside a correctional facility, jail, or secure treatment facility must register or be registered within 48 hours after entering the county of permanent or temporary residence. Any change in temporary or permanent address, also, must be provided within 48 hours. Typically, a designated sexual predator must maintain registration with the FDLE for the duration of the offender's life. However, current law contains an amnesty provision. If the offender breaks no laws for a period of 10 years, then he or she may petition the court for removal of the sexual predator designation. A sexual predator who fails to register or be registered, or who fails after registration, to provide location information, commits a third degree felony. Law enforcement must inform the community and the public of a sexual predator's presence. FDLE is responsible for the on-line maintenance of current information regarding each registered sexual predator.

Further, sexual predators may have their parental rights terminated pursuant to F.S. 39.464, or be denied visitation pursuant to F.S. 61.13((2)(b)2., if they are incarcerated in a state or federal institution and the period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years, and the court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child.

Currently, sex offender treatment is an unfunded program provided by the Department of Corrections as an adjunct to other mental health services. DOC offers group therapy for inmates with a diagnosed sexual disorder, who acknowledge the problem and who express an interest in treatment. Group therapy lasts approximately 6 months, typically meeting weekly for 90 minutes; the goal of the therapy is to reinforce the inmate's need for in-depth treatment, help the offender engage in the treatment process, and encourage continued treatment participation in the community upon release. The Director of Mental Health Services at the Department of Corrections reports that of 9,500 inmates screened, approximately 10% fit the criteria for sex offender treatment. Currently 450 offenders are in treatment, and another 500 are on waiting lists. An inmate's priority for treatment increases as the inmate approaches within 6 months of expiration of sentence.

CONSTITUTIONAL ISSUES

Article 1, Section 9 of the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. Id at 960. The courts have found that when placing persons involuntarily due to mental disorders, least restrictive alternatives must be actually available, and not just hypothetical possibilities. Williams v. Davis, 459 So. 2d 406 (Fla. 1st DCA 1984). Further, courts have found that to keep a mental patient committed when there are less restrictive alternatives available, would violate the constitutional rights of the patient. Handley v. Dennis, 642 So. 2d 115 (Fla. 1st DCA 1994).

Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. There is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met. Department of Law Enforcement, at 960.

The United States Supreme Court, in a narrow 5 to 4 ruling, recently found a similar statute constitutional in Kansas v. Hendricks, 117 S.Ct 2072, 65 USLW 4564 (U.S. 1997). The Kansas Sexually Violent Predator Act establishes procedures for the civil commitment of persons who, due to mental abnormality or personality disorder, are likely to engage in predatory acts of sexual violence. Regarding substantive due process, the Court stated that it generally sustains commitment statutes if they couple proof of dangerousness with proof of some additional factor, such as mental illness or mental abnormality. The Court leaves to the States the task of defining terms of a medical nature that have legal significance. In finding that the Kansas Act did not violate Double Jeopardy or Ex Post Facto provisions of the U.S. Constitution, the Court held that the Kansas Act did not establish criminal

proceedings, and involuntary confinement under it was not punishment. The Court relied on the following arguments in making its determination:

- the State disavowed any punitive intent;
- the Act limited confinement to a small segment of particularly dangerous individuals;
- the Act provided strict procedural safeguards;
- the Act directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed;
- the Act recommends treatment if such is possible;
- the Act permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired.

In Justice Breyer's dissent, in which three other Justices joined, he argued that because Kansas believed that treatment for the mental abnormality existed, but did not offer such treatment, the legislative scheme begins to look punitive. If treatment were the primary aim, the State could have required treatment during imprisonment. "When a State decides offenders can be treated and confines an offender to provide the treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive." If punitive, the Act would violate the Ex Post Facto clause, unless drafted to operate prospectively only. "Where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners."
Id. at 2098.

B. EFFECT OF PROPOSED CHANGES:

Section 1 of HB 3327 creates the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act" by creating F.S. sections 916.30 - 916.43.

