SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1746

SPONSOR: Criminal Justice Committee and Senators Lee and Brown-Waite

SUBJECT: Sentencing

DATE: April 12, 1999 REVISED: 04/14/99

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.	Mannelli	Hadi	FP	Fav/1 amendment
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1746 amends s. 775.084, F.S. (1998 Supp.), Florida's habitual offender law, to create a new category of repeat offender called the "three time violent felony offender." Like the habitual felony offender, habitual violent felony offender, violent career criminal, and the prison releasee reoffender, the three time violent felony offender receives enhanced penalties triggered by the nature of the offender's current offense and prior criminal history. This offender is required to serve 100 percent of his or her court-imposed sentence. Other provisions of the CS do the following:

- Amend the current method that counts only prior felonies sentenced on separate occasions for purposes of qualification under the various categories for repeat offenders, so that cases and counts sentenced on the same day are counted for purposes of such qualification.

- Provide that any person convicted of aggravated assault or aggravated battery upon a law enforcement officer must be sentenced to a mandatory minimum term of imprisonment 3 or 5 years, respectively.

- Provide for a 3-year mandatory minimum term of imprisonment for aggravated assault or aggravated battery against a person 65 years of age or older.

- Create, in addition to the three-time violent felony offender, another repeat offender category referred to as the "repeat sexual batterer" who receives enhanced penalties triggered by his current sexual battery offense if that offense was either committed while he was serving a sentence for another sexual battery offense or was committed during a specified time period.

- Provide for 3-year mandatory minimum terms for trafficking in cannabis, cocaine, "illegal drugs," methaqualone, amphetamines and methamphetamines, phencyclidine, and flunitrazepam;

- Lower the threshold for trafficking in cannabis from 50 pounds to 25 pounds;

- Provide for 7-year mandatory minimum terms for trafficking in cannabis, cocaine, amphetamines and methamphetamines, and a 15-year mandatory minimum term for trafficking in illegal drugs;

- Remove the upper caps for weight ranges applicable to high-weight, first degree felony trafficking offenses;

- Provide that sentencing can be based upon the number of cannabis plants, regardless of weight, which is conceptually similar to a former federal sentencing scheme;

- Define "cannabis plant" and provide for how a court shall sentence cannabis trafficking offenses based upon weight and number;

- Provide that persons convicted of certain first degree felony trafficking offenses relating to trafficking in cocaine, illegal drugs, and flunitrazepam, are ineligible for any form of gain-time.

This CS substantially amends or creates the following sections of the Florida Statutes: 775.082; 775.084; 784.07; 784.08; 794.011; 794.0115; 893.135; and 943.0535. The CS reenacts 397.451(7); 782.04(4)(a); 893.1351(1); 903.133; 907.041(4)(b); 921.0022(3)(g), (h), and (i); 921.0024(1); 921.142(2); 943.0585; and 943.059.

II. Present Situation:

A. The Criminal Punishment Code

Florida's current sentencing scheme or structure, the Criminal Punishment Code, applies to persons who have committed felony offenses on or after October 1, 1998. The Code establishes what is called a "lowest permissible sentence." This sentence is based upon a calculation of sentencing points for the current offense, additional offenses, prior offenses and other factors, point enhancements and point multipliers. The lowest permissible sentence is a baseline sentence, not necessarily a recommended sentence. It is the "floor" which the court cannot go below absent certain mitigating factors.

The Code establishes a sentencing range from the lowest permissible sentence up to and including the maximum penalty for the felony degree of the primary offense. The judge is free to sentence the offender anywhere within that range.

The maximum penalties provided in s. 775.082, F.S. (1998 Supp.), for felonies are as follows:

FELONY	PENALTY
Life	For life or a term not exceeding life
First	For a term not exceeding 30 years, or when provided by statute, for a term not exceeding life
Second	For a term not exceeding 15 years
Third	For a term not exceeding 5 years

B. Habitual Felony Offender and Habitual Violent Felony Offender

Under s. 775.084, F.S. (1998 Supp.), a judge has the complete discretion to sentence a person as a "habitual felony offender" if the following criteria are met:

- The defendant has previously been convicted of two felonies;

- The current offense and one of the prior felonies cannot be for purchase or possession of a controlled substance.

A judge has the complete discretion to sentence a person classified as a "habitual violent felony offender" if the following criteria are met:

- The defendant has previously been convicted for one of the following crimes or for an attempt to commit one of the following crimes:

  - arson;
  - sexual battery;
  - robbery;
  - kidnapping;
  - aggravated child abuse;
  - aggravated abuse of an elderly person or disabled adult;
  - aggravated assault;
  - murder;
  - manslaughter;
  - aggravated manslaughter of an elderly person or disabled adult;
  - aggravated manslaughter of a child;
  - unlawful throwing, placing, or discharging of a destructive device or bomb;
  - armed burglary aggravated battery; or
  - aggravated stalking; and

- The current offense was committed while the defendant was serving a sanction for a qualifying prior, or within 5 years of the date of conviction or release from sanction, whichever occurred later in time, for a qualifying felony.

