

b. There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and

(b) All available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.

“Mental illness” is defined in s. 394.455, F.S., as

. . . an impairment of the emotional processes that exercise conscious control of one’s actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person’s ability to meet the ordinary demands of living, regardless of etiology. For the purposes of this part, the term does not include retardation or developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse impairment.

Section 916.12, F.S., provides, in part, that a person is incompetent to stand trial if the person does not have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, or if the person has no rational, as well as factual, understanding of the proceedings against him or her.

Section 916.13(1), F.S., provides:

(1) CRITERIA.--Every person adjudicated incompetent to stand trial or incompetent for sentencing, pursuant to the applicable Florida Rules of Criminal Procedure, may be involuntarily committed for treatment upon a finding by the court of clear and convincing evidence that:

(a) The person is mentally ill and because of her or his mental illness, or that the person is mentally retarded and because of her or his mental retardation:

1. The person is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the person is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to her or his well-being; or

2. There is a substantial likelihood that in the near future the person will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and

(b) All available, less restrictive treatment alternatives, including treatment in community residential facilities or community inpatient or outpatient settings, which would offer an opportunity for improvement of the person’s condition have been judged to be inappropriate.

The definition of “mentally ill,” for the purpose of s. 916.13, F.S., is almost the same as the definition of the term in s. 394.455, F.S.

Section 916.15, F.S., provides, in part, that a person who is acquitted of criminal charges because of a finding of “not guilty by reason of insanity” may be involuntarily committed pursuant to such a finding if the person is manifestly ill and, because of the person’s illness, is manifestly dangerous to himself or herself or others.

Section 916.17, F.S., provides, in part, that the court committing a defendant according to a finding of incompetency to stand trial or an adjudication of not guilty by reason of insanity, may order the person’s conditional release based on an approved plan for providing appropriate outpatient care and treatment.

III. Effect of Proposed Changes:

Section 1.

Section 1 directs the Division of Statutory Revision to change the name of chapter 916 from “Mentally Deficient and Mentally Ill Defendants” to “Mentally Deficient and Mentally Ill Defendants: Civil Commitment of Sexually Violent Predators.”

Section 2.

Section 2 provides a short title. Sections 916.10-916.20 may be cited as the, “Forensic Client Services Act.”

Section 3.

Section 3 creates s. 916.30, F.S., and provides that ss. 916.30-916.49, F.S., which are created by this Legislation, may be cited as, “The Jimmy Ryce Act of 1998.”

Section 4.

Section 4 creates s. 916.31, F.S., which provides legislative findings and intent. The Legislature finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary commitment for long-term control, care, and treatment. The Legislature finds that there is a significant likelihood that these sexually violent predators will engage in repeat acts of sexual violence if their mental conditions are not treated. The Legislature finds that the “Baker Act” commitment process is inadequate to address the special needs and risks to society posed by these sexually violent predators. The Legislature determines that a separate involuntary civil commitment process for the long-term control, care, and treatment of these sexually violent predators is necessary, and because of the nature of these predators’ mental conditions and the danger they present, it is necessary to house these predators in an environment separate from persons involuntarily committed under traditional civil commitment statutes.

Section 5.

Section 5 creates s. 916.32, F.S., which provides definitions. An “agency with jurisdiction” is defined as the “agency that releases upon lawful order or authority a person serving a sentence in the custody of the Department of Corrections [DOC], a person adjudicated delinquent and committed to the custody of the Department of Juvenile Justice [DJJ], or a person who was involuntarily committed to the Department of Children and Family Services [DCFS] upon an adjudication of not guilty by reason of insanity.”

“Convicted of a sexually violent offense” is defined as a person who has been adjudicated guilty of a sexually violent offense after a trial, guilty plea, or plea of nolo contendere; adjudicated not guilty by reason of insanity of a sexually violent offense; or adjudicated delinquent of a sexually violent offense after a trial, guilty plea, or plea of nolo contendere.

“Department” is defined as the Department of Children and Family Services.

“Likely to engage in acts of sexual violence” is defined as “the person’s propensity to commit acts of sexual violence is of such degree as to pose a menace to the health and safety of others.”

“Mental abnormality” is defined as “a mental condition affecting a person’s emotional or volitional capacity that predisposes the person to commit sexually violent offenses.”

“Person” is defined as an individual 18 years of age or older who is a potential or actual subject of proceedings under this act.

“Sexually motivated” is defined as “one of the purposes for which the defendant committed the crime was sexual gratification.”

