

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CRJS 14-06 Civil Commitment of Sexually Violent Predators

**SPONSOR(S):** Criminal Justice Subcommittee; Hutson

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 522

| REFERENCE                                  | ACTION    | ANALYST    | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--------------------------------------------|-----------|------------|------------------------------------------|
| Orig. Comm.: Criminal Justice Subcommittee | 12 Y, 0 N | Cunningham | Cunningham                               |

### SUMMARY ANALYSIS

In 1998, the Legislature enacted the Involuntary Civil Commitment of Sexually Violent Predators Act, also known as the Ryce Act. Under the Ryce Act, offenders convicted of specified sex offenses who are nearing the end of their criminal sentence are referred to the Department of Children and Families (DCF) for assessment as to whether the offender meets the clinical definition of a sexually violent predator. If a judge determines that probable cause exists to believe an offender is a sexually violent predator, the offender is detained at the Florida Civil Commitment Center (FCCC) until a trial is conducted. After trial, those civilly committed as sexually violent predators are housed for treatment at FCCC, and remain confined until the court determines that they are no longer a threat to public safety.

Currently, only the Department of Corrections, the Department of Juvenile Justice, and DCF are permitted to refer persons to DCF to initiate civil commitment proceedings. There is not a mechanism by which persons sentenced to local detention centers (jails) can be referred.

The bill creates a process by which persons sentenced to a term of imprisonment in a jail can be referred to DCF for civil commitment. Specifically, the bill creates s. 394.9125, F.S., which authorizes a state attorney to refer a person who meets all of the following criteria to DCF for civil commitment proceedings:

- A person who is required to register as a sexual offender;
- A person who has previously been convicted of a sexually violent offense; and
- A person who has been sentenced to a term of imprisonment in a county or municipal jail for any criminal offense except for a violation of ss. 316.193, 322.34, and 832.05, F.S.

The bill also provides that if the release of a person who has been convicted of a sexually violent offense occurs due to the following reasons, the state attorney may file a petition with the circuit court within 120 hours of such person's release requesting the court to order such person into DCF's custody for purposes of initiating civil commitment proceedings:

- Part V of ch. 394, F.S., required that the person be referred for civil commitment proceedings prior to such person's release, but the person was not referred due to mistake, oversight, or intentional act; or
- The person was referred for civil commitment proceedings but, through mistake, oversight, or intentional act, the person was released rather than transferred to the custody of the department.

The bill may have a fiscal impact on DCF because it broadens the pool of individuals that may be referred to DCF for civil commitment. However, the precise impact of the bill is indeterminate because it is unknown how many people state attorneys may refer. See fiscal section.

The bill is effective July 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Sexually Violent Predator Program - Background**

A sexually violent predator is a person who has been convicted of a sexually violent offense<sup>1</sup> and has a mental abnormality or personality disorder that makes them likely to engage in future acts of sexual violence if not confined to a secure facility for long-term control, care, and treatment.<sup>2</sup>

To address the treatment needs of these offenders, the 1998 Legislature enacted the Involuntary Civil Commitment of Sexually Violent Predators Act,<sup>3</sup> also known as the Ryce Act.<sup>4</sup> The Ryce Act creates a civil commitment process for sexually violent predators that is similar to the Baker Act (used to involuntarily commit and treat mentally ill persons).<sup>5</sup> Under the Ryce Act, offenders convicted of specified sex offenses who are nearing the end of their criminal sentence are referred to the Department of Children and Families (DCF) for assessment by a multidisciplinary team (MDT) as to whether the offender meets the clinical definition of a sexually violent predator. After assessment, DCF provides a recommendation to the state attorney.<sup>6</sup>

Following receipt of DCF's recommendation and supporting information, the state attorney determines whether to file a petition with the circuit court alleging that the offender is a sexually violent predator. If the judge determines probable cause exists, the offender is detained at the Florida Civil Commitment Center (FCCC) until a trial is conducted. At trial, a judge or jury must determine by clear and convincing evidence that an offender meets the definition of a sexually violent predator.<sup>7</sup>

Those civilly committed as sexually violent predators are housed for treatment at FCCC.<sup>8</sup> The treatment program consists of four levels of sex offender-specific cognitive behavior treatment, which takes approximately six years to complete. However, persons committed to the state under the Ryce Act must be confined until the court determines that they are no longer a threat to public safety.<sup>9</sup>