Under current law a period of probation or community control with a withhold of adjudication can only be considered a prior offense if the defendant was on such supervision at the time the current offense was committed.

Current law specifies that an offense can only be considered as a prior offense under s. 775.084, F.S., if it resulted in a conviction sentenced separately prior to the current offense and any other prior qualifying offense.

For purposes of habitual felony offender and habitual violent felony offender sentencing, the current offense must have been committed within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

If the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction, and the court, in a separate proceeding, determines that the defendant meets the criteria for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment unless the court finds that such sentence is not necessary for the protection of the public. The penalty for the habitual felony offender is identical to the penalty authorized for a habitual felony offender. *State v. Hudson*, 698 So.2d 831 (Fla.1997).

FELONY	PENALTY
Life	For Life
First	For Life
Second	For a term not exceeding 30 years
Third	For a term not exceeding 10 years

C. Violent Career Criminal

Section 775.084, F.S. (1998 Supp.), provides that a person must be sentenced as a "violent career criminal" if the following criteria are met:

- The defendant has 3 or more prior convictions for:
  - any forcible felony as described in s. 776.08, F.S.;
  - aggravated stalking;
  - aggravated child abuse;
  - aggravated abuse of an elderly person or disabled adult;
  - lewd, lascivious, or indecent conduct;
  - escape; or
  - a felony violation of ch. 790 involving a firearm; and

- The current offense is for one of these crimes and was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison, whichever was later; and

- The offender has previously been incarcerated in state or federal prison.

If a judge elects to designate an offender as a violent career criminal, then the court must sentence the violent career criminal as follows:

FELONY	PENALTY
Life	For Life
First	For Life
Second	For a term not exceeding 40 years, with a mandatory minimum term of 30 years
Third	For a term not exceeding 15 years, with a mandatory minimum term of 10 years

A caveat in the law states that the court does not need to impose violent career criminal penalties if it finds that such sentencing is not necessary for the protection of the public.

D. Prison Releasee Reoffender

Under s. 775.082, F.S. (1998 Supp.), a judge must sentence a person as a "prison releasee reoffender" if the defendant meets the following criteria:

- The defendant has committed or attempted to commit:
  - treason;
  - murder;
  - manslaughter;
  - sexual battery;
  - carjacking;
  - home-invasion robbery;
  - robbery;
  - arson;
  - kidnapping;
  - aggravated assault;
  - aggravated battery;
  - aggravated stalking;
  - aircraft piracy;
  - unlawful throwing, placing, or discharging of a destructive device or bomb;
  - any felony that involves the use or threat of physical force or violence against an individual;
  - armed burglary;
  - burglary of an occupied unoccupied dwelling;
  - any violation of s. 790.07, (felons in possession of firearms);
  - any violation of s. 800.04 (lewd or lascivious act in the presence of a child);
  - any violation of s. 827.03 (abuse, aggravated abuse and neglect of a child);
  - any violation of s. 827.071 (sexual performance by a child); and
- The offender committed one of the enumerated offenses within 3 years of being released from a state or private correctional facility.

The prison release reoffender provisions provide that legislative intent is that prison releasee reoffenders "be punished to the fullest extent of the law" unless the prosecuting attorney does not have sufficient evidence to prove the highest charge available, the testimony of material witness cannot be obtained, the victim provides a written statement that he or she does not want the offender to receive a mandatory sentence, or other extenuating circumstances exist which preclude the just prosecution of the offender.

E. Penalties for Assaults or Batteries on Law Enforcement Officers

Section 784.07, F.S. (1998 Supp.), provides for reclassification of the misdemeanor offenses of assault and battery to felony offenses, and the reclassification of the felony offenses of aggravated assault and aggravated battery to the next, higher felony degree, if these offenses are committed against a law enforcement officer and other designated officers and persons.

Under the Criminal Punishment Code, aggravated assault and aggravated battery on a law enforcement officer or "LEO" require a 1.5 non-discretionary multiplier of total sentence points.

Under the Code, the lowest permissible sentence for aggravated assault on a LEO is 1.6 years and the maximum penalty is 15 years in prison. Aggravated assault does not allow for the assessment of victim injury as no injury can be inflicted during the commission of this offense.

Under the Code, the lowest permissible sentence for aggravated battery upon a LEO is 5.2 years and the maximum penalty is 30 years in state prison (assuming moderate injury). If there is severe injury, the lowest permissible sentence is 7.25 years. An assessment with slight injury is not made as this is unlikely to meet the standard for aggravated battery which requires great bodily harm or disfigurement.

