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/SB 1666

SPONSOR: Criminal Justice Committee and Senator Laurent

SUBJECT: Sex Crimes

DATE: April 11, 2001 REVISED: _____ _____ _____ _____

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

I. Summary:

Committee Substitute for Senate Bill 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.

The CS also creates a separate proceeding in which a jury or court determines, by a preponderance of the evidence that a defendant who has been convicted of an enumerated felony sexual offense meets criteria for sentencing as a dangerous sexual felony offender. The CS sets forth the procedures for this separate proceeding and affords the defendant the right to confront and cross examine witnesses, call experts, challenge evidence, and other rights. The CS provides that such offender shall receive a sentence of 25 years to life imprisonment. Direct appeal of this sentence is authorized.

This CS substantially amends or creates the following sections of the Florida Statutes: 775.251; 775.252; 775.253; 775.254; 775.255; 775.256; 794.011; 796.07; 800.14; 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"

Committee Substitute for Senate Bill 1666 provides a definition of "vagina" and "vaginal" in ss. 794.011, 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 female 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.

Sections 1 to 6 of the CS, relating to the definition of "vagina" and "vaginal," take effect July 1, 2001.

Dangerous Sexual Felony Offender Sentencing

Committee Substitute for Senate Bill 1666 creates s. 775.251, F.S., a definitions section. This section defines a "dangerous sexual felony offender" as a person who is convicted of a felony sexual offense and who has been determined by a jury or court as being likely to commit one or more future felony sexual offenses and, based on that likelihood, would present a threat to others if released from prison within the foreseeable future.

"Felony sexual offense" consists of any of the following felony offenses:

- Murder while engaged in sexual battery in violation of s. 782.04(1)(a)12., F.S.;
- Kidnapping of a child under the age of 13 and, in the course of the offense, committing sexual battery or a lewd, lascivious, or indecent assault or act upon or in the presence of a child;
- False imprisonment upon a child under the age of 13 and, in the course of that offense, committing sexual battery or a committing a lewd, lascivious, or indecent assault or act upon or in the presence of a child;
- Sexual battery in violation of s. 794.011, F.S.;
- Lewd, lascivious, or indecent assault or act upon or in the presence of a child in violation of s. 800.04, F.S.
- An attempt, criminal solicitation, or conspiracy to commit any offense previously described, if the attempt, criminal solicitation, or conspiracy is a felony offense.
- A felony offense in effect at any time on or after the date this section becomes law which is comparable to any offense previously described.

Staff notes that a lewd, lascivious or indecent assault or act under s. 800.04, F.S., covers a wide range of acts, from exposing the genitals in a lewd or lascivious manner in the presence of a victim less than 16 years of age to lewd or lascivious battery of a person 12 years of age or older but less than 16 years of age.

The CS creates s. 775.252, F.S., which provides that, in accordance with ss. 775. 253, 775.254, and 775.255, F.S., after a defendant's conviction or a plea of guilty or nolo contendere to a felony sexual offense, the court, upon motion by the state or the court, shall, if any sentence otherwise provided by law is less than 25 years in state prison, sentence the defendant as a

dangerous sexual felony offender, except in a any case in which the defendant must be sentenced to a mandatory term of imprisonment of 25 years or longer in state prison, or in which the defendant is sentenced to death.

The CS creates s.775.253, F.S., which provides that prior to a defendant's acceptance of a plea of guilty or nolo contendere to a felony sexual offense, the court shall advise the defendant that he or she may be sentenced under the dangerous sexual felony offender provisions.

The CS creates s. 775.254, F.S., which sets forth the procedures for the separate sentencing hearing to determine if the defendant is a dangerous sexual felony offender. The CS specifies how the jury is to be summoned or impaneled. The court may permit the presentation of any evidence relevant to the nature of the crime and character of the defendant, including previous felony sexual offenses committed by the defendant, which shall be considered by the jury or the court. The court may receive any evidence it deems to have probative value, regardless of its admissibility under exclusionary rules of evidence, provided that the defendant has a fair opportunity to rebut any hearsay statements. This section does not authorize introduction of evidence secured in violation of the state or federal constitutions.

