

# 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 934  
SPONSOR: Criminal Justice Committee and Senator Wasserman Schultz  
SUBJECT: Sexual Offenses  
DATE: February 26, 2002 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>                    </u>	<u>                    </u>	<u>CF</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

Currently, s. 825.1025(2), F.S., prohibits the offense of lewd or lascivious battery on an elderly person or disabled adult. The offense is a second degree felony and is ranked in level 7 of the offense severity ranking chart of the Criminal Punishment Code. The bill ranks the offense in level 8 of the offense severity ranking chart. This will increase the lowest permissible sentence for the offense to correspond to the offense of sexual battery. The bill also changes the term disabled *adult* to disabled *person* in s. 825.1025, F.S.

The bill provides that where, in a sexual battery prosecution under s. 794.011, F.S., the victim’s mental defect or mental incapacity is an issue, certain expert witnesses may be used to prove or disprove that fact.

This bill substantially amends sections 794.011, 825.1025, and 921.0022 of the Florida Statutes.

## II. Present Situation:

### *Lewd or Lascivious Offenses Against Elderly Persons or Disabled Adults*

Section 825.1025, F.S., prohibits various sexual offenses committed against “an elderly person or disabled adult.” In relevant part, the section prohibits “lewd or lascivious battery upon a elderly person or disabled adult and provides that it occurs when a person encourages, forces, or entices a disabled adult to engage in any act involving sexual activity when the person knows or reasonably should know that the disabled adult either lacks the capacity to consent or fails to give consent.

The term “disabled adult” is defined as:

A person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living. s. 825.101(4), F.S.

The term "elderly person" is defined as:

A person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. s. 825.101(5), F.S.

The chapter defines the term "lacks capacity to consent" as meaning:

An impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short term memory loss, or other cause, that causes an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning the elderly person's or disabled adult's person or property. s. 825.101(9), F.S.

### ***Sexual Battery***

Section 794.011, F.S., prohibits sexual battery on a person which occurs without the victim's consent. The term "sexual battery" is defined 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." s. 794.011(1)(h), F.S. The severity of the offense depends on the age of the victim, the age of the offender and the circumstances of the offense.

The crime of sexual battery is punished as different levels of felony and at different levels in the Severity Ranking Chart of the Criminal Punishment Code, depending on the victim's age and sometimes the defendant's age.

The statute defines the term consent in the following manner:

"Consent" means intelligent, knowing and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean the failure of the alleged victim to offer physical resistance to the offender.

The Standard Jury Instruction further clarifies the definition of consent in sexual battery cases to include the following:

"Consent" means intelligent, knowing and voluntary consent and does not include forced submission. Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

In other words, if the “consent” given by a person with a mental incapacity or defect is not intelligent, knowing and voluntary, an offender can be convicted of the offense of sexual battery.

Further, s. 794.011(4), F.S., specifically provides enhanced penalties for sexual battery upon a person over the age of 12 without that person’s consent, “when the offender is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.” The term mentally defective is defined to mean a “mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.” s. 794.011, F.S. *See Wilburn v. State*, 763 So.2d 353 (Fla. 4th DCA 1998); *Schimele v. State*, 784 So.2d 591 (Fla. 4th DCA 2001)(affirming conviction and holding that sufficient evidence existed to find that the victim had a mental disease or defect rendering him incapable of appraising the nature of his conduct at the time of the incident and therefore his consent could not have been intelligent, knowing and voluntary).

### ***Criminal Punishment Code***

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. A defendant’s sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; the injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant’s prior record and other aggravating factors. Offenses are ranked in the offense severity ranking chart from level one to level ten and are assigned points based on the severity of the offense as determined by the Legislature. s. 921.0022, F.S.

The points assigned for the offense committed, the offender’s prior record and other factors are added in order to determine the “lowest permissible sentence” for the offense. This is the minimum sentence that a judge may impose. The permissible sentence for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is thirty years, for a second degree felony is fifteen years and for a third degree felony is five years. s. 775.082, F.S.

The offense of lewd or lascivious battery on an elderly person or disabled adult is a second degree felony which is ranked in *level 7* of the offense severity ranking chart. The lowest permissible sentence for this offense would be 51 months in prison. The offense of sexual battery on a person age 12 or older where the offender does not use force is also a second degree felony which is ranked in *level 8* of the offense severity ranking chart. The lowest permissible sentence for this offense is 64.5 months in prison. These calculations include points assessed for “sexual contact.” s. 921.0024, F.S.

### **III. Effect of Proposed Changes:**

The offense of “lewd or lascivious battery of an elderly person or disabled adult” is currently a second degree felony and is ranked in level 7 of the offense severity ranking chart of the Criminal Punishment Code. The bill ranks the offense in level 8 of the offense severity ranking chart. As a result, the lowest permissible sentence for the offense will increase from 51 months to 64.5 months. The maximum punishment for the offense will remain 15 years in prison. This ranking will correspond to the ranking for the offense of sexual battery.

The bill amends s. 825.1025, F.S., which prohibits lewd or lascivious battery, molestation, and exhibition upon or in the presence of an elderly person or disabled adult, to change the term “disabled *adult*” to “disabled *person*.” This change would allow for prosecution of offenses under this statute which might otherwise be precluded because the disabled person was under the age of eighteen.

Section 794.011, F.S., the sexual battery statute is amended to provide that when mental defect or mental incapacity of the victim is an issue, an expert witness who is licensed under chapter 490 (psychological services), chapter 458 (physicians), or chapter 459 (osteopathic medicine), *may* be utilized.

**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:

Although the Criminal Justice Impact Conference has not considered this proposed committee substitute, it can be assumed that it will have minimal prison bed impact.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Because section 1 of the bill, which allows for the use of certain expert witnesses in sexual battery cases is permissive (*may* be utilized), there should not be a separation of powers issue with regard to the court’s independence in deciding the admissibility of evidence. The language

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does not prohibit the use of other types of experts and does not require the use of the experts who may qualify under this section of the bill.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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