F. Penalties for Assaults or Batteries on Elderly Persons

Section 784.08, F.S., provides that when a person is charged with committing an assault or aggravated assault upon a person 65 years of age or older, regardless of whether the person charged knows the victim's age, the offense for which the person is charged is reclassified to the next, higher felony degree.

Under the Criminal Punishment Code, the sentencing range for aggravated assault upon an elderly person is from a non-state prison sanction to 15 years in state prison. The sentencing range for aggravated assault upon an elderly person (assuming victim injury is moderate) is from 2.9 years to 15 years. With an assessment of severe injury, the range is from 4.25 years to 15 years. An assessment with slight injury is not made as this is unlikely to meet the standard for aggravated battery which requires great bodily harm or disfigurement.

G. Sexual Battery

Section 794.011 describes sexual battery offenses and provides penalties for these offenses. Sexual battery offenses are subject to sentencing under the Criminal Punishment Code, as well as the various repeat offender provisions. Under the Code, sexual battery offenses receive some of the highest rankings. Offense severity levels range from level 8 through level 10. Sexual battery on

a child under the age of 12 is a capital offense (though the death penalty is not imposed due to case decisions against such imposition). Sexual batteries are assessed victim injury points.

Penalties for lower-level sexual battery with contact points (as opposed to penetration points) ranges from 5.4 years to 15 years in state prison. With penetration, the range is from 7.8 years to 15 years. The most severe penalty for a non-capital sexual battery is 10.5 years to life imprisonment. Penalties for sexual battery offenses increase with the nature of the offender's prior record and other factors that may be present at sentencing.

H. Drug Trafficking

Section 893.135, F.S., provides for and punishes various drug trafficking offenses. Penalties for trafficking offenses graduate upward depending upon the weight of the drugs which are trafficked. Prior to 1994, s. 895.135, F.S., provided for 3-year and 5-year mandatory minimum terms for lower-weight trafficking in cannabis, cocaine, "illegal drugs" (a category that includes heroin), methaqualone, and amphetamines and methamphetamines.

In 1994, these mandatory minimum terms were eliminated and replaced by a discretionary 1.5 multiplier of total sentence points under the sentencing guidelines for drug trafficking offenses ranked in levels 7 or 8 of the offense severity ranking chart. *See* ch. 93-406, L.O.F. Level 9 and higher drug trafficking offenses continued to provide for mandatory minimum sentences of 15-years, 25-years, life, and death. Subsequent to 1994, offenses for trafficking in phencyclidine and flunitrazepam were added to the statute. No mandatory minimum terms of imprisonment are provided for lower-weight trafficking of these drugs.

The multiplier has been retained under the current sentencing code and the mandatory minimum terms for level 9 offenses have also been retained. These lower-weight trafficking offenses are sentenced pursuant to the sentencing code and there is a mandatory fine. Under the current sentencing code, the court is free to impose a sentence from the lowest permissible sentence to the maximum felony degree of the offense. The described trafficking offenses are first degree felonies. The maximum penalty for a first degree felony is a term of imprisonment not exceeding 30 years unless imprisonment for a term of years not exceeding life is specified. s. 775.082, F.S. The lowest permissible sentence for a level 7 trafficking offense with no 1.5 multiplier is 1.75 years; it is 2.3 years if the multiplier is included. The lowest permissible sentence for a level 8 offense is 2.9 years; it is 3.6 years if the multiplier is included.

Provided is a brief summary of the lower-weight drug trafficking offenses:

- **Trafficking in Cannabis**

  - In excess of 50 pounds, but less than 2,000 pounds: Scored as a level 7 offense under the sentencing code, including a $25,000 fine.

  - 2,000 pounds or more, but less than 10,000 pounds: Scored as a level 8 offense, including a $50,000 fine.

- **Trafficking in Cocaine**
  - 28 grams or more, but less than 200 grams: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.
  - 200 grams or more, but less than 400 grams: Scored as a level 8 offense, including a $100,000 fine.
- **Trafficking in Illegal Drugs (Morphine, Opium, Heroin and Other Drugs)**
  - 4 grams or more, but less than 14 grams: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.
  - 14 grams or more, but less than 28 grams: Scored as a level 8 offense, including a $100,000 fine.
- **Trafficking in Phencyclidine**
  - 28 grams or more, but less than 200 grams: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.
  - 200 grams or more, but less than 400 grams: Scored as a level 8 offense, including a $100,000 fine.
- **Trafficking in Methaqualone**
  - 200 grams or more, but less than 5 kilograms: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.
  - 5 kilograms or more, but less than 50 kilograms: Scored as a level 8 offense, including a $100,000 fine.
- **Trafficking in Amphetamines/Methamphetamines**
  - 14 grams or more, but less than 28 grams: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.
  - 28 grams or more, but less than 200 grams: Scored as a level 8 offense, including a $100,000 fine.
- **Trafficking in Flunitrazepam**
  - 2 grams or more, but less than 14 grams: Scored as a level 7 offense under the sentencing code, including a $50,000 fine.