Section 2: Creates F.S. 916.30: **Legislative findings and intent.** Provides for Legislative findings that a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment under the Baker Act, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under the Baker Act, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in criminal, sexually violent behavior. Further, the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedures under the Baker Act for the treatment and care of mentally ill persons is inadequate to address the risk these sexually violent predators pose to society. The prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the Baker Act. The intent of the Legislature is to create a civil commitment procedure for the long-term care

and treatment of sexually violent predators. ***This section is identical to Kansas Statutes Annotated 59-29a01.***

Section 3: Creates F.S. 916.31: **Definitions.**

- Agency with jurisdiction is the agency with the authority to direct the release of a person:
 - i) serving a sentence in the custody of the Department of Corrections,
 - ii) a person adjudicated delinquent and committed to the custody of the Department of Juvenile Justice, or
 - iii) a person who was involuntarily committed to the custody of the Department of Children and Family Services upon an adjudication of not guilty by reason of insanity. ***Similar to the definition of “agency with jurisdiction” found in KSA 59-29a02(f). Kansas does not have a specific department to handle juvenile justice.***
- Court: the circuit court which would have adjudicated or sentenced, or did adjudicate or sentence, the person for the most recent sexually violent offense. ***The Kansas law does not define “court.”***
- Mental abnormality: a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree such that the person constitutes a menace to the health and safety of others. ***Identical to KSA 59-29a02(b).***
- Overt act: any act that either causes harm of a sexually violent nature or creates a reasonable apprehension of such harm. ***The Kansas law does not define “overt act.”***
- Predatory: acts directed toward another person for the primary purpose of victimization. ***Similar to KSA 59-29a02(c).***
- Sexually motivated: one of the purposes for which the defendant committed the crime was for the purpose of the defendant’s sexual gratification. ***Identical to KSA 59-20a02(d).***
- Sexually violent offense:
 - iv) Murder as part of a sexual battery in violation of F.S. 782.04(1)(a)2. ***(not included in the Kansas law);***
 - v) Sexual battery of any person in violation of F.S. 794.011;
 - vi) Lewd, lascivious, or indecent assault upon or act upon or in the presence of a person in violation of F.S. 800.04 (requires presence of child);
 - vii) Procuring a person for prostitution in violation of F.S. 796.03 (procuring a person under the age of 18); or F.S. 796.04 (forcing, compelling, or coercing another to become a prostitute); and F.S. 787.01(3)(a) (kidnaping a child under the age of 13, and in the course of committing the offense commits one or more of the following: aggravated child abuse, sexual battery against the child; a lewd, lascivious, or indecent assault or act upon or in the presence of the child; procuring or compelling a child into prostitution; or exploitation of the child);

- viii) Purchasing or obtaining custody or control, or offering to purchase or obtain custody or control, of a person to engage in sexually explicit conduct as defined by F.S. 847.0145 (selling or buying of minors);
 - ix) Any conviction for a felony offense in effect at any time before the effective date of this act that is comparable to a sexually violent offense as defined in the act or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense;
 - x) An attempt, criminal solicitation, or conspiracy in violation of F.S. 777.04, of a sexually violent offense; or
 - xi) Any act that either at the time of sentencing or adjudication for the offense or subsequently during civil commitment proceedings under this act has been determined beyond a reasonable doubt to have been sexually motivated.
- Sexually violent predator: any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. **Identical to KSA 59-29a02(a).**
 - State attorney: the state attorney for the county where the person was charged for a sexually violent offense most recently, or, upon request of the state attorney, the Attorney General. **State attorney is not defined in the Kansas law.**

Section 4: Creates F.S. 916.32: **Notice to state attorney of release of sexually violent predator; immunity from liability.** Requires the agency with jurisdiction to give written notice to the state attorney of the county and the Attorney General, when it appears that a person may meet the criteria of a sexually violent predator. This notice must be given 60 days before: the anticipated release date from the Department of Corrections of a person who has been convicted of a sexually violent offense; the anticipated release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial; or the anticipated release of a person who has been adjudicated not guilty by reason of insanity of a sexually violent offense and involuntarily committed. Requires the agency with jurisdiction to provide to the state attorney all relevant information, including but not limited to the person's name, identifying factors, anticipated future residence, and offense history; a complete copy of the institutional records compiled by the agency with jurisdiction relating to the person and any out-of-state correctional records, if available; and all records relating to the psychological or psychiatric evaluation and treatment of the person. The agency with jurisdiction and the state attorney and their employees and individuals contracting, appointed, or volunteering to perform services are immune from liability for any good-faith conduct under this section. **KSA 59-29a03(a)(1) requires notice to the attorney general and a multi disciplinary team, 90 days prior to anticipated release. The multi disciplinary team is to review available records and assess whether or not the person meets the definition of a sexually violent predator, and notify the attorney general of its findings within 30 days. The state of Wisconsin uses a procedure within the Wisconsin Department of Corrections to screen out over 90% of those who meet initial eligibility criteria. Kansas also provides for a prosecutor's review committee to assist the attorney general in determining whether or not the person meets the criteria of a sexually violent**

predator, however, Kansas is in the process of amending the prosecutor's review team out of their Act. The immunity provision is identical.