A person committed under the Ryce Act has an examination of his or her mental condition once every year (or more frequently at the court's discretion) and the court holds a hearing to determine whether there is probable cause to believe that the person's condition has so changed that it is safe for him or her to be released. If the court believes there is probable cause, a trial is held at which the state

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<sup>1</sup> Section 394.912(9), F.S., defines the term "sexually violent offense" as:

- Murder of a human being while engaged in sexual battery in violation of s. 782.04(1)(a)2., F.S.;
- Kidnapping or false imprisonment of a child under the age of 13 and, in the course of that offense, committing sexual battery; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;
- Sexual battery in violation of s. 794.011, F.S.;
- Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of ss. 800.04 or 847.0135(5), F.S.;
- An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, F.S., of a sexually violent offense;
- Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense listed above or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or
- Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings under this part, has been determined beyond a reasonable doubt to have been sexually motivated.

<sup>2</sup> Section 394.912(10), F.S.

<sup>3</sup> Part V of ch. 394, F.S.

<sup>4</sup> *Conditional Release of Sexually Violent Predators through Stipulated Agreements*, Office of Program Policy Analysis and Government Accountability (OPPAGA) Research Memorandum, October 21, 2011 (on file with the Criminal Justice Subcommittee).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> FCCC is a 720-bed, physically secure facility located in Arcadia, FL, and operated by the GEO Group. *Id.*

<sup>9</sup> Section 394.918, F.S.

attorney bears the burden of proving that the person's mental condition remains such that, if released, he or she is likely to engage in acts of sexual violence.<sup>10</sup>

### **Referral to DCF for Civil Commitment**

As noted above, persons convicted of a sexually violent offense who are nearing the end of their criminal sentence must be referred to DCF for assessment as to whether the person meets the clinical definition of a sexually violent predator. Currently, only the Department of Corrections (DOC), the Department of Juvenile Justice (DJJ), and DCF are permitted to refer such persons to DCF for civil commitment proceedings. There is not a mechanism by which persons sentenced to local detention centers (jails) can be referred.

### **Effect of the Bill**

The bill creates a process by which persons sentenced to jail can be referred to DCF for civil commitment. Specifically, the bill creates s. 394.9125, F.S., which authorizes a state attorney to refer a person who meets all of the following criteria to DCF for civil commitment proceedings:

- A person who is required to register as a sexual offender pursuant to s. 943.0435, F.S.;
- A person who has previously been convicted of a sexually violent offense as defined in s. 394.912(9)(a)-(h), F.S.; and
- A person who has been sentenced to a term of imprisonment in a county or municipal jail for any criminal offense except for a violation of ss. 316.193,<sup>11</sup> 322.34,<sup>12</sup> and 832.05, F.S.<sup>13</sup>

A state attorney who refers a person for civil commitment must notify the jail to which the person has been sentenced within one week of the referral being made.

A jail that has custody of a person that has been referred by a state attorney must, at least 180 days prior to the anticipated release of the person, give written notice to the MDT<sup>14</sup> of such person's upcoming release. If the person is confined in the jail for less than 180 days, the jail must provide notice to the MDT as soon as practicable.

The bill amends the definitions of the terms "agency with jurisdiction," "sexually violent offense," and "total confinement" to conform with the above-described referral process and ensure that all of the provisions of the Ryce Act are applicable to the newly-created referral process.

### **Immediate Release from Confinement**

Section 394.913, F.S., requires DOC, DJJ, and DCF, to notify the MDT of the release of a person convicted of a sexually violent offense within specified timeframes. For example, DOC must notify the MDT that a person convicted of a sexually violent offense is being released within 545 days of such person's release.<sup>15</sup>

On occasion, a person convicted of a sexually violent offense is released without much notice, which may prevent DOC, DJJ, and DCF from complying with the notice timeframes discussed above. In such instances, the provisions of s. 394.9135, F.S., take effect, which requires DOC, DJJ, and DCF, to immediately transfer a person convicted of a sexually violent offense to the custody of DCF for civil commitment if the person's release becomes immediate for any reason. However, even with this "back-up" provision, there are still instances in which a person convicted of a sexually violent offense may be released without being referred to DOC, DJJ, or DCF. For example, a DOC inmate who has been convicted of a sexually violent offense may leave prison to attend a court hearing and, as a result of the hearing, have his or her release date changed. In such cases, the inmate may be released at the conclusion of the hearing and never return to prison. These situations are problematic because current law prohibits a person from being referred for civil commitment after release.<sup>16</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> Relating to driving under the influence.