- 14 grams or more, but less than 28 grams: Scored as a level 8 offense, including a $100,000 fine.

I. Counting Cannabis Plants; Provisions of Former Federal Sentencing Laws

Florida law punishes trafficking cannabis based upon the weight of the cannabis plants. However, federal law once provided for punishing manufacturers of marijuana based on the weight of the drug or upon the number of marijuana plants. When Congress changed the law so that counting the number of plants was as relevant as weight in terms of sentencing, the change reflected Congress' intent to punish growers of marijuana by the scale or potential of their operation and not just by the weight of the plants seized at a given moment. Congress must have found a defendant who is growing 100 newly planted marijuana plants to be as culpable as one who successfully grows 100 kilograms of marijuana. *United States v. Fitol*, 733 F.Supp. 1312 (D.Minn. 1990).

A body of federal case law developed around defining a "marijuana plant" which was not found in the federal sentencing law, even though "marijuana plants" (the federal government reference is to "marijuana"; the Florida reference is to "cannabis") were being counted for the purpose of federal sentencing.

The federal appellate courts which addressed the issue of what constitutes a "marijuana plant" applied a test, the origin of which "appears to be the practice of law enforcement authorities." *United States v. Delaporte*, 42 F.3d 1118, 1120 (7th Cir. 1994). Often the marijuana seized by law enforcement authorities consisted in large part of cuttings from a mature marijuana plant. There was essentially no debate that a mature marijuana plant constituted a "marijuana plant" for the purpose of sentencing under federal law. The problem was whether the cuttings applied, and law enforcement authorities began to cull from the cuttings those cuttings that showed evidence of root formation. That practical focus on root formation became the basis for the development of the "root test" that all federal circuits have applied to the issue of whether a plant is a "marijuana plant."

The "root test," simply stated, is that the plant must have some readily observable evidence of root formation, such as root hairs. *See United States v. Burke*, 999 F.2d 596 (1st Cir. 1993); *United States v. Edge*, 989 F.2d 871 (6th Cir. 1993); *Delaporte, supra*; *United States v. Bechtol*, 939 F.2d 603 (8th Cir. 1991); *United States v. Robinson*, 35 F.3d 442, 447 (9th Cir. 1994); *United States v. Eves*, 932 F.2d 856 (10th Cir. 1991), *cert. denied*, 502 U.S. 884 (1991); and *United States v. Foree*, 43 F.3d 1572 (11th Cir. 1995).

Callous tissue, which is formed after a cutting takes place, was determined not to be a root formation but rather is an "organized tissue mass" that "covers the newly exposed surface, or 'wound'." It is "a *marker of* the beginning of the development of [a] root." *United States v. Edge*, 989 F.2d, at 879, quoting the record (emphasis supplied by the court).

Numerous other issues were debated in the federal courts surrounding marijuana plants. Some issues are particularly important in determining what constituted a marijuana plant. For example, issues have been raised as to whether a plant must be "viable" and whether it must be a "female" plant, which is virtually the whole source of tetrahydrocannabinols or "THC," to be defined as a

"marijuana plant" for purposes of including them in the count of marijuana plants. *See, e.g. Delaporte,* supra. Other issues have arisen in the context of interpreting former sentencing laws. For example, the case of *U.S. v. Shields,* 49 F.3d 707 (11th Cir. 1995), which addressed the counting of dead harvested plants in the context of a particular federal weight-per-plant ratio in the former sentencing law. This, among other related issues not mentioned here, may assist in developing a definition of a "marijuana plant" for the purpose of crafting a sentencing scheme that counts marijuana plants regardless of the plant's weight.

J. Aliens; Criminal Records

Section 943.0535, F.S., provides that upon the request of a United State Immigration officer of the federal Immigration and Naturalization Services (INS), a Clerk of the Court in the jurisdiction of the INS officer must furnish a certified copy of a complaint, information, or indictment and the judgement and sentence of an alien convicted of a felony or misdemeanor.

According to staff of the Criminal Alien Program of the INS in Miami, efforts to identify criminal aliens have focused on identifying those offenders who are incarcerated in the Department of Corrections (DOC) and in county correctional facilities. Such efforts are based upon a memorandum of understanding between the INS and the DOC which outlines a program where the DOC assists the INS in the identification process.

According to the DOC, as of February 19, 1999, there were 4,555 suspected aliens in the state prison system of which 4,226 have been confirmed. The alien identification program currently applies to the incarcerated population in the DOC. No data currently exist on the number of aliens on DOC community supervision (probation, community control, or post-prison release). In November 1998, there were 145,979 offenders on community supervision (active community supervision population).