Section 5: Creates F.S. 916.33: **Petition; time; contents.** Allows the state attorney to file a petition alleging that the person is a sexually violent predator when it appears that a person presently confined may be a sexually violent predator or it appears that a person who is not presently confined but who has previously been convicted of a sexually violent offense has committed a recent overt act and the state attorney has determined that the person meets the definition of a sexually violent predator. The petition must state sufficient facts to support the allegation. "Time" is mentioned in the catchline, but not in the substance of the section. ***Kansas does not include a provision for persons who are not presently confined but who have been previously convicted of a sexually violent offense. In Florida, inclusion of this provision adds 4300 people to be released from Community Supervision who may meet sexual predator eligibility criteria. Kansas includes a time requirement for filing. KSA 59-29a04.***

Section 6: Creates F.S. 916.34: **Determination of probable cause; evaluation; person taken into custody.** Provides that upon the filing of the petition, the court shall make a non-adversary determination regarding whether the petition sets forth sufficient grounds to believe probable cause exists that the respondent is a sexually violent predator. If the court determines that probable cause exists, the court shall direct that the person be taken into custody if not already in custody, or shall direct the agency with jurisdiction to transfer, if necessary, the person to an appropriate secure facility, including but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation is to be conducted by a person deemed to be professionally qualified to conduct such an examination. ***Kansas provides for a hearing to contest the probable cause determination made by the judge. KSA 59-29a05.***

Section 7: Creates F.S. 916.35: **Trial, counsel and experts; indigent persons; jury.** Subsection (1) provides for the trial. Requires the court to conduct a trial within 45 days after the filing of the petition. The trial is to determine whether the person is a sexually violent predator. The trial may be continued upon a showing of good cause by either party or by the court on its own motion in the due administration of justice and when the person will not be substantially prejudiced. ***Identical to Kansas, except for the timeframe. KSA 59-29a06.***

Section (2) provides for counsel, experts, and indigent persons. Provides that at all adversary proceedings under this act, the person subject to the act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint the public defender or, if a conflict exists, other counsel to assist the person. Whenever a person is subject to an examination under this act, the person may retain qualified professionals to perform an examination of the person on his or her own behalf. When the person wishes to be examined by a qualified professional of his or her own choice, the examiner shall be permitted to have reasonable access to the person, for the purpose of the examination, and to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall assist the person in obtaining a qualified professional to perform an examination or participate in the trial on the person's behalf and shall order reasonable compensation for such services to be paid for by the county, in accordance with F.S. 914.06. ***Kansas allows assistance of counsel at all stages of the proceedings. Kansas also requires a***

judicial finding of necessity to assist in the appointment of a qualified professional of the person's choice. KSA 59-29a06.

Subsection (3) provides that the person or the state attorney may demand, or the court on its own motion may order, that the trial be held before a jury of six persons. The demand must be filed, in writing, or the order entered, at least four days before the trial. If no demand or order is made, the trial shall be before the court. ***Identical to Kansas.***

Section 8: Creates F.S. 916.36: **Determination; commitment procedure; mistrials.**

Subsection (1) requires the court or the jury to determine whether, beyond a reasonable doubt, the person is a sexually violent predator. When the determination is made by a jury, the verdict must be unanimous. Provides that the determination may be appealed.

Identical to Kansas.