The state and defendant have the right to present their arguments. All evidence is presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

Findings required as the basis of the sentence shall be found to exist by a preponderance of the evidence.

The defendant has the right to direct appeal of his or her sentence.

Minimum sentencing factors are enumerated, including, but not limited to whether, before committing the felony sexual offense, defendant was unknown to the victim; prior felony sexual offenses; and whether prior record indicates a pattern of escalating criminality.

Neither the state nor the defendant is precluded from providing expert testimony for the jury's consideration.

The jury may reach a determination, based on the enumerated factors or *others factors*, that a defendant is a dangerous sexual felony offender. This determination by the jury must be unanimous.

The CS creates s. 775.255, F.S., which provides that a dangerous sexual felony offender must be sentenced to a term of imprisonment of not less than 25 years and not more than a term of life imprisonment. The court may not sentence the defendant to a sentence less than 25 years, notwithstanding any other law. A person not sentenced as a dangerous sexual felony offender is sentenced as otherwise provided by law.

Finally, the CS creates s. 775.256, F.S., which provides that, in order to protect the public, relevant information and records that are otherwise confidential or privileged shall be released to the state attorney or state's experts for the purpose of evaluating a defendant to determine

whether he or she is a dangerous sexual felony offender. This information does not lose its confidential status due to its release.

Sections 7 through 12 of the CS, relating to the dangerous sexual felony offender provisions, take effect upon becoming law.

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:

A possible constitutional issue that may arise regarding the dangerous sexual felony offender provisions of the CS is a due process issue involving whether the criteria for determining that a defendant is a dangerous sexual felony offender subject to the considerable mandatory sentencing provisions are sentencing factors or elements of a crime. If they are simply sentencing factors, than there may not be a due process issue.

Often, a due process argument is raised regarding a law that creates what is purported to be simply a sentencing enhancement. Typically, a defendant is subject to this sentencing enhancement if the state proves that the defendant meets criteria. The court's findings are based on a preponderance standard. A defendant who is subject to enhanced sentencing under the law challenges the law, arguing that the law is not, in fact, creating sentencing factors or criteria but rather is creating new and distinct criminal elements that must be charged and/or proven beyond a reasonable doubt.

The courts have generally held that, in a sentencing enhancement proceeding, findings of the sentencing court based on a preponderance standard comport with due process. For a discussion of the standard, s*ee U.S. v. Darby*, 744 F.2d 1508 (11th Cir. 1984). However, where those proceedings and the burden of proof applied in those proceedings have been challenged, courts have balanced the "defendant's liberty interests, the risk of erroneous deprivation and the government's interest in protecting society." *Darby*, at 1537. The results of this balancing have generally favored the state.

Dicta in the fairly recent case of *Jones v. Unites States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), in which the court reviewed enhanced penalties under the federal carjacking statute, have raised the question as to the constitutionality of sentencing enhancements based on criteria other than prior record. *See U.S. v. Grimaldo*, 214 F.3d 967,

972 (8th Cir. 2000) "In *Jones*, the Court explained the principle underlying its position that if the carjacking statute were construed to contain sentencing enhancements it might be unconstitutional: '[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' 526 U.S. at 243 n. 6, 119 S.Ct. 1215. The Court went on to say, however, that its 'prior cases suggest rather than establish this principle.' *Id*. In addition, the Court expressly stated that it was announcing no new principle of constitutional law. *See id*. at 252 n. 11, 119 S.Ct. 1215."

Without further pronouncement indicating that the Court is establishing a new principle, the pre-*Jones* law presumably governs. *See Grimaldo*, at 967 ("We are not certain that the Constitution requires that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in the indictment and proven to a jury beyond a reasonable doubt. Until this constitutional principle is established, rather than suggested, we decline to find plain error under these circumstances.") The pre-*Jones* law is described by the Eighth Federal Circuit as follows:

