

# 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 2172

SPONSOR: Criminal Justice Committee and Senator Cowin

SUBJECT: Repeat Sexual Offenders

DATE: April 10, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>                    </u>	<u>                    </u>	<u>ACJ</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>AP</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:

Committee Substitute for Senate Bill 2172 deletes all of the current provisions of s. 794.0115, F.S., which currently provides for a 10-year mandatory minimum term of imprisonment for certain recidivist sexual offenders designated “repeat sexual batterers.” The most significant change made by the CS is changing the mandatory minimum term to 25 years to life.

This term must be imposed or included in sentencing of a person as a “dangerous sexual felony offender,” which the CS defines as a person who is convicted of any one of several sexual offenses, which the person committed when he or she was 18 years of age or older, and the person meets any one of several designated factors, such as causing serious personal injury to the victim as a result of the offense.

This CS substantially amends s. 794.0115, F.S.

## II. Present Situation:

The Criminal Punishment Code accounts for the severity of a sexual offense committed by an offender, victim injury, and prior sexual offenses through the assessment of sentencing points that when entered into a statutorily prescribed calculation determine the lowest permissible sentence. There are also a number of provisions in Florida law that provide for mandatory minimum terms of imprisonment or enhanced penalties of considerable length that may apply to a repeat sexual offender, depending upon the offender’s offense history. Provided are some hypothetical cases illustrating how such sentencing might occur.

**CASE 1:** In 2000, the adult defendant committed sexual battery upon another adult. The defendant threatened to stab the victim if the victim did not submit to the sexual battery. The

sexual battery involved sexual penetration, but there was no physical injury. In 2002, the defendant was convicted of sexual battery pursuant to s. 794.011(3), F.S., a life felony ranked in Level 10 of the offense severity ranking chart of the Criminal Punishment Code (which replaced the former sentencing guidelines). The defendant had a prior conviction for lewd assault (under s. 800.03, F.S. (1997)), a second degree felony ranked in Level 7 of the offense severity ranking chart of the former sentencing guidelines.

In determining the lowest permissible sentence for the offense, the Level 10 sexual battery offense was scored as the primary offense (there were no additional offenses). Points were also scored for the sexual penetration and the prior offense. The defendant scored a lowest permissible sentence of 11 years and some months. The sentencing range was from the lowest permissible sentence to the maximum penalty. A life felony is punishable by life imprisonment or a term of years not exceeding 40 years.

The defendant does not qualify for any other mandatory term or enhanced penalty provision.

**CASE 2:** In 2000, the adult defendant touched the breasts of a 14-year old. In 2002, the defendant was convicted of lewd molestation pursuant to s. 800.04(5)(b), F.S., a second degree felony ranked in Level 7 of the Code ranking chart. The defendant had a prior conviction for a lewd act (under s. 800.03, F.S. (1997)), a second degree felony ranked in Level 7 of the guidelines ranking chart.

The lewd molestation offense was scored as the primary offense (there were no additional offenses). Points were also scored for sexual contact and the prior offense. The defendant scored a lowest permissible sentence of 5 years and some months. The sentencing range was from the lowest permissible sentence to the maximum penalty. A second degree felony is punishable by a term of imprisonment not exceeding 15 years.

The defendant in Case 2 does not qualify for any mandatory term or enhanced penalty provision.

**CASE 3:** In 2000, the adult defendant committed sexual battery on a 16-year-old, without the victim's consent, and in the process of committing the sexual battery did not use physical force or violence likely to cause serious personal injury to the victim. The sexual battery involved sexual penetration, but there was no physical injury. In 2002, the defendant was convicted of sexual battery pursuant to s. 794.011(5), F.S., a second degree felony ranked in Level 8; possession of burglary tools, a third degree felony ranked in Level 4; and resisting arrest without violence, a third degree felony ranked in Level 1. These offenses are ranked in the Code ranking chart. The defendant had a prior conviction for a lewd act (under s. 800.03, F.S. (1997)), a second degree felony ranked in Level 7 of the guidelines chart. The defendant served a sentence in prison of more than one year for this offense and was released from prison in 1998. Additionally, the defendant had a 1995 conviction for aggravated assault, a third degree felony ranked in Level 6 of the guidelines ranking chart.

The sexual battery offense was scored as the primary offense. Points were also scored for the additional offenses, sexual penetration, and the prior offense. The defendant scored a lowest permissible sentence of 9 years and some months. The sentencing range was from the lowest

permissible sentence to the maximum penalty. A second degree felony is punishable by a term of imprisonment not exceeding 15 years.