Subsection (2) provides that if the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the Department of Children and Family Services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by DCF. At all times, sexually violent predators who are committed for control, care, and treatment by DCF shall be kept in a secure facility segregated from patients who are not committed under this section. ***Identical to Kansas, except that Kansas requires the committed persons to be kept in a facility or building separate from any other patient. KSA 59-29a07.***

Subsection (3) provides for the person's release if the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator. If a mistrial is declared, the court shall direct that the person be held at an appropriate secure facility until another trial is conducted. Any subsequent trial must be held within 60 days of the previous trial. ***Identical to Kansas, except for timeframe.***

Subsection (4) provides that if a person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released, and such person's commitment is sought under this act, the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at a criminal trial, other than the right not to be tried while incompetent shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section. ***Identical to Kansas.***

Subsection 9: Creates F.S. 916.37: **Annual examination.** Requires each person committed under this act to have an examination of his or her mental condition made once every year. The committed person may retain a qualified professional to examine such person, and the qualified professional shall have access to all records concerning the person. If the committed person is indigent and so requests, the court may appoint a qualified professional to examine the person. This yearly report shall be provided to the

court that committed the person and to the state attorney. The court shall conduct an annual review of the status of the committed person. **Similar to Kansas. KSA 59-29a08. The Kansas Act includes that "nothing in this Act shall prohibit the person from otherwise petitioning the court for discharge." The United States Supreme Court cited this language in finding the Kansas Act constitutional. Kansas v. Hendricks, at 2083.**

Section 10: Creates F.S. 916.38: Provides that the involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment. **Identical to Kansas. KSA 59-29a09.**

Section 11: Creates F.S. 916.39: **Petition for release; procedure.**

Subsection (1) provides for the petition for release when DCF determines that the mental abnormality or personality disorder of a person committed as a sexually violent predator has so changed that the person is not likely to commit predatory acts of sexual violence if released. In this instance, DCF shall authorize the person to petition the court for release. The petition shall be served upon the court and the state attorney. The court, upon receipt of the petition, shall order a hearing within 30 days. The state attorney shall represent the state and shall have the right to have the committed person examined by a qualified professional of the state attorney's choice. The hearing shall be before a jury if demanded by either the committed person or the state attorney. The burden of proof shall be upon the state attorney to show beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large, and that, if discharged, the person is likely to commit predatory acts of sexual violence. **Identical to Kansas. KSA 59-29a10.**

Subsection (2) provides for petition for discharge without the approval of DCF. The department is required to provide the committed person with an annual written notice of the person's right to petition the court for discharge over the department's objection. The notice shall contain a waiver of this right if the committed person does not choose to petition the court. The department shall forward the notice and signed waiver form or the committed person's petition to the court with the annual report. If the committed person files a petition over the department's objection, the court shall review the petition to determine whether there are reasonable grounds to support the petition. If the court finds that the petition is based upon frivolous grounds, it shall deny the petition without a hearing. If the court finds that the petition is based on reasonable grounds, the court shall set a show-cause hearing to determine whether facts exist that warrant an adversary hearing on whether the committed person's condition has so changed that he or she is safe to be discharged. The committed person has the right to have an attorney present to represent the person at the show-cause hearing, but is not entitled to be present. If the court at the show-cause hearing determines that probable cause exists to believe that the committed person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not likely engage in acts of sexual violence if discharged, then the court shall order an adversary hearing. At the adversary hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that the person was entitled to at the initial commitment proceeding. The state attorney shall represent the state and shall have a right to a trial by jury and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on his or her own behalf, and the court shall appoint a qualified professional if the person is indigent and requests that an expert be appointed. The burden of proof at the hearing shall be upon the state attorney to prove beyond a reasonable doubt that the committed

person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

Identical to Kansas. KSA 59-29a08.

Subsection (3) provides that if a committed person has previously filed a petition for discharge without the approval of DCF and the court determined upon review of the petition, or following a hearing, that the petition was frivolous or that the committed person's condition had not so changed that the person was safe to be at large, the court shall deny any subsequent petition unless the petition contains facts upon which a court could find the condition of the committed person had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from the committed person without the department's approval, the court shall review the petition and determine if the petition is based upon frivolous grounds, and, if so, shall deny the petition without a hearing. **Similar to Kansas. KSA 59-29a11. The Kansas Act provides that nothing in the Act prohibits a person from filing a petition for discharge.**

Section 12: Creates F.S. 916.40: **Department of Children and Family Services responsible for costs.** Provides that DCF is responsible for all costs relating to evaluation and treatment of a person committed to the department's custody as a sexually violent predator under any provision of this act. Reimbursement may be obtained by DCF for the cost of care and treatment of persons committed to the department's custody as provided by law. **Identical to Kansas. KSA 59-29a12.**

