SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 1666

SPONSOR: Appropriations Subcommittee on Public Safety and Judiciary, Criminal Justice Committee and Senator Laurent

SUBJECT: Sexual Offenses

DATE: April 24, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.	Pingree	Beck	APJ	Favorable/CS
3.			AP	
4.				
5.				
6.				

I. Summary:

CS/CS/SB 1666 provides a definition of "vagina" and "vaginal" in several statutes relating to various sexual offenses, in order to provide that those terms encompass both the internal and external parts of the sexual organ of a female. This definition is intended to indicate an interpretation of those terms at variance with *Richards v. State*, 738 So.2d 415 (Fla. 2nd DCA 1999), in which the court held that the defendant's touching of the victim's vaginal area was insufficient to support a conviction for sexual battery. The effect of the *Richards* holding is that, for purpose of charging sexual battery regarding particular sexual acts, there must be actual penetration into the vagina, however slight.

This CS substantially amends the following sections of the Florida Statutes: 794.011; 796.07; 800.04; 825.1025; 827.1025; 827.071; and 847.001.

II. Present Situation:

Section 794.011, F.S., which proscribes sexual battery defines the term "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." s. 794.011(1)(h), F.S.

Section 796.07, F.S., which prohibits prostitution, contains a definition of "sexual activity" that incorporates the definition of "sexual battery" in s. 794.011, F.S., but also includes the handling or fondling of the sexual organ of another for the purpose of masturbation.

Section 800.014, F.S., which prohibits certain lewd or lascivious acts committed upon or in the presence of a person less than 16 years of age, contains a definition of "sexual activity" that incorporates the definition of "sexual battery" in s. 794.011, F.S.

Section 825.1025, F.S., which prohibits certain lewd or lascivious acts committed upon or in the presence of an elderly person or disabled adult, contains a definition of "sexual activity" that incorporates the definition of "sexual battery" in s. 794.011, F.S.

Section 827.071, F.S., which prohibits certain acts that are relevant to the promotion or possession of representations of a sexual performance by a child less than 18 years of age, contains a definition of "sexual battery" that incorporates the definition of "sexual battery" in s. 794.011, F.S.

Section 847.001, F.S., which is the definitions section for ch. 847, F.S., relating to various obscene acts, representations, or presentations, contains a definition of "sexual battery" that incorporates the definition of "sexual battery" in s. 794.011, F.S.

In *Richards v. State*, 738 So.2d 415 (Fla. 2nd CA 1999), the court considered on appeal the conviction of Richards for capital sexual battery based upon a charge that he had digitally penetrated the vagina of a four-year-old girl. According to the court, "the evidence in the case involved little or no physical evidence of a crime and critical testimony from a small child who does not understand the nuances of anatomy." *Id.* at 416.

At the trial, defense objected to testimony of a doctor that it argued intermingled a medical definition of vagina that included the opening of the canal and its extension back up to the cervix and uterus with a statement in "general terms" of the vagina and vaginal area to include the labia majora, the labia minora, the clitoris, the urethra, the hymen, and the tissues surrounding and encompassing the canal itself. The court overruled this objection and added that counsel could address the issue on re-cross. At the trial's conclusion, the defense requested an instruction that provided an "accurate" definition of vagina and distinguished between the vagina and the vulva. The court denied this instruction.

The court, in its analysis, underscored the difficulties it had with the statutory definition of "sexual battery." The court stated that the words "union" and "penetration" were "used with some precision." *Id.* at 418. As interpreted by the court, "[u]nion permits a conviction based on contact with the relevant portion of the anatomy, whereas penetration requires some entry into the relevant part, however slight." *Id.* The court stated that it was clear that the defendant's finger was an "other object," "which must penetrate and not merely have union with the relevant part." *Id.*

The court also stated that "vaginal" and "sexual organ" were not equivalent terms, and embraced an interpretation by one court of the "sexual battery" definition that indicates the Legislature's intent "to use an accurate definition of vagina and [use] sexual organ as a more generic term comparable to 'private part."' *Id.* While agreeing with another court that "a man penetrates the vulva, and thus the sexual organ, in the process of making union with the vagina, "the court was nevertheless persuaded that "the statute unambiguously requires at least union with the vagina"

and "[p]enetration of the vulva without union with the vagina simply is not defined as sexual battery when anything other than the defendant's mouth is used." *Id*. at 419.

Further, the court disagreed with another court's interpretation of the "sexual battery" definition to indicate that the use of the word "vagina" in the sexual battery statute was a term of art connoting "private parts." *Id.* The court found no expanded definition of vagina to include the entire female sexual organ.

The court stated that, even if it were to concede that two definitions of vagina existed, the narrower definition would have to apply because when the language of a statute is susceptible of differing constructions, it must be construed most favorably to the accused.

Although the court concluded that the evidence in Richards' case was sufficient for resolution by the jury, the court also concluded that it had to reverse Richards' conviction because "the confusion created by the definition of vagina may have misled the jury into believing that the penetration of the vaginal area was sufficient to convict Mr. Richards." *Id*. at 419.