The defendant in Case 3 qualifies as a prison releasee reoffender and a habitual felony offender.

*Prison Releasee Reoffender (s. 775.082(9), F.S.):* This provision applies if:

1. The defendant commits an enumerated offense (sexual battery is an enumerated offense) within 3 years after being released from a state correctional facility or a correctional institution in another jurisdiction, or while serving a prison sentence or on escape status from such facility or institution, following incarceration for an offense for which the sentence is punishable by more than one year in this state.

If the defendant in Case 3 was sentenced as a prison releasee reoffender, his sexual battery offense would be punishable by a term of imprisonment of 15 years.

*Habitual Felony Offender (s. 775.084, F.S.):* This provision applies if:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses (a qualified offense is an offense in another jurisdiction substantially similar in elements and penalties to an offense in this state, which is punishable by death or imprisonment exceeding one year).
2. The felony for which the defendant is to be sentenced was committed:
  - a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or
  - b. 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, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.
3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not possession or purchase of a controlled substance.
4. The defendant has not received a pardon for any offense necessary to the operation of this provision, or had a conviction for such offense set aside in any postconviction proceeding.

If the defendant in Case 3 was sentenced as a habitual felony offender, his sexual battery offense could be punished by a term of years not exceeding 30 years.

**CASE 4:** In 2000, the adult defendant committed sexual battery on an adult, without the victim's consent. The victim was physically helpless to resist. The sexual battery involved sexual penetration. The victim was not physically injured. In 2002, the defendant was convicted of

sexual battery pursuant to s. 794.011(4), F.S., a first degree felony ranked in Level 9 of the Code ranking chart. The defendant was also convicted of resisting arrest without violence, a Level 1 offense in the Code ranking chart. The defendant had a prior conviction for sexual battery pursuant to s. 794.011(5), F.S., a second degree felony ranked in Level 8 of the guidelines ranking chart. The defendant served a prison sentence of more than one year for this offense and was released in 1996.

The sexual battery offense was scored as the primary offense. Points were also scored for sexual penetration, the additional offense, the prior offense, and the prior serious felony. The defendant scored a lowest permissible sentence of 11 years and some months. The sentencing range was from the lowest permissible sentence to the maximum penalty. A first degree felony is punishable by a term of imprisonment not exceeding 30 years.

The defendant in Case 4 qualifies as a habitual felony offender. As such, he could be sentenced “for life.” The defendant also qualifies as a habitual violent felony offender.

*Habitual Violent Felony Offender (s. 775.084, F.S.):* This provision applies if:

1. The defendant has previously been convicted of an enumerated felony (sexual battery is an enumerated offense) or an attempt or conspiracy to commit such felony.
2. The felony for which the defendant is to be sentenced was committed:
  - a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision, that is imposed as a result of a prior conviction for an enumerated felony; or
  - b. Within 5 years of the date of the conviction of the last prior enumerated felony, or 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 or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.
3. The defendant has not received a pardon on the ground of innocence for any offense necessary for the operation of this provision, or had a conviction for such offense set aside in any postconviction proceeding.

If the defendant in Case 4 was sentenced as a habitual violent felony offender, he could be sentenced “for life,” and would not be “eligible for release for 15 years.”

**CASE 5:** In 2000, the adult defendant, while serving sentences for sexual battery pursuant to s. 794.011(5), F.S., and false imprisonment, committed a sexual battery on an adult inmate, without the victim’s consent, and in the process of committing the sexual battery used physical force likely to cause severe injury to the victim. The sexual battery involved sexual penetration. The victim was physically injured; the injury was determined to be moderate. In 2002, the defendant was convicted of sexual battery pursuant to s. 794.011(3), F.S., a life felony ranked in Level 10 of the Code ranking chart. The defendant’s sexual battery for which he was serving his

sentence was a second degree felony ranked in Level 8 of the guidelines ranking chart. The defendant's false imprisonment offense for which he was also serving his sentence was a first degree felony ranked in Level 9 of the guidelines ranking chart. Additionally, the defendant had a prior conviction for a lewd act, a second degree felony ranked in Level 7 of the guidelines ranking chart.

The Level 10 sexual battery offense was scored as the primary offense (there were no additional offenses). Points were also scored for sexual penetration, moderate injury, the three prior offenses, and the prior serious felony. The defendant scored a lowest permissible sentence of 17 years. The sentencing range was from the lowest permissible sentence to the maximum penalty. A life felony is punishable by life imprisonment or a term of years not exceeding 40.