The DOC collects and reports monthly data from county correctional facilities on the number and characteristics of offenders housed in county jails. One type of information collected is the number of undocumented aliens housed in county jails. Since the collection of these data are voluntary and not all facilities report, the DOC believes that these data are underestimates. In addition, the DOC staff report that county facility staff may not be accurately reporting the number of undocumented aliens in the facility. In spite of these limitations, the DOC reports that for 1998, the average daily population of undocumented aliens in county jails was 425 offenders (395 males and 30 females).

III. Effect of Proposed Changes:

Provided is a section-by-section analysis of CS/SB 1746.

Section 1

The act may be cited as the "Three-Strikes Violent Felony Offender Act."

Section 2

Section 775.082, F.S. (1998 Supp.), is amended to expand the definition of a "prison release reoffender" to include any defendant who commits or attempts to commit any of the enumerated offenses relevant to the prison release reoffender definition while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections (DOC) or a private vendor.

The CS removes most of the circumstances in the current law that may be offered against punishing a prison releasee reoffender to "the fullest extent of the law" as provided in the penalty provisions relating to this offender. The text is further amended so that legislative intent is to apply the maximum prescribed punishment unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender be sentenced as provided under the penalty provisions relating to the prison release reoffender.

Section 3

The CS amends s. 775.084, F.S. (1998 Supp.), to create a new repeat offender category referred to as the "three time-violent felony offender." Four similar categories currently exist: the habitual felony offender; the habitual violent felony offender; the violent career criminal; and the prison releasee reoffender.

The three-time violent felony offender (for brevity, abbreviated here as the "3-strikes offender") is a defendant for whom the court must impose a mandatory term of imprisonment if it finds that:

- The defendant has previously been convicted as an adult two or more times of a felony and two or more of such convictions were for committing, or attempting or conspiring to commit, any of the following offenses or a combination of such offenses:
  - arson;
  - sexual battery;
  - robbery;
  - kidnapping;
  - aggravated child abuse;
  - aggravated abuse of the an elderly person or a disabled adult;
  - aggravated assault;
  - murder;
  - manslaughter;
  - aggravated manslaughter of an elderly person or a disabled adult;
  - aggravated manslaughter of a child;
  - unlawful throwing, placing, or discharging of a destructive device or bomb;
  - armed burglary;
  - aggravated battery;
  - aggravated stalking; or
  - an offense that is in violation of a law of any other jurisdiction if the elements are substantially similar to the enumerated offenses, or an attempt or conspiracy to commit any such felony;

- The felony for which the defendant is to be sentenced is one of these felonies and was committed:
  - while the defendant was serving a prison sentence or other sentence imposed as a result of a prior conviction for any of these felonies; or
  - within 5 years after the date of conviction of the last prior offense that is one of these felonies, or within 5 years after the defendant's release from a prison sentence, probation, community control, or other sentence imposed as a result of a prior conviction for these offenses; and
- The defendant has not received a pardon or had a conviction set aside for any crime necessary to the operation of this provision.

The CS provides for a separate proceeding to determine if the defendant is a 3-strikes offender and sets forth procedures for that proceeding that are identical to the proceeding in the violent habitual offender provision.

If the court determines that the 3-strikes offender meets the criteria set forth in the CS, the 3-strikes offender is sentenced as follows:

FELONY	PENALTY
Life	For Life
First	For a term not exceeding 30 years
Second	For a term not exceeding 15 years
Third	For a term not exceeding 5 years

The 3-strikes offender is required to serve 100 percent of the sentence imposed. The penalties mirror those of the penalty provisions regarding prison releasee reoffenders. The DOC notes that "although these penalties are discretionary with the state attorney whereas habitual violent felony penalties are discretionary with the court, this provides for less of a maximum penalty tha[n] habitual violent offender provisions and the three time offender is more serious in criminality."

The most significant change to the habitual offender law, other than the creation of the new repeat offender category, is the significant potential extension of the application of the repeat offender categories as a result of the amendment of the prior record definition. The amendment provides that all prior convictions can be counted separately as long as the conviction date is prior to the current date. In contrast, the current definition is limited to prior convictions sentenced separately from other prior conviction sentencing events.

The CS changes another provision in the habitual offender law which authorizes enhanced penalties under the habitual felony offender, the habitual violent felony offender, and the violent career criminal provisions if the crime for which the offender is to be sentenced occurred "within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a conviction for a qualifying felony." The CS strikes the quoted language and substitutes: "within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision. . . ."

The change appears to be in response to the holding in *Bacon v. State*, 620 So.2d 1084, (Fla. 1st DCA 1993) that "other commitment" did not include release from probation.

The CS changes another provision in the law that provides that, for purposes of the section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction "if the subsequent offense for which the person is to be sentenced was committed during this period of probation or community control." The CS strikes through this qualifier, thereby expanding the application by having any prior period of probation or community control with adjudication withheld qualify as a prior.