Section 13: Creates F.S. 916.41: **Notice to victims of release of person committed as a sexually violent predator.** Requires DCF to give written notice of the release of a committed person under this act. Notice must be given to any victim of the person's activities or crime who is alive and whose address is known to the department, or if the victim is deceased, to the victim's next of kin, if the address of the next of kin is known to the department. Failure to notify is not a reason for postponement of the release. Nothing in this section creates a cause of action against the state or any employee of the state or agents or volunteers who help make this notification. **Similar to Kansas, except that Kansas requires notice to the victim's family if the victim is deceased. Further, Kansas provides that the law does not create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of the failure to notify. KSA 59-29a13.**

Section 14: Creates F.S. 916.42: **Severability.** Provides that if any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable. **Identical to Kansas. KSA 59-29a15.**

Section 15: Creates F.S. 916.43: **Confidential or privileged information and records.** Provides that in order to protect the public, relevant information and records that are held by a governmental entity or are otherwise confidential or privileged shall be released to the agency with jurisdiction or the state attorney for the purpose of meeting the notice requirement and determining whether a person is or continues to be a sexually violent predator. This section is supplemental to the provisions of ss. 916.30 - 916.42. **Identical to Kansas. KSA 59-29a16.**

Section 16: Provides for an effective date of January 1 after the year in which enacted.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

HB 3327 creates a civil commitment process for the care, custody, and treatment of sexually violent predators.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

HB 3327 will require a substantial amount of court involvement in the commitment and subsequent release of sexually violent predators.

Agencies with jurisdiction (Department of Corrections, Department of Juvenile Justice, and Department of Children and Family Services) are required to notice the State Attorney 60 days prior to the anticipated release of a person who appears to meet the definition of a sexually violent predator.

The State Attorney may file a petition alleging that a person is a sexually violent predator, and then is responsible for arguing the case through to trial, and defending the state when a committed person petitions for release.

The Office of the Public Defender is responsible for defending the alleged sexually violent predator during all adversary proceedings under this act.

The Department of Children and Families is responsible for housing and treating persons committed as sexually violent predators. DCF is also responsible for the annual examination of the committed person, and for the provision of an annual written notice to the committed person of their right to petition the court for discharge over the department's objection. The department is responsible for all costs relating to evaluation and treatment of a person committed to the department's custody as a sexually violent predator. The Department is required to notice victims or next of kin prior to the release of a committed person.

Section 7 of HB 3327 requires counties to pay for pre-commitment evaluations of persons who are in temporary custody awaiting trial. The evaluation must be conducted by a person deemed to be professionally qualified to conduct such an examination. Further, section 6 of HB 3327 requires a person to be taken into custody following a judicial determination of probable cause, but before a trial. Custody must be in a "appropriate secure facility" including, but not limited to, a county jail. It is possible that

the person would be confined in the county jail for up to 45 days between the time the petition was filed and trial.

- (3) any entitlement to a government service or benefit?

A committed person would have a strong argument pursuant to the dissent in *Kansas v. Hendricks*, that he or she is entitled to treatment.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

HB 3327 creates the following sections of the Florida Statutes: 916.30, 916.31, 916.32, 916.33, 916.34, 916.35, 916.36, 916.37, 916.38, 916.39, 916.40, 916.41, 916.42, and 916.43.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Creates the "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act."

Section 2: Creates s. 916.30, F.S., to provide legislative findings and intent.

Section 3: Creates s. 916.31, F.S., to provide definitions of "agency with jurisdiction"; "court"; "mental abnormality"; "overt act"; "predatory"; "sexually motivated"; "sexually violent offense"; "sexually violent predator"; and "state attorney".

Section 4: Creates s. 916.32, F.S., requiring that written notice be given to the state attorney of the county and the Attorney General 60 days before the anticipated release of a sexually violent predator. Requires the agency with jurisdiction to provide certain information to the state attorney. Provides immunity from liability for the agency with jurisdiction and the state attorney and their employees and individuals contracting,

appointed, or volunteering to perform services for any good-faith conduct under this section.

Section 5: Creates s. 916.33, F.S., allowing the state attorney to file a petition when it appears that a person presently confined may be a sexually violent predator or it appears that a person who is not presently confined but who has previously been convicted of a sexually violent offense has committed a recent overt act and the state attorney has determined that the person meets the definition of a sexually violent predator. The petition must allege that a person is a sexually violent predator and state sufficient facts to support the allegation.