III. Effect of Proposed Changes:

Definition of "Vagina" and Vaginal"

Effective July 1, 2001, CS/CS/SB 1666 provides a definition of "vagina" and "vaginal" in ss. 794.011, 796.07, 800.014, 825.1025, 827.071, and 847.001, F.S., relating to various sexual offenses, in order to provide that those terms encompass both the internal and external parts of the sexual organ of a female. This definition is intended to indicate an interpretation of those terms at variance with *Richards v. State*, 738 So.2d 415 (Fla. 2nd DCA 1999), in which the court held that the defendant's touching of the victim's vaginal area was insufficient to support a conviction for sexual battery. The effect of the *Richards* holding is that, for purpose of charging sexual battery regarding particular sexual acts, there must be actual penetration into the vagina, however slight.

The legislation appears to nullify any real or meaningful distinction between the words "union" and "penetration" in the "sexual battery" definition, as it relates to penetration of the vagina by the penis, or union of the penis with the vagina. If the vaginal area includes the external parts of the female sexual organ then the "penetration" language becomes essentially meaningless because "union" of the penis with any external part of the sexual organ qualifies the act as a sexual battery. For example, the clitoris cannot be "penetrated" by the penis but, since the clitoris is an external part of the female sexual organ, the "union" of the penis with the clitoris would be sexual battery, as provided in this legislation.

As regards vaginal penetration by an "other object," which would, based upon case law, include a finger, the definition of "vagina" and "vaginal," when read together with the definition of "sexual battery," may arguably be interpreted as indicating that "penetration" be treated as including "union" or be treated as synonymous with "union" if both definitions are to be given full effect. If "union" of a sexual organ with an other object is a subset of "penetration" of a sexual organ by an other object, or if the terms are essentially synonymous, then the touching or fondling of, for example, the clitoris by another person would constitute a sexual battery.

(*Touching or fondling of the male sexual organ is not covered in the current definition of "sexual battery" and the definition of "vagina" and "vaginal," when read together with the definition of "sexual battery" would not appear to address the touching or fondling of the male sexual organ.*)

Reading the two definitions together, the word "penetration" may also arguably be interpreted to indicate that the definition of "vagina" and "vaginal" are limited in this instance to external parts of the sexual organ that can be "penetrated" by an other object, since the definition does not expressly indicate what "parts" are included as "external parts" of the female sexual organ.

If the legislation essentially nullifies the distinction between "penetration" and "union," than there is the potentiality for more sexual acts to fall within the net for prosecution as sexual batteries, lewd or lascivious batteries, or other sexual offenses. Further, the definition offers a distinct advantage to prosecutors in proving sexual battery and various other sexual offenses based on the union of the penis with external parts of the female sexual organ that do not arguably fall within the medical definition of "vagina." Also, if the new definition, read together with the definition of "sexual battery," includes touching or fondling of the external parts of the xfemale sexual organ, then the advantage to the prosecutor is even greater, because the prosecutor would only have to prove the union of the finger or other object with an external part of the female sexual organ, in contrast to having to prove that a finger or other object penetrated the vagina, the proof requirement if the "sexual battery" definition stands alone.

Lewd or lascivious battery relies on a definition of "sexual activity" that is identical to the definition of "sexual battery" in s. 794.011, F.S., the sexual battery statute. Lewd or lascivious battery is a level 8 offense; sexual battery by an adult upon a person 12 years of age or older (where physical force likely to cause serious injury is not used) is also a level 8 offense. Consent of the victim to the "sexual activity" is not an issue with regard to lewd or lascivious battery; it is an issue with regard to the described sexual battery offense.

With the creation of lewd or lascivious battery, there appears to be no distinct advantage to the prosecutor in charging the described sexual battery offense unless the prosecutor is seeking to pursue three-time violent felony offender sanctions or repeat sexual batterer sanctions where charging the described sexual battery would be necessary because lewd or lascivious battery is not a qualifying offense under those sanction provisions (this assumes the offender is not charged with an additional offense that qualifies under the sanction provisions). Absent this narrow exception, the advantage to the prosecutor appears to lie in charging lewd or lascivious battery and the legislation would do no less than maintain the status quo and may possibly further solidify the advantage of charging lewd or lascivious battery in this instance.

Further, the creation of the lewd or lascivious battery section would appear to provide an advantage to prosecutors in terms of plea negotiations in particular instances. For example, if a defendant could be charged with a level 9 or 10 sexual battery offense, or a capital sexual battery offense, but the evidence in the case when weighed against the risk of a trial on the sexual battery offense, may be disadvantageous to the prosecutor, tendering an offer of lewd or lascivious battery may be to the advantage of both the prosecutor and defendant. Again, the legislation would do no less than maintain the status quo and may possibly further solidify the advantage of charging lewd or lascivious battery in this instance.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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 (CJEC) reviewed CS/SB 1666, but has not reviewed the provisions of bill that provide definitions of "vagina" and "vaginal" in several statutes relating to various sexual offenses. The CJEC will review the CS/CS/SB 1666. It is anticipated that the bill will have an indeterminate, but expected to be insignificant, impact on the state's prison population.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.