The CS deletes current language relating to the application of the Criminal Punishment Code in relation to sentencing under s. 775.084, F.S. (1998 Supp.).

Section 4

The CS amends s. 784.07, F.S. (1998 Supp.), to provide that any person convicted of aggravated assault upon a law enforcement officer must be sentenced to a mandatory minimum term of imprisonment of 3 years, and any person convicted of aggravated battery upon a law enforcement officer must be sentenced to a mandatory minimum term of imprisonment of 5 years.

Section 5

The CS amends s. 784.08, F.S., to provide that any person convicted of aggravated assault or aggravated battery against a person over 65 years of age shall be sentenced to a mandatory minimum term of imprisonment of 3 years.

Section 6

The CS amends s. 790.235. F.S., relating to possession of a firearm by a violent career criminal, solely to make a cross-reference to s. 775.084, F.S., consistent with the numbering of the violent career criminal provision which is changed by the creation of the new 3-strikes offender provisions.

Section 7

The CS creates a section of the Florida statutes which creates a new category of repeat offender referred to as a "repeat sexual batterer." A repeat sexual batterer is a person for whom the judge must impose a mandatory minimum term of imprisonment of 10 years if the judge finds that the following criteria are met:

- The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for any sexual battery under s. 794.011, F.S., that is not a capital felony, a solicitation to engage in sexual battery, or sexual battery by a person in who is in a position of familial or custodial authority over the victim;

- The current offense occurred:

- while the defendant was serving a prison sentence or other sentence imposed as a result of a prior conviction for a qualifying offense; or

- within 10 years after the date of the conviction of the last prior qualifying offense, or within 10 years after the defendant's release from a prison sentence, probation, community control, or other sentence imposed as a result of a prior qualifying offense; and

- The defendant has not received a pardon "on the ground of innocence" for any crime that is necessary for the operation of this section, or such crime has not been set aside.

The CS provides that the determination that a person is a repeat sexual batterer is made in a separate proceeding. This proceeding and the procedures prescribed are identical to those found in the violent habitual felony offender provisions.

Under the Criminal Punishment Code, a first-time offender convicted of the most severe sexual battery listed in the repeat sexual batterer provisions would score, absent other factors at sentencing, a prison sentence of 12.3 years as the lowest permissible sentence. The judge is free to sentence this person anywhere within the range that is the lowest permissible sentence up to the maximum penalty, which in this case is life imprisonment.

Section 8

The CS amends s. 794.011, F.S., the sexual battery statute, to include references to the newly created repeat sexual batterer statute for purposes of noting this section as applicable to the punishment of various sexual battery offenses.

Section 9

The CS amends s. 893.135, F.S., to:

- Provide for 3-year mandatory minimum terms for trafficking in cannabis, cocaine, "illegal drugs," methaqualone, amphetamines and methamphetamines, phencyclidine, and flunitrazepam;

- Lower the threshold for trafficking in cannabis from 50 pounds to 25 pounds;

- Provide for 7-year mandatory minimum terms for trafficking in cannabis, cocaine, amphetamines and methamphetamines, methaqualone, phencyclidine, and flunitrazepam, and a 15-year mandatory minimum term for trafficking in illegal drugs;

- Remove the upper caps for weight ranges applicable to high-weight, first degree felony trafficking offenses;

- Provide that sentencing can be based upon the number of cannabis plants, regardless of weight, which is conceptually similar to a former federal sentencing scheme;

- Define "cannabis plant" and provides for how a court shall sentence cannabis trafficking offenses based upon weight and number; and

- Provide that a person shall not be eligible for statutory gain-time under s. 944.275, F.S., if the person is convicted of "trafficking in cocaine" (involving 150 kilograms or more, but less than 300 kilograms), "trafficking in illegal drugs" (involving 30 kilograms or more, but less than 60 kilograms), or "trafficking in flunitrazepam" (involving 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam), which are first degree felonies for which a sentence of life imprisonment must be imposed.

Based upon these described changes to the law, the following changes (in bold) would be made to the offenses of trafficking in cannabis, trafficking in cocaine, trafficking in illegal drugs, trafficking in phencyclidine, trafficking in methaqualone; trafficking in amphetamines and methamphetamines, and trafficking in flunitrazepam:

- **Trafficking in Cannabis**

  - In excess of 50 pounds, but less than 2,000 pounds, **or in excess of 300 cannabis plants, but not more than 2,000 cannabis plants.** Level 7 offense under the sentencing code, including a $25,000 fine. **3-year mandatory minimum term.**

  - 2,000 pounds or more, but less than 10,000 pounds, **or in excess of 2,000 cannabis plants, but not more than 10,000 cannabis plants.** Level 8 offense, including a $50,000 fine. **5-year mandatory minimum term.**

  - 10,000 pounds or more, **or is in excess of 10,000 cannabis plants.** Level 9 offense, including a $200,000 fine. 15-year mandatory minimum term.