Section 6: Creates s. 916.34, F.S., requiring the court to make a nonadversary determination whether the petition sets forth sufficient grounds to believe probable cause exists that the respondent is a sexually violent predator. If the court finds probable cause, the court shall direct that the person be taken into custody if not already in custody, or shall direct the agency with jurisdiction to transfer the person to an appropriate, secure facility, including but not limited to, a county jail, for an evaluation. The evaluation is to ascertain whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

Section 7: Creates s. 916.35, F.S. requiring the court to conduct a trial within 45 days of the filing of the petition. The trial is to determine whether the person is a sexually violent predator. The trial may be continued upon a showing of good cause by either party or by the court on its own motion when the person will not be substantially prejudiced. The alleged sexually violent predator is entitled to the assistance of counsel, and if indigent, the court shall appoint the public defender. If a conflict exists, other counsel shall be appointed. The bill allows a person to retain qualified professionals to perform an examination on their behalf, if the person is subjected to an examination under this act. When the person wishes to be examined by a qualified professional of his or her own choice, the examiner shall be permitted to have reasonable access to the person and to all relevant medical and psychological records and reports. If the person is indigent, the court, upon the request of the person, shall assist the person in obtaining a qualified professional, and shall order reasonable compensation for such services which shall be paid for by the county.

The bill also allows the person, the state attorney, or the court on its own motion, to demand that the trial be held before a jury of six persons. The demand must be filed in writing, or the order entered, at least four days before the trial. If no demand or order is made, the trial shall be held before the court.

Section 8: Creates s. 916.36. Subsection (1) requires the court or the jury to determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the determination is made by a jury, the verdict must be unanimous. The determination may be appealed.

Subsection (2) provides for the commitment of the person if the court or jury determines that the person is a sexually violent predator. The person shall be committed to the custody of the Department of Children and Family Services (DCF) for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. The facility shall be operated by DCF.

At all times, sexually violent predators who are committed to DCF shall be kept in a secure facility segregated from patients who are not committed under this law.

Subsection (3) requires the court to release the person if the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator. If a mistrial is declared, the court shall direct that the person be held at an appropriate secure facility until another trial is conducted. Any subsequent trial following a mistrial must be held within 60 days of the previous trial.

Subsection (4) requires the court to hear evidence and determine whether the person committed the acts charged, if the person charged with a sexually violent offense has been found incompetent to stand trial and such person's commitment is sought. The rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at a criminal trial, other than the right not to be tried while incompetent, shall apply. After hearing evidence, the court shall make specific findings on whether the person did commit the act, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If the court finds beyond a reasonable doubt that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed.

Section 9: Creates s. 916.36, F.S., which requires each person committed to have an annual examination of his or her mental condition made once every year. The committed person may retain a qualified professional to examine them, and the qualified professional shall have access to all records concerning the person. If the committed person is indigent, and so requests, the court may appoint a qualified professional to examine the person. The yearly report shall be provided to the court that committed the person and to the state attorney. The court is required to conduct an annual review of the status of the committed person.

Section 10: Creates s. 916.38, F.S., which requires the involuntary detention or commitment of persons under the Jimmy Ryce Act to conform to constitutional requirements for care and treatment.

Section 11: Creates s. 916.39, F.S., which provides for the release of committed sexually violent predators. Subsection (1) provides for the Department of Children and Family Services to authorize the committed person to petition the court for release, if DCF determines that the mental abnormality or personality disorder of the committed person has so changed that the person is not likely to commit predatory acts of sexual violence if released. The petition is to be served on the court and the state attorney. The court, upon receipt of the petition for release, shall order a hearing within 30 days. The state attorney shall represent the state and shall have the right to have the committed person examined by a qualified person of the state attorney's choice. The hearing shall be before a jury if demanded by either the committed person or by the state attorney. The burden of proof is on the state attorney to show beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large, and that if discharged, the person is likely to commit predatory acts of sexual violence.

