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 232

SPONSOR: Criminal Justice Committee and Senators Cowin and Fasano

SUBJECT: Sentencing/Sexual Offense

DATE: March 25, 2003 REVISED: _____ _____ _____ _____

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

I. Summary:

Committee Substitute for SB 232 provides that the fact that the victim was an initiator, willing participant, aggressor, or provoker of the incident or consented to the incident is not a mitigating factor (i.e., a factor that may be used to support a reduction in a sentence) to any offense contained in ch. 794, F.S. (sexual battery), or s. 800.04, F.S. (lewd or lascivious assaults or acts), in which consent is not a defense to the offense, if the victim was more than 5 years older than the victim at the time of the offense, unless the court makes a written finding, supported by evidence in the record, that the victim knowingly and intentionally mislead or knowingly and intentionally deceived the defendant regarding the victim's actual age.

This CS substantially amends s. 921.0026, F.S.

II. Present Situation:

A. Legislative Intent Regarding Consent as a Defense to Some Sexual Offenses

The Legislature has provided that victim's consent is a defense to some crimes involving sexual activity. *See e.g.*, s. 794.011(3), F.S. (life felony involving sexual battery by a person of any age upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury); s 794.011(4)(a) – (f), F.S. (first degree felony involving sexual battery by a person of any age upon a person 12 years of age or older without that person's consent under any of a specified list of circumstances, such as when the victim is physically helpless to resist); s. 794.011(5), F.S. (second degree felony involving sexual battery by a person of any age upon a person 12 years of age or older, without that person's

consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury).

The term "consent," as defined in both s. 794.011(1)(a), F.S., and s. 800.04(1)(b), F.S., means "intelligent, knowing, and voluntary consent, and does not include coerced submission." Section 794.011(1)(a), F.S., also provides that the usage of that term in that section is "not deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender." Further, s. 794.011(9), F.S., provides that "acquiescence to a person reasonably believed by the victim to be in a position of authority or control does not constitute consent" to sexual battery by a law enforcement officer or other specified person in a position of control or authority upon a person 12 years of age or older (s. 794.011(4)(g), F.S.).

For some sexual offenses, the Legislature has either specified that consent is not a defense or has not specified that consent is a defense. *See e.g.*, s. 794.011(2), F.S. (consent not specified as a defense to sexual battery involving a victim who is less than 12 years of age); s. 794.011(4)(g) and (9), F.S. (consent specifically precluded as a defense to sexual battery by a law enforcement officer or other specified person in a position of control or authority upon a person 12 years of age or older); s. 794.011(8), F.S. (consent specifically precluded as a defense to sexual battery on a minor by a person in familial or custodial authority to that minor); s. 794.05, F.S. (consent not specified as a defense to sexual activity by a person 24 years of age or older with a person 16 or 17 years of age); s. 800.04(2), F.S. (consent specifically precluded as a defense to lewd or lascivious assaults or acts proscribed by that section); s. 826.04, F.S. (consent not specified as a defense to incest); s. 827.071, F.S. (consent not specified as a defense to offenses relating to use of a child in a sexual performance).

In *Schmitt v. State*, 590 So.2d 404, 410-411 (Fla. 1991), the Florida Supreme Court stated that "... it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents and whether or not that conduct originates from a parent." In a footnote, the Court further stated, in part, that "[o]bviously, minor children are legally incapable of consenting to a sexual act in most circumstances." *Schmitt*, 590 So.2d