  - **"For the purpose of this paragraph, a plant, including, but not limited to, a seedling or cutting, is a "cannabis plant" if it has some readily observable evidence of root formation, such as root hairs. To determine if a piece or part of a cannabis plant severed from the cannabis plant is itself a cannabis plant, the severed piece or part must have some readily observable evidence of root formation, such as root hairs. Callous tissue is not readily observable evidence of root formation. The viability and sex of a plant and the fact that the plant may or may not be a dead harvested plant, are not relevant in determining if the plant is a "cannabis plant" or in the charging of an offense under this paragraph. Upon conviction, the court shall impose the greatest term of imprisonment provided for in this paragraph."**

    This definition employs the "root test" and anticipates issues that have been raised in federal courts regarding what constitutes a "marijuana plant." The sentencing provision also anticipates the case in which the weight of the cannabis falls into the weight range in which a 3-year mandatory minimum term applies but the number of cannabis plants falls within the range of the number of

cannabis plants in which a 7-year or 15-year mandatory minimum term applies. In that case, the court sentences the defendant to the 7-year or 15-year mandatory minimum term, whichever is applicable.

- **Trafficking in Cocaine**
  - **28 grams or more, but less than 200 grams.** Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**
  - **200 grams or more, but less than 400 grams.** Level 8 offense, including a $100,000 fine. **5-year mandatory minimum term.**
- **Trafficking in Illegal Drugs (Morphine, Opium, Heroin and Other Drugs)**
  - **4 grams or more, but less than 14 grams.** Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**
  - **14 grams or more, but less than 28 grams.** Level 8 offense, including a $100,000 fine. **15-year mandatory minimum term.**
- **Trafficking in Phencyclidine**
  - 28 grams or more, but less than 200 grams. Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**
  - 200 grams or more, but less than 400 grams. Level 8 offense, including a $100,000 fine. **5-year mandatory minimum term.**
- **Trafficking in Methaqualone**
  - 200 grams or more, but less than 5 kilograms. Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**
  - 5 kilograms or more, but less than 50 kilograms. Level 8 offense, including a $100,000 fine. **5-year mandatory minimum term.**
- **Trafficking in Amphetamines/Methamphetamines**
  - 14 grams or more, but less than 28 grams. Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**
  - 28 grams or more, but less than 200 grams. Level 8 offense, including a $100,000 fine. **5-year mandatory minimum term.**
- **Trafficking in Flunitrazepam**

- 2 grams or more, but less than 14 grams. Level 7 offense under the sentencing code, including a $50,000 fine. **3-year mandatory minimum term.**

- 14 grams or more, but less than 28 grams. Level 8 offense, including a $100,000 fine. **5-year mandatory minimum term.**

Sections 10-19

For the purposes of incorporating the amendments to s. 893.135, F.S., in references thereto, the following sections of the Florida States are reenacted: 397.451(7); 782.04(4)(a); 893.1351(1); 903.133; 907.041(4)(b); 921.0022(3)(g), (h), and (i); 921.0024(1); 921.142(2); 943.0585; and 943.059.

Section 20

The CS amends s. 943.0535, F.S., which requires a Clerk of the Court, upon the request of the federal Office of Immigration and Naturalization Services (INS), and subject to certain conditions, to furnish to INS without charge a certified copy of the complaint, information, or indictment and the judgment and sentence and any other record pertaining to the case of a convicted alien. The amendment removes the burden placed upon INS to request this information from a Clerk of the Court, and instead, requires a Clerk of the Court, with the assistance of the State Attorney, to furnish this information to the INS in every case in which an alien is convicted of or enters a plea to any felony or misdemeanor.

Section 21

The CS requires that the Office of the Governor place public service announcements in visible local media throughout the state explaining the penalties provided in the CS.

Section 22

The effective date of the CS is July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Estimating Conference has reviewed CS/SB 1746 and approved the following forecast of the fiscal impact of this CS:

Fiscal Year	Projected Additional Annual Prison Beds Required	Annual Operating Costs	Annual Fixed Capital Outlay Costs	Total Annual Funds
1999-00	7	$67,402	$1,125,840	$1,193,242
2000-01	45	$582,942	$3,844,387	$3,844,387
2001-02	127	$2,342,758	$6,195,131	$6,195,131
2002-03	146	$5,251,884	$3,146,522	$8,398,406
2004-05	116	$8,205,607	$3,739,893	$11,945,500
TOTAL	**441**	**$16,450,593**	**$15,126,074**	**$31,576,667**

The primary impact of CS/SB 1746 is expected to be on the Department of Corrections due to projected increases in the inmate population. The Fiscal Year 1999-2000 cost is approximately $1.2 million, but it will not be necessary to appropriate the $1.1 million for prison bed construction in FY 1999-2000 since there is surplus bed capacity in the prison system. The primary short-term impact of this legislation on the prison population will be to accelerate the date by which the current bed surplus will be depleted.

