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 444

SPONSOR: Criminal Justice Committee and Senator Latvala

SUBJECT: Offenses Against Children

DATE: March 13, 2001 REVISED: _____ _____ _____ _____

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

I. Summary:

Committee Substitute for Senate Bill 444 amends s. 787.025, F.S., which prohibits a person over the age of 18 who has been previously convicted of certain sexual offenses from intentionally luring or enticing a child under the age of 12 into a building, structure, or conveyance for other than a lawful purpose. The amendment modifies the elements of the offense so that the section would prohibit a person over the age of 18 who has been previously convicted of certain sexual offenses from intentionally luring or enticing a child under the age of 15 years into a building, structure, or conveyance without the consent of the child's parent or legal guardian.

The CS also provides a definition of the word "presence" for the purpose of indicating that a lewd or lascivious exhibition in "the presence of a victim" means that the victim must be physically present where and when this exhibition occurs and in the immediate vicinity of this exhibition, but does not have to see or sense this exhibition.

This CS substantially amends the following sections of Florida Statutes: s. 787.025 and s. 800.04.

II. Present Situation:

Section 787.025, F.S., currently provides that it is a third degree felony for a person over the age of 18 who, having been previously convicted of a violation of ch. 794, F.S. (sexual battery and other sexual offenses), or s. 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age), or a violation of a similar law of another jurisdiction, to intentionally lure or entice a child under 12 years of age into a structure, dwelling, or conveyance for other than a lawful purpose.

On March 21, 2000, in an article by the Associated Press from Clearwater, it was reported that a 12 year old girl was walking home from school when a man approached her in a car and asked

her to get in the car with him. The girl kept on walking. A short time later, the girl's mother pulled up and the girl told her the man was following her and propositioning her. The mother chased the man as he was trying to speed away. Police later caught the man and found that he was convicted in 1989 of attempted sexual battery on an 8-year old child and handling and fondling. The girl identified the man as her pursuer. However, when the police learned that the girl was 12 years of age, they released the man because the luring or enticing offense covered in s. 787.025, F.S., didn't apply if the victim was 12 years of age.

Section 800.04(7), F.S., which prohibits lewd or lascivious exhibition provides that this exhibition is committed in "the presence of a victim." In *State v. Werner*, 609 So. 2d 585 (Fla. 1992), the Florida Supreme Court interpreted what the word "presence" in the statute meant. Werner argued the word meant that the victim had to see or sense the exhibition. The State (and the Guardian Ad Litem Program in the Eleventh Judicial Circuit and the Family Law Section of the Florida Bar, in amicus briefs) argued that the word only meant the victim had to be in the vicinity of where the exhibition occurred. The Court agreed with Werner, holding that "while the child need not be able to articulate or even comprehend what the offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation to occur. *Id.*, at page 587.

The Orange County Sheriff's Office has indicated in 1997 one of its investigators encountered a suspect (stepfather) who was standing behind the child, who was sitting on a bus stop bench. The suspect was masturbating and a witness saw the act and reported the suspect. The child was handicapped and did not see the suspect masturbating nor could the child have perceived the act happening behind her. The suspect could not be arrested for lewd or lascivious exhibition on the basis of the *Werner* standard.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 444 amends s. 787.025, F.S., which makes it unlawful for a person over 18 years of age who has been previously convicted of certain sexual offenses from intentionally luring or enticing a child under the age of 12 into a building, structure, or conveyance for other than a lawful purpose. The amendment deletes the words "for other than a lawful purpose" and adds the words "without the consent of the child's parent or legal guardian." The deleted words have been held to be unconstitutionally vague and to create a mandatory rebuttable presumption (See the "Constitutional Analysis" section of this analysis).

The CS does not affect current affirmative defenses that the person reasonably believed that his or her action was necessary to prevent the child from being seriously injured, or that the person's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the child. (The CS does delete the current affirmative defense of luring or enticing a child under the age of 12 into a structure, dwelling, or conveyance for a lawful purpose.) "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." *State v. Cohen*, 568 So.2d 49, 51 (Fla.1990). A defendant has the burden of initially offering evidence to establish an affirmative defense, after which the burden shifts to the state to disprove the defense beyond a reasonable doubt. *Hansman v. State*, 679 So.2d 1216, 1217 (Fla. 4th DCA 1996).

The CS does not dispense with scienter. The statute continues to require that the luring be intentional, which appears to negate the possibility that apparently innocent conduct would be criminalized. Further, the affirmative defenses do not appear to negate this element, but rather provide possible justification or excuse for the intentional luring. Therefore, it does not appear that the changes made by the CS impermissibly shift the government's burden of persuasion to the defendant.

The CS also provides that s. 775.025, F.S., is triggered if the victim of this offense is under the age of 15 (current law specifies the victim must be under the age of 12).

The CS also amends s. 800.04, F.S., to provide a definition of the word "presence" for the purpose of indicating that a lewd or lascivious exhibition "in the presence of a victim" means that the victim just be physically present where and when this exhibition occurs and in the immediate vicinity of this exhibition, but does not have to see or sense this exhibition.

The effect of this amendment is that it effectively eliminates the *Werner* standard (see *Werner*, supra).

The CS takes effect on July 1, 2001.

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:

The Second District Court of Appeal held s. 787.025, F.S., to be unconstitutionally vague, finding that the term "other than a lawful purpose" failed to give persons of common intelligence adequate notice of the proscribed conduct and also impermissibly shifted the burden to the defendant to adduce evidence that he or she had a "lawful purpose" upon proof by the State of a lack of parental consent, thereby constituting a mandatory rebuttable presumption. *Brake v. State,*. 746 So.2d 527 (Fla. 2d DCA 1999). Absent interdistrict conflict, district court decisions bind all Florida trial courts. *Pardo v. State*, 596 So.2d 665 (Fla. 2nd DCA 1992). The judges of other districts must follow a decision of a district court of appeal unless a contrary ruling has been issued from their district or there is a ruling from the Florida Supreme Court superseding that district court. *State v. Sanchez*, 642 So.2d 122 (Fla. 5th DCA 1994).

The Second District Court noted that "one way that the legislature could cure this problem [the failure to give persons of common intelligence adequate notice of the proscribed conduct] is by leaving out the offending language and making it illegal for a convicted sex offender over the age of eighteen, especially someone convicted of child sexual abuse, to lure or entice a child under twelve into a structure, dwelling, or conveyance without the permission of a parent or guardian." *Brake*, 746 So.2d at 530.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An impact analysis from the Criminal Justice Estimating Conference was not received at the time of completion of this analysis. However, the luring offense is an unranked third degree felony so it appears likely that the CS will have little or no impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.