“Sexually violent offense” is defined as murder of a human being while engaged in sexual battery; kidnaping or false imprisonment of a child under 16 years of age (and, in the course of either of these offenses, commits: sexual battery; or a lewd, lascivious, or indecent assault or act upon or in the presence of a child); sexual battery; a lewd, lascivious or indecent assault or act upon or in the presence of a child; any conviction for a felony offense in effect at any time before the effective date of the act that is comparable to a sexually violent offense as defined in the act or any federal conviction or conviction in another state that would be a sexually violent offense in this state; an attempt, criminal solicitation, or conspiracy of a sexually violent offense; or any act that either at sentencing for the offense or subsequently during civil commitment proceedings under the act has been determined beyond a reasonable doubt to have been sexually motivated.

“Sexually violent predator” is defined as a person who has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Section 6.

Section 6 creates s. 916.33, F.S., which provides that the agency with jurisdiction over a person who has been convicted of a sexually violent offense shall give written notice to the state attorney of the circuit where that person was last convicted of a sexually violent offense 180 days before: the anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who have been returned to confinement for no more than 90 days, written notice shall be provided as soon as practicable following the person's return to confinement; or the anticipated hearing regarding the possible release of a person who has been found not guilty by reason of insanity or mental incapacity of a sexually violent offense.

The agency with jurisdiction shall provide the state attorney with the following information: name; identifying characteristics; anticipated future residence, offense history; and documentation of institutional adjustment and any treatment reviewed.

Notice provisions in the section are not jurisdictional and failure to comply with those provisions does not prevent the state attorney from petitioning for the civil commitment of a person meeting the sexually violent predator criteria.

The Secretary of the DCFS shall establish a multidisciplinary team, which may include individuals from other state agencies. The purpose of the team is to review records of each person referred to the team as meeting the sexually violent predator criteria. Within 30 days after receiving notice, the team shall access whether the person meets the predator criteria, and within 60 days after receiving notice, shall provide the state attorney with its written assessment.

Section 7.

Section 7 creates s. 916.34, F.S., which provides that, when a multidisciplinary team determines that a person meets the definition of sexually violent predator, the state attorney in the judicial circuit where the person committed the sexually violent offense may file a petition with the circuit court, alleging that the person is a sexually violent predator and stating facts sufficient to support this allegation.

Section 8.

Section 8 creates s. 916.35, F.S., which provides that, when the petition is filed, the court shall determine whether probable cause exists that the person is a sexually violent predator. If a determination of probable cause is made, then the judge shall direct that the person be taken into custody and held in a county jail or county detention facility where the petition is filed. Within 72 hours after the person is taken into custody, the person must be provided with written notice of, and an opportunity to appear in person at, an adversary hearing to contest the probable cause determination. At this hearing, the judge shall receive evidence and hear arguments from the parties, and determine whether probable cause exists to believe that the person is a sexually violent predator.

At the adversary probable-cause hearing, the person shall have the right to be represented by counsel, to present evidence, to cross-examine any witness testifying against the person, and to view and copy all petitions and reports in the court file.

If the court finds probable cause to believe that the person is a sexually violent predator, the person must be held in custody in a secure facility, without opportunity for pretrial release.

Section 9.

Section 9 creates s. 916.36, F.S., which provides that, within 60 days after the completion of an adversary probable-cause hearing, the court shall conduct a trial to determine if the respondent is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the administration of justice when the person will not be substantially prejudiced.

The person is entitled to assistance of counsel and, if the respondent is indigent, the court shall appoint counsel to represent the person. If the person is subject to a mental health examination, the person may retain experts or mental health professionals to perform an examination. If a person wishes to be examined by a professional of the person's own choice, the examiner must be provided reasonable access to the person, as well as to all relevant medical and mental health records and reports. If the respondent is indigent, the court, upon the persons request, shall appoint a mental health professional and determine reasonable compensation for the professional's services.

The person or the State Attorney has the right to demand that the trial be before a jury. A demand for a jury trial must be filed, in writing, at least five days prior to trial. If no demand is made, the trial shall be to the court.

Section 10.

Section 10 creates s. 916.37, F.S., which provides that the court or jury shall determine, by clear and convincing evidence, that the person is a sexually violent predator. If the jury determines the person is a sexually violent predator, the decision must be unanimous. If a majority of the jury finds the person is a sexually violent predator, but the decision is not unanimous, the state attorney may refile the petition and proceeding according to the provisions of the act. Any retrial shall occur within 90 days of the previous trial, unless the subsequent proceeding is continued. The jury's determination is appealable.

If the judge, in a trial to the court, or at least half of the jury, finds that the person is not a sexually violent predator, the court shall direct that the person be released.

A person determined to be a sexually violent predator shall be committed to the custody of the DCFS for control, care, and treatment until such time as the person is not a threat to the public and has been ordered to be released pursuant to the provisions of the act. The committed person

shall be kept in a secure facility and shall be segregated from all other patients under the DCFS's supervision. The committed person may be housed in a correctional mental facility operated by the DOC or a private correctional contractor, provided that the person is segregated from prisoners in custody, to the greatest extent practicable.

Section 11.

Section 11 creates s. 916.38, FS., which provides that a person committed as a sexually violent predator shall have an examination of the person's mental condition once every three years, or more frequently at the court's discretion. The person may retain or, if the person is indigent and so requests, the court may appoint, a qualified professional to examine the person. This professional shall have access to all records concerning the person. The results of the examination shall be provided to the court that committed the person. Upon receipt of the report, the court shall conduct review of the person's status.

The DCFS shall provide the person with annual written notice of the person's right to petition the court for release over the objection of the director of the facility where the person is committed. The notice shall contain a waiver of rights. The director of the facility shall forward the notice and waiver form to the court.

The court shall hold a limited hearing to determine whether there is probable cause to believe that the person's condition has so changed that the person is not a threat to the public and will not engage in acts of sexual violence if discharged. The person has the right to be represented by counsel at the hearing, but not to be present. If the court finds that probable cause exists, a trial is set, and the person is entitled to the benefit of all constitutional protections afforded the person at the initial trial, except trial by jury. The state attorney shall represent the state and has the right to have the person examined by professionals chosen by the state. The state must prove, by clear and convincing evidence, that the person's mental condition remains such that the person, if released, is a threat to the public and is likely to engage in acts of sexual violence.

Section 12.

Section 12 creates s. 916.39, F.S., which provides that the Secretary of the DCFS or the Secretary's designee may petition the court for the release of a person confined as a sexually violent predator, if the Secretary or the Secretary's designee determines that the person is not likely to commit acts of sexual violence if unconditionally discharged. The petition shall be served on the court and the state attorney. Upon receipt of the petition, the court shall order a trial within 30 days unless continued for good cause. The state attorney shall represent the state and has the right to have the person examined by professionals of the state attorney's choice. The state must prove by clear and convincing evidence that the person, if discharged, is a threat to the public and is likely to engage in acts of sexual violence.

Section 13.

Section 13 creates s. 916.40, F.S., which provides that the act shall not prohibit a person from filing a petition for discharge at any time. However, if the person has previously filed a petition, without approval of the Secretary of the DCFS or the Secretary's designee, and the court has determined that the petition was without merit, then a subsequent petition shall be denied unless there are new facts warranting a probable cause hearing.

Section 14.

Section 14 creates s. 916.41, F.S., which provides for the release of relevant information and records that are otherwise confidential or privileged to the agency with jurisdiction or the state attorney for the purpose of meeting the notice requirements under the act and determining whether a person is or continues to be a sexually violent predator. Psychological or psychiatric reports, drug and alcohol reports, treatment records, medical records or victim impact statements submitted to the court or admitted into evidence shall be part of the record but sealed and may be opened only pursuant to a court record.

Section 15.

Section 15 creates s. 916.42, F.S., which provides that long-term control, care, and treatment of sexually violent predators shall conform to constitutional requirements.

Section 16.

Section 16 creates s. 916.43, F.S., which provides immunity from civil liability for good faith conduct under the act by: the agency with jurisdiction, its officers, and its employees; the state attorney and the state attorney's employees; and those involved in the evaluation, care and treatment of sexually violent predators committed under the act.

Section 17.

Section 17 creates s. 916.44, F.S., which provides for the severability of any provision declared unconstitutional.

Section 18.

Section 18 creates s. 916.45, F.S., which provides that the act applies to those persons who meet the definition of sexually violent predator, regardless of the date the sexually violent offense was committed.

Section 19.

Section 19 creates s. 916.46, F.S., which provides that the victims of any person committed as a sexually violent predator shall be notified of the person's release from commitment. Failure to notify does not postpone release. The failure to meet notification requirements does not create a cause of action against the state or an employee acting within the scope of his or her employment.

Section 20.

Section 20 creates s. 916.47, F.S., which provides that it is a second degree felony for a person to escape from lawful custody pursuant to the act.

Section 21.