Subsection (2) allows the committed person to petition for discharge without the approval of DCF. The department shall provide the committed person with an annual written notice of the person's right to petition the court for discharge over the department's objection. The notice shall contain a waiver of this right if the committed person does not choose to petition the court. The department shall forward the notice and signed waiver form or the committed person's petition to the court with the annual report. If the committed person files a petition for discharge over the department's objection, the court shall review the petition to determine whether there are reasonable grounds to support the petition. If the court finds the petition is based on frivolous grounds, it shall deny the petition without a hearing. If the court finds that the petition is based on reasonable grounds, the court shall set a show-cause hearing to determine whether facts exist that warrant an adversary hearing on whether the committed person's condition has so changed that he or she is safe to be discharged. The committed person has the right to have an attorney present to represent them at the show-cause hearing, but the committed person is not entitled to be present at that hearing.

If the court determines at the show-cause hearing that the committed person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not likely engage in acts of sexual violence if discharged, then the court shall set an adversary hearing. At the adversary hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that the person was entitled to at the initial commitment proceeding. The state attorney shall represent the state and shall have a right to a trial by jury, and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person and the court shall appoint a qualified professional if the person is indigent and requests that an expert be appointed. The burden of proof at the hearing shall be on the state attorney to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

Subsection (3) requires the court to deny subsequent petitions filed by a committed person who has filed a petition for discharge without the approval of the department, when the court initially determined that the petition was frivolous or the person's condition had not so changed that the person was safe to be at large. If the subsequent petition contains facts upon which a court could find the condition of the committed person had so changed that a hearing was warranted, the court need not deny the petition. Upon receipt of a first or subsequent petition from the committed person without the department's approval, the court shall review the petition and determine if the petition is based upon frivolous grounds, and if so, shall deny the petition without a hearing.

Section 12: Creates s. 916.40, F.S., which makes the Department of Children and Family Services responsible for all costs relating to the evaluation and treatment of a person committed to the department's custody as a sexually violent predator. Reimbursement may be obtained by the department for the cost and treatment of persons committed to the department's custody as provided by law.

Section 13: Creates s. 916.41, F.S., which requires the Department of Children and Family Services to give written notice of the release of a person committed as a sexually

violent predator to any victim of the person's activities or crime who is alive and whose address is known to the department, or if the victim is deceased, to the victim's next of kin, if the address is known to the department. Notice must be given prior to the release of the committed person. Failure to notify is not a reason for postponement of the release. Nothing in this section creates a cause of action against the state or any employee of the state or agents or volunteers who help make this notification.

Section 14: Creates s. 916.42, F.S., which provides that if any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 15: Creates s. 916.43, F.S., which allows relevant information and records that are held by a governmental entity or are otherwise confidential or privileged to be released to the agency with jurisdiction or to the state attorney for the purpose of meeting with the notice requirement and determining whether a person is or continues to be a sexually violent predator. Provides that this section shall be part of and supplemental to the provisions of ss. 916.30 - 916.42.

Section 16: Provides an effective date of January 1 after the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

DOC Workload: The department expects a workload increase to complete the required notifications, and to copy institutional records and mental health records of inmates to be sent to the state attorney within specified time frames.

Secure Facilities: The Department of Children and Family Services reports a significant fiscal impact. HB 3327 will require the segregation of sexually violent predators from other patients. The department reports having no such facilities at this time, and would have to establish units at its civil hospitals. Further, as juveniles may be committed, juveniles might have to be further segregated from the adults.

Post- commitment Evaluations: The Department of Children and Family Services is responsible for the costs of an annual examination for each committed person. DCF estimates the cost of the evaluation will be \$1,000 per examination. The state of Wisconsin, which has had a similar law in effect since 1994, reports evaluation costs of \$2,500 to \$5,000 per evaluation. Additionally, the committed person may retain a qualified professional person to examine the person on their own behalf. If

the committed person is indigent, the court may appoint a qualified professional to examine the person. The department estimates that this fee would likely cost between \$750 and \$1,000 for each examination ordered by the court. The Department of Children and Family Services presumes that the costs of post-commitment evaluations will be included in the treatment costs, discussed below.

Treatment: The Department of Children and Family Services reports that there are no comparable civil programs for the care and treatment of sexually violent predators. The department further reports that the program in Kansas costs \$100,000 per person committed per year. The fiscal analysis for SB 0098 in the Indiana Legislature estimates a cost of \$150,000 per year for treatment. Legislative intent concedes that the treatment needs for this population are very long term. Thus, as the years progress, an indeterminate number of persons will enter the care and treatment program, but few will be released.