The defendant in Case 5 qualifies as a prison releasee reoffender. As such, the sentence is a term of imprisonment for life. He could also be sentenced "for life" as a habitual felony offender or a habitual violent felony offender ("and such offender shall not be eligible for release for 15 years.") The defendant also qualifies as a three-time violent felony offender, a violent career criminal, and a repeat sexual batterer.

*Three-time Violent Felony Offender (s. 775.084, F.S.):* This provision applies if:

1. The defendant has previously been convicted as an adult two or more times of a felony, or an attempt to commit a felony, and two or more of such convictions were for committing, or attempting to commit, any enumerated felony (sexual battery is an enumerated offense) or combination thereof.
2. The felony for which the defendant is to be sentenced is an enumerated felony and was committed:
  - a. While the defendant was serving a prison sentence or other sentence imposed as a result of a prior conviction for any enumerated felony; or
  - b. Within 5 years after the date of the conviction of the last prior enumerated felony, 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 any enumerated felony, whichever is later.
3. The defendant has not received a pardon on the ground of innocence for any offense necessary to the operation of this provision or had such offense set aside in any postconviction proceeding.

If the defendant in Case 5 was sentenced as a three-time violent felony offender, the sentence would be "for life."

*Violent Career Criminal (s. 775.084, F.S.):* This provision applies if:

1. The defendant has previously been convicted as an adult three or more times for an enumerated felony (sexual battery and any lewd offense are enumerated offenses) or other qualified offense.
2. The defendant has been incarcerated in a state or federal prison.
3. The primary felony offense for which the defendant is to be sentenced is an enumerated felony, and was committed on or after October 1, 1995, and:
  - a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for an enumerated felony; or
  - b. Within 5 years after the conviction of the last prior enumerated felony, or within 5 years after the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole, or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.
4. The defendant has not received a pardon for an offense necessary for operation of this provision or had such offense set aside in any postconviction proceeding.

If the defendant in Case 5 was sentenced as a violent career criminal, the sentence would be “for life.”

*Repeat Sexual Batterer (s. 794.0115, F.S.):* This provision applies if:

1. 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 an enumerated sexual battery offense or qualified offense.
2. The felony for which the defendant is to be sentenced is an enumerated sexual battery offense and was committed:
  - a. While the defendant was serving a prison sentence or other sentence imposed as a result of a prior conviction for an enumerated sexual battery offense or qualified offense, or an attempt or conspiracy to commit such offense; or
  - b. Within 10 years after the date of the conviction of the last prior enumerated sexual battery offense or qualified 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 conviction for such offense, whichever is later.

3. The defendant has not received a pardon on the ground of innocence for any offense necessary for the operation of this provision, or had such offense set aside in any postconviction proceeding.

If the defendant is sentenced as a “repeat sexual batter,” the sentence includes a 10-year mandatory minimum term of imprisonment.

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

Committee Substitute for Senate Bill 2172 deletes all of the current provisions of s. 794.0115, F.S., which currently provides for a 10-year mandatory minimum term of imprisonment for certain recidivist sexual offenders designated “repeat sexual batterers.”

The CS changes the mandatory minimum term to 25 years to life. This term must be imposed or included in sentencing of a person as a “dangerous sexual felony offender,” which the CS defines as a person who is convicted of any one of several designated sexual battery offenses, or lewd battery, lewd molestation, lewd offenses against the elderly, or selling or buying minors, which the person committed when he or she was 18 years of age or older, and the person:

- caused serious personal injury to the victim as a result of the offense;
- used or threatened to use a deadly weapon during the commission of the offense;
- victimized more than one person during the course of the criminal episode applicable to the offense;
- committed the offense while under the jurisdiction of a court for a felony offense in Florida or another jurisdiction or for an offense that would be a felony if that offense were committed in Florida; or
- has previously been convicted of any of the above-described offenses.

The CS provides that it is irrelevant that a factor for sentencing is an element of the offense (a similar provision is found in s. 775.087, F.S.) or that such offense was reclassified to a higher felony degree.

Finally, the CS provides that a person sentenced to a mandatory minimum term under this section is not eligible for statutory gain-time or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release before serving the minimum sentence.

The difference or similarities in punishments may be illustrated by using the hypothetical case examples previously discussed (see “Present Section” of this analysis).

#### **CASE 1:**

Primary offense: sexual battery (Level 10; life felony).

Additional: none.

Priors: lewd act (Level 7; second degree felony).

Lowest permissible sentence under the Code: 11 years and some months.