> In *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), the Court held that due process was not satisfied where the petitioner was convicted under a state statute that carried a maximum sentence of 10 years but sentenced under another statute (the Sex Offenders Act) that allowed the trial court to sentence a convicted defendant to an indefinite term of one year to life if the court found that the person constituted a threat of bodily harm to the public or was a habitual offender and mentally ill. *See* 386 U.S. at 607, 611, 87 S.Ct. 1209.
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> Soon after, the Court made clear that due process requires that "every fact necessary to constitute the crime" charged be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) This high standard was necessary, the Court asserted, because of the immensely important interests of the accused: loss of liberty and stigmatization. *See id*. at 363, 90 S.Ct. 1068.
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> The Court then struck down a state law that required a defendant charged with murder (punishable by life in prison) to prove that he acted in the heat of passion on sudden provocation in order to reduce his crime to manslaughter (punishable by a maximum of twenty years in prison). *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Because malice aforethought was an essential element of murder, the fact that the law conclusively implied it when the homicide was intentional and unlawful violated *Winship*. *See id.* at 686, 703-04, 95 S.Ct. 1881. "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." *Id.* at 698, 95 S.Ct. 1881. The Court pointed out that *Winship* was concerned with substance rather than form, and implied that a state could not redefine elements of crimes and characterize them as factors that bear only on punishment. *See id.* at 698-99, 95 S.Ct. 1881.

> In *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the Court upheld a state statute that required a mandatory five-year minimum sentence for certain felonies if the sentencing judge found by a preponderance of the evidence that the individual visibly possessed a firearm during commission of the felony. The Court pointed out that the statute merely limited the sentencing court's discretion in selecting a punishment within the range that was already available to it, and that it neither altered the maximum punishment for the crime nor created a separate offense with a separate penalty. *See id*. at 87-88, 106 S.Ct. 2411. There was no indication that the statute had been designed "to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88, 106 S.Ct. 2411.
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> Finally, the Court interpreted 8 U.S.C. s. 1326 to define one crime: a deported alien returning to the United States without special permission. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). If convicted, the alien could be sentenced to a maximum of 2 years; his sentence, however, could be enhanced to as much as 20 years if he had been deported after a conviction for an aggravated felony. The Court held that the enhancement was not a separate crime, but merely a penalty provision. See id. According to the Court, recidivism has typically been considered a sentencing factor. *See id.* at 230, 118 S.Ct. 1219. The Court specifically rejected the argument that the Constitution requires that any factor that significantly increases the maximum sentence must be considered an element of the crime. *See id.* at 247, 118 S.Ct. 1219.
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> Exactly one year after *Almendarez-Torres* was decided, the Supreme Court decided *Jones*, in which it held that factors that increase the maximum sentence for the crime of carjacking are elements of the offense. These cases illustrate that the Court has long been grappling with the due process requirements for conviction and sentencing. The Supreme Court's failure to conclusively resolve the constitutional issues raised by these cases and discussed in *Jones* leads us to doubt that the Court announced a new rule for criminal prosecutions that must be applied retroactively.

Grinaldo, at 973-74.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An impact analysis has been requested from the Criminal Justice Estimating Conference (CJEC) but was not received at the time this analysis was completed. However, this request was directed toward the original bill, sans the repeat sexual felony offender provisions. Therefore, the CJEC has neither reviewed nor analyzed the repeat felony sexual offender provisions for possible prison bed impact. It is expected, given the considerable mandatory penalties provided in the bill, that those penalties will have some impact. It is also likely that the new sentencing provisions will have an impact on pleas and trials for the enumerated "felony sexual offenses," though staff is unable to ascertain what that impact will be.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The CS explicitly reconciles its mandatory sentencing provisions with current mandatory sentencing provisions providing for comparable mandatory sentencing. Inferentially, rather than explicitly, the statute, by its requirement that the dangerous sexual felony offender sentencing provisions shall apply where the defendant would qualify for such sentencing and would otherwise be sentenced to less than 25 years imprisonment, appears to address the application of the sentencing provisions of the CS in relation to current mandatory sentencing provisions that might be invoked by the same or similar criteria as contained in the CS, that provide that the sentencing provisions must be imposed, and that impose lesser mandatory penalties than prescribed by the CS. In regard to two statutes that proscribe the same act but have different penalties, the Florida Supreme Court has opined that prosecution of the act under the statute providing for the greater penalty is permissible. *See State v. Cogswell*, 521 So.2d 1081 (Fla.1988) (However, the Court in *Cogswell* was not reviewing two statutes with different mandatory penalties).

VIII. Amendments:

None.