Since the primary thrust of this CS is to increase the length of sentences for certain current offenses, the fiscal impact will tend to accelerate in the years outside of the five-year window of the forecast as offenders begin to “stack” in the prison system. With regard to long mandatory prison terms, annual operating costs are more relevant to the long-term fiscal impact than fixed capital outlay costs. DOC’s prototype prison costs approximately $30,000 per bed to construct and $18,000 per year to operate. With a ten-year sentence, the cost to operate a prison bed will be from six to seven times greater than the cost to construct it.

The following assumptions were made in developing the projected impact of CS/SB 1746:

- Three-Time Violent Felony Offender:
  - Only those offenders who are currently sentenced as habitual felony offenders and habitual violent felony offenders who are eligible for the three-strike violent felony offender provision of this CS would be affected.
  - Offenders who would be eligible for the three time violent felony offender provisions of this CS who currently are not receiving a prison sentence would also not receive a prison sentence as a three-time violent felony offender.
- Assault and battery on a Law Enforcement Officer (LEO):
  - The number of prison admissions affected by this provision is based on the percentage of sentencing guidelines cases in FY 1997-98 sentenced to prison for these offenses who received the LEO multiplier in the guidelines.
  - No offenders eligible for the law enforcement mandatory provisions of this CS who currently receive a non-prison sentence will receive a prison sentence.
- Drug Trafficking:
  - The percentage of offenders who received drug trafficking mandatories for these sentences in FY 1993-94 when mandatory provisions existed in law were used to derive the number of future drug trafficking admissions affected by provisions of this CS.
  - No offenders eligible for the drug trafficking provisions of this CS who currently are receiving a non-prison sentence will receive a prison sentence.
- Prior Offenses of Habitual Offenders Based on the Actual Number of Counts:
  - It was determined that 23 percent of offenders who were statutorily eligible to be habitualized for prison admissions from July 1, 1998 to November 30, 1998 were habitualized. This rate is applied to those offenders who would become eligible under this CS to determine the number of additional habituals sentenced to prison.
  - No offenders who would be eligible for the new definition of habitual offenders' priors provision in the CS who are currently receiving a non-prison sentence will receive a prison sentence under the CS.

The assumption that offenders eligible for the provisions of this CS who currently are receiving a non-prison sentence will continue to receive a non-prison sentence is based on empirical data (both nation-wide and in Florida) which indicate that whenever sentencing structures are radically changed, the participants will attempt to maintain their prior sentencing practices. However, it should be noted in this regard that the intent of this CS embodied in the "Whereas" clauses is to incarcerate more people for greater lengths of time. To the extent that this goal is accomplished, the associated costs are not captured in this fiscal analysis.

It is likely that the increased penalties embodied in CS/SB 1746 will result in fewer pleas by defendants and more trials. Accepting fewer pleas could result in longer time spent in county jails awaiting trial, with a resultant impact on the counties. The Florida Association of Counties also estimates a potential, but indeterminate fiscal impact in cases where private counsel has been appointed by the court, since the CS requires a separate proceeding to determine if an offender is a three time violent felony offender (similar provisions currently exist for habitual offender, violent habitual offender, and violent career criminal sentencing proceedings).

According to the State Court's Administrator's office, CS/SB 1746 will have a significant adverse impact on the judicial system, resulting from offenders who are eligible for these penalties opting for a jury trial rather than accepting a plea; the increase in jury trials will place a strain on the court system and on court support personnel and facilities. Additional costs may be incurred by the court system including workload increases in the offices of state attorneys, public defenders, and local law enforcement. These cost increases are indeterminate, but it is estimated that every 100 additional trials would cost between $900,000 and $1.5 million for additional judges and support staff, prosecutors, and public defenders.

To the extent that CS/SB 1746 is successful in reducing crime (either by incarcerating criminals for longer periods of time or by deterring potential offenders from committing crimes), any increased costs may be avoided.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Several states have "Three Strikes" laws or similar laws patterned on the idea of lengthy sentences for repeat offenders who meet a requisite number of qualifying prior offenses (or "strikes"). "Three strikes," as an optimal number, as opposed to "two strikes" or "four strikes" has no empirical grounding. Georgia has a "Two Strikes" law, and the "Evelyn Gort Act," which created the violent career criminal provision, is essentially a "Four Strikes" law.

VIII. Amendments:

#1 by Fiscal Policy:
Adds the term "railroad vehicle" to the definition of "conveyance" for purposes of enforcement of laws concerning burglary.