Maximum penalty (s. 775.082, F.S.): life imprisonment or a term of years not exceeding 40.

CS/SB 2172: 25 years to life.

**CASE 2:**

Primary offense: lewd molestation (Level 7; second degree felony).

Additional: none.

Priors: lewd act (Level 7; second degree felony).

Lowest permissible sentence under Code: 5 years and some months.

Maximum penalty (s. 775.082, F.S.): 15 years imprisonment.

CS/SB 2172: 25 years to life.

**CASE 3:**

Primary offense: sexual battery (Level 8; second degree felony).

Additional: possession of burglary tools (third degree felony; Level 4); resisting arrest/no violence (third degree felony; Level 1).

Priors: lewd act (second degree felony; Level 7).

Lowest permissible sentence under Code: 9 years and some months.

Maximum penalty (s. 775.082, F.S.): 15 years imprisonment.

Prison releasee reoffender: a term of imprisonment of 15 years.

Habitual felony offender: a term of years not exceeding 30.

CS/SB 2172: 25 years to life.

**CASE 4:**

Primary offense: sexual battery (Level 9; first degree felony).

Additional: none.

Priors: sexual battery (Level 8; second degree felony).

Lowest permissible sentence under Code: 11 years and some months.

Maximum penalty (s. 775.082, F.S.): a term of imprisonment not exceeding 30 years.

Habitual felony offender: "for life."

Habitual violent felony offender: "for life and "such offender shall not be eligible for release for 15 years."

CS/SB 2172: 25 years to life.

**CASE 5:**

Primary offense: Sexual battery (life felony; Level 10).

Additional: None.

Priors: Sexual battery (second degree felony; Level 8); false imprisonment (first degree felony; Level 9)

Lowest permissible sentence under Code: 17 years.

Maximum penalty (s. 775.082, F.S.): life imprisonment or a term of years not exceeding 40.

Prison releasee reoffender: a term of imprisonment for life.

Habitual felony offender: "for life."

Habitual violent felony offender: "for life" and "such offender shall not be eligible for release for 15 years."

Three-time violent felony offender: "for life."

Violent career criminal: "for life."

Repeat sexual batterer: a 10-year mandatory minimum term of imprisonment.

CS/SB 2172: 25 years to life.



It is within the prosecutor's discretion whether to pursue the mandatory minimum term under s. 794.0115, F.S. If the mandatory minimum term is pursued, and the defendant qualifies as a repeat sexual offender, the court must impose the mandatory minimum term (or, if the sentence exceeds the mandatory minimum term, include the term in the sentence).

Unlike the current s. 794.0115, F.S., this section, as amended by the CS could apply to some offenders convicted of only one sexual offense, including a first-time offender whose only offense is a sexual offense (assuming a qualify offense and sentencing factor).

In regard to the sentencing factor relating to the person committing the qualifying offense "while under the jurisdiction of a court for a felony offense," the choice of the words "under the jurisdiction of a court" rather than "under the supervision of a court" may be that some states have what is called "non-reporting probation," and there may be some question as to whether that form of supervision could be construed as unsupervised. In contrast, there does not appear to be any question that a court has jurisdiction over a defendant until the defendant's sentence ends.

While all of the qualifying offenses under s. 794.0115, F.S., as amended, can be described as "sexual offenses," not all of those offenses involve sexual intercourse. For example, the CS adds lewd molestation as a qualifying offense. "Lewd molestation" consists of intentionally touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forcing or enticing a person under 16 years of age to so touch the perpetrator.

The CS includes the offense of lewd exhibition on the elderly. It is uncertain if this was intended, as the CS does not also include lewd exhibition of a child, which presumably would have been included if the intent was to make lewd exhibition subject to s. 794.0115, F.S. If intended, the difference between the sentencing under the Code of an offender convicted of this offense and sentencing under s. 794.0115, F.S. (assuming the person qualified, e.g., the person was being sentenced for lewd exhibition, which was committed while the person was under probation for possessing cocaine) would be dramatic. The lowest permissible sentence under the Code (for the hypothetical example) would likely be a non-prison sanction. Under s. 794.0115, F.S., the minimum sentence would be 25 years.

The CS takes effect July 1, 2003.

#### **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 Impact Conference (CJIC) estimates that CS/HB 77, which is almost identical to CS/SB 2172, has an indeterminate prison bed impact with minimal prison bed impact expected. However, CJIC does not make estimates beyond 5 years, so the long-term prison bed impact of the CS cannot be ascertained.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

---

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

---