<sup>12</sup> Relating to driving while license suspended, revoked, canceled, or disqualified.

<sup>13</sup> Relating to passing worthless checks.

<sup>14</sup> And the state attorney of the circuit where the person was last convicted of a sexually violent offense. Section 394.913(1), F.S.

<sup>15</sup> Section 394.913(1)(a), F.S.

<sup>16</sup> *See, e.g., Larimore v. State*, 2 So.3d 101 (Fla. 2008). *Also see*, ss. 394.913 and 394.9135, F.S.

### Effect of the Bill

The bill addresses the above-described scenario by specifying that if the release of a person who has been convicted of a sexually violent offense occurs due to the following reasons, the state attorney may file a petition with the circuit court within 120 hours of the person's release requesting the court to order such person into DCF's custody for purposes of initiating civil commitment proceedings:

- Part V of ch. 394, F.S., required that the person be referred for civil commitment proceedings prior to such person's release, but the person was not referred due to mistake, oversight, or intentional act; or
- The person was referred for civil commitment proceedings but, through mistake, oversight, or intentional act, the person was released rather than transferred to the custody of the department.

If the judge determines that there is probable cause to believe that the person was released due to the reasons specified above, the judge must order that the person be taken into custody and delivered to the custody of DCF for civil commitment proceedings. The MDT must assess the person within 72 hours after transfer and, if determined that the person meets criteria, provide the state attorney with the assessment and recommendation. The MDT must release the person if the MDT determines the person does not meet the definition of a sexually violent predator.

### **Timeframes - Notice to the State Attorney**

Once the MDT receives notice from DOC, DJJ, or DCF that a person convicted of a sexually violent offense is nearing release, the MDT must, within 180 days after receiving notice, assess the person to determine whether he or she meets the clinical definition of a sexually violent predator. The MDT's assessment and recommendation must be provided to the state attorney. In cases where an assessment and recommendation have not been completed at least 365 days before a person's release, DCF must prioritize the assessment based upon the person's release date.

### Effect of the Bill

The bill eliminates the requirement that the MDT provide an assessment and recommendation within 180 days of receiving notice that a person convicted of a sexually violent offense is nearing release. Instead, the bill permits the MDT to prioritize all assessments and recommendations based upon the person's release date.

### **Post-Commitment Probable Cause Hearings**

Section 394.918, F.S., currently requires persons committed as a sexually violent predator to have an examination of his or her mental condition at least annually. The results of the examination must be provided to the court, which must review the person's status.<sup>17</sup> If the person files a petition for release, the court must hold a limited hearing to determine if there is probable cause to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged.<sup>18</sup> Currently, caselaw prohibits the court from considering evidence presented by the state attorney at the probable cause hearing.<sup>19</sup>

### Effect of the Bill

The bill specifies that both the petitioner and the respondent may present evidence that the court may weigh and consider at a post-commitment probable cause hearing. The bill also authorizes the petitioner to attend the probable cause hearing.

#### **B. SECTION DIRECTORY:**

Section 1. Amends s. 394.912, F.S., relating to definitions.

Section 2. Creates s. 394.9125, F.S., relating to state attorney; authority to refer a person for civil commitment.

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<sup>17</sup> Section 394.918(1), F.S.

<sup>18</sup> Section 394.918(3), F.S.

<sup>19</sup> See *Spivey v. State*, 100 So.3d 1254 (Fla. 5th DCA 2012); *In re Commitment of Allen*, 927 So.2d 1070, 1074 (Fla. 2d DCA 2006); and *Westerheide v. State*, 888 So.2d 702, 706 (Fla. 5th DCA 2004).

Section 3. Amends s. 394.913, F.S., relating to notice to state attorney and multidisciplinary team of release of sexually violent predator; establishing multidisciplinary teams; information to be provided to multidisciplinary teams.