Because this is a new program, and different from other states, there is little data upon which to make financial assumptions. Based on data from Wisconsin, 25% of the people who initially qualify for violent sexual predator status actually go to trial. Using this figure, 1,510 people released from the custody of DOC will actually go to a commitment trial in Florida in 1998 (6,040 x .25). Also assuming that 100% of those persons who go to trial will actually be committed, 1,510 persons will be committed in Florida. At \$100,000 per year for treatment, treatment would cost \$151,000,000 in the first year. This figure will grow incrementally, as the assumption is that more persons will be entering into the system than leaving it.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

Pre-commitment Evaluations: Pursuant to section 7 of HB 3327, prior to trial the person alleged to be a sexually violent predator may retain qualified professionals to perform an examination of the person on his or her own behalf. In the case of a person who is indigent, the court, upon the person's request, shall assist the person in obtaining a qualified professional to perform an examination or participate in the trial, and shall order reasonable compensation for such services as provided in F.S. 914.06. Florida Statute section 914.06 requires the counties to pay for expert witnesses in criminal cases, when the state or an indigent defendant requires their services. Without a multi-disciplinary team to assist in screening possible sexually

violent predators, the assumption is made that the state attorney will file a petition for all persons who qualify. Assuming 6,040 will qualify in 1998, the cost to evaluate at \$1,000 per evaluation, at one evaluation each for the state and for the respondent, is \$12,080,000.

Pre-commitment Custody: Pursuant to section 6 of HB 3327, if the court determines that there is probable cause to believe that the respondent is a sexually violent predator, the court shall direct that the person be taken into custody, if not already in custody, or shall direct the agency with jurisdiction to transfer the person to an appropriate secure facility, **including but not limited to a county jail**, for an evaluation.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

The Department of Corrections reports that there are 9,311 inmates in the department who have committed one or more of the specified offenses and may be affected by HB 3327. Of these inmates, 1,515 are due to be released within the next 12 months. The average age of a sexual offender at the time of release is 37.8 years. The number of persons not presently confined but who have been previously convicted of a sexually violent offense and who have committed a recent overt act for which the state attorney may file a petition pursuant to section 5 of HB 3327, is indeterminate. Assuming that HB 3327 applies to offenders under community supervision, the Department of Corrections reports that there are 4,300 offenders who were released during fiscal year 1996-1997 with **current** sexually violent offense convictions. There is an indeterminate number of offenders released from community supervision with **prior** sexually violent offense convictions. The Department of Juvenile Justice estimates that 225 juvenile delinquents will be released who are eligible for sexual predator classification. Adding these figures together, there is an expected 6,040 people who may be classified as violent sexual predators in 1998.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Pursuant to the assumptions made in the fiscal analysis above, it appears that this bill may require counties to spend funds or take action requiring the expenditure of funds in excess of \$1.4 million.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

HB 3327 designates the Department of Juvenile Justice as an "agency with jurisdiction," but DJJ is not specifically required to report the anticipated release of a juvenile charged with a sexually violent offense.

During pre-commitment proceedings, the person is directed to be taken into custody or transferred to an "appropriate secure facility, including but not limited to, a county jail" for an evaluation. Both the Department of Corrections and the Department of Children and Family Services report concern that "appropriate secure facility" be defined to designate which agency should assume this responsibility. Using the county jail for pre-commitment housing may make the law more punitive in nature, thus upsetting the delicate balance of constitutionality found in *Kansas v. Hendricks*.

HB 3327 does not address the custody of the individual during any interim between expiration of his or her sentence and a judicial determination that he or she is a sexually violent predator for purposes of civil commitment.

The Department of Children and Family Services has expressed concern regarding section 10 of HB 3327. Pursuant to the bill, DCF is required to conform commitment to constitutional requirements for care and treatment. Without specific guidelines or patient Bills of Rights, DCF is unsure of the acceptable modes of treatment for sexual predators.

HB 3327 will require evaluations to be conducted by evaluators "professionally qualified to conduct such an exam." The bill does not define or establish professional qualifications to preform this type of work.

The Department of Corrections reports that it is unclear whether HB 3327 is intended to apply to offenders on community supervision.

STORAGE NAME: h3327.flc

DATE: February 27, 1998

PAGE 23

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON Family Law and Children:
Prepared by:

Legislative Research Director:

Stephanie Olin

Stephanie Olin