Section 21 creates s. 916.48, F.S., which authorizes the court, upon committing a person as a sexually violent predator, to require the person to pay some or all of the daily subsistence costs and treatment costs, based upon the person's ability to pay, liability or potential liability to the victim or the guardian or estate of the victim, and the needs of the person's dependents. The person subject to paying subsistence and treatment costs is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposing the assessment. An order directing payment of subsistence and treatment costs may survive against the person's estate.

Section 22.

Section 22 creates s. 916.49, F.S., which provides that the DCFS is responsible for all costs relating to the evaluation and treatment of persons committed to the DCFS' custody as sexually violent predators.

Section 23.

Section 23 provides that the act shall take effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Under Section 14 of CS/SB 646, the agency with jurisdiction or the state attorney shall have access to confidential or privileged records of persons who may meet the definition of a sexually violent predator. Section 14 does not make confidential or privileged those records

that are currently public, nor does it provide the public at large with access to records that would be confidential or privileged under current law.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Committee Substitute for Senate Bill 646 is substantially patterned after Kansas' sexual predator law, though it contains features of the sexual predator laws of Washington and Missouri.

On June 23, 1997, the United States Supreme Court issued its holding in *Kansas v. Hendricks*, 1997 WL 338555, a case in which Kansas' sexual predator law was argued to be unconstitutional. The three issues before the Court were as follows: Kansas argued that substantive due process was not violated by a civil commitment based on a "mental abnormality," rather than a "mental illness"; Hendricks (the first person committed under Kansas' sexual predator law) argued that his commitment amounted to double punishment in violation of double jeopardy; and Hendricks argued that Kansas' sexual predator law is an ex post facto law because it was passed after his last conviction and purportedly increased the punishment for his criminal behavior.

The Supreme Court, in a five-to-four holding, upheld Kansas' sexual predator law. The Court found that a traditionally defined "mental illness" is not a prerequisite to a civil commitment. The double jeopardy and ex post facto issues were resolved in Kansas' favor after the Court determined that civil commitment of sexual predators under Kansas' law did not amount to a punishment. As a prerequisite to finding these issues, the conduct must be found to constitute a punishment. The Court's reasons for finding that civil commitment is not a punishment were: retribution or deterrence were not implicated (in fact, Kansas' law does not require a conviction); Kansas' law requires a prediction of dangerousness, not *mens rea*; sexually violent predators are confined under conditions similar to those of patients, not prisoners; the prospect of indefinite confinement indicates that confinement is until the person's mental condition is altered and not until a fixed amount of time is served. The Court determined that the elaborate and detailed procedural aspects accompanying the civil commitment process were not indicative that a punishment is being prescribed, but rather were indicative that Kansas intended to narrowly define the class of sexually violent predators.

It is unclear from the Supreme Court's opinion whether commitment under Kansas' sexual predator law requires a bona fide effort to treat the sexually violent predator's underlying mental disorder. Some comments of Justice Thomas, the author of the opinion, suggest that all that is required is that treatment be a legislatively-pronounced ancillary goal in order to satisfy federal due process concerns. Of course, if treatment is not provided under a Florida law authorizing civil commitment, nothing precludes a state court from addressing a "right to

treatment” claim under Florida law. Section 4 of CS/SB 646 provides that it is the Legislature’s intent to provide treatment to sexually violent predators.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

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 this proposed bill.” It is anticipated that of these inmates, 1,515 will be released within the next 12 months. The workload would increase for institutional staff who would be responsible for distributing to the appropriate agencies complete copies of the prison records and mental health records.

Staff anticipates there will be a fiscal impact on the Department of Children and Family Services as a result of the requirements relating to multidisciplinary team reviews, mental health evaluations, treatment and care, and confinement. Staff also anticipates there will be a fiscal impact on the Department of Corrections, the Department of Juvenile Justice, the state attorney, and the courts, as a result of notice requirements, copying and distributing records, hearings, and trials relating to civil confinement of sexually violent predators and any ensuing appeals.

The Association of Counties reports that the indeterminate fiscal impact will be significant. The counties’ fiscal responsibilities will include court costs; housing in jail any person who is determined to be a sexually violent predator and who is awaiting a hearing or commitment; court appointed counsel for indigent persons; and court appointed experts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Mentally Disordered Sex Offender Program at the North Florida Evaluation and Treatment Center closed in August, 1989. The closure was due to budget reductions in the former Department of Health and Rehabilitative Services as well as the lack of program evaluation data

to show that the program made a difference in the behaviors of the mentally disordered sex offenders to prevent the recurrence of sexual offenses.

VIII. Amendments:

None.

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