Section 4. Amends s. 394.9135, F.S., relating to immediate release from total confinement; transfer of person to department; time limitations on assessment, notification, and filing petition to hold in custody; filing petition after release.

Section 5. Amends s. 394.9151, F.S., relating to contract authority.

Section 6. Amends s. 394.917, F.S., relating to determination; commitment procedure; mistrials; housing; counsel and costs in indigent appellate cases.

Section 7. Amends s. 394.918, F.S., relating to examinations; notice; court hearings for release of committed persons; burden of proof.

Section 8. Amends s. 394.9215, F.S., relating to right to habeas corpus.

Section 9. Amends s. 394.929, F.S., relating to program costs.

Section 10. Amends s. 394.930, F.S., relating to authority to adopt rules.

Section 11. Amends s. 394.931, F.S., relating to quarterly reports.

Section 12. Provides an effective date of July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill may have a negative fiscal impact on DCF because it authorizes a state attorney to refer a person who meets specified criteria to DCF for civil commitment proceedings. This has the effect of broadening the pool of individuals that may be referred to DCF for civil commitment.

According to DCF, each person referred costs approximately \$700 to review.<sup>20</sup> Roughly 7% of those referred require a face-to-face evaluation, which costs approximately \$2,000.<sup>21</sup> Ultimately, approximately 3% of those referred to DCF are recommended for commitment housed at FCCC, which has a daily bed rate of approximately \$99.<sup>22</sup>

DCF will incur the \$700 initial review cost for each additional person referred. The additional costs described above would only be incurred if the person, after the initial review, required a face-to-face evaluation or was housed at FCCC. However, the precise impact of the bill is indeterminate because it is unknown how many people state attorneys may refer.

The provisions authorizing a state attorney to refer certain persons sentenced to jail to DCF for civil commitment proceedings may result in an increased workload for state attorneys. However, these

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<sup>20</sup> E-mail dated December 20, 2014, from Kristin Kanner, Director of DCF's Sexually Violent Predator Program (on file with the Criminal Justice Subcommittee).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

provisions simply authorize a state attorney to make a referral – they do not mandate it. Since these provisions are discretionary, the workload impact is estimated to be minimal.

The bill also authorizes both the petitioner and the respondent to present evidence that the court may weigh and consider at a post-commitment probable cause hearing. This may have a negative fiscal impact on state attorneys, but will likely result in fewer subsequent continued commitment trials, which would have a positive fiscal impact.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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

None.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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

The bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

The Florida Legislature modeled the Ryce Act after Kansas' statutory scheme. In *Kansas v. Hendricks*, the United States Supreme Court held that Kansas's Sexually Violent Predator Act “comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking.”<sup>23</sup> The Florida Supreme Court likewise found the Ryce Act to be constitutional in *Westerheide v. State*.<sup>24</sup>

Although they upheld the constitutionality of the Ryce Act, the Florida Supreme Court has repeatedly emphasized the importance of procedural safeguards and time constraints within the Ryce Act to ensure that an individual's constitutional rights are protected. For example, *Westerheide* noted the “range of procedural safeguards” provided by the Act, including the assistance of counsel and mental health professionals, the right to a jury trial, the right to appeal, at least an annual review of the person's condition, the right to petition for release, and the State's burden of proving by clear and convincing evidence that the person requires commitment.<sup>25</sup>

The bill expands the instances in which a person may be referred to DCF for civil commitment, permits civil commitment proceedings to be commenced upon persons who are no longer in confinement (albeit in very limited instances), and allows both the petitioner and the respondent to present evidence that the court may weigh and consider at a post-commitment probable cause

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<sup>23</sup> 521 U.S. 346, 371 (1997).

<sup>24</sup> 831 So.2d 93 (Fla. 2002).

<sup>25</sup> *Id.* at 105.

hearing (while authorizing the petitioner to attend such hearings). These modifications to the Ryce Act could be challenged as violating one's due process<sup>26</sup> rights.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>26</sup> The due process clause (found in the Fifth Amendment of the United States Constitution and applied to states through the Fourteenth Amendment, and in Article I, Section 9 of the Florida Constitution) requires a state to provide due process of law before depriving any person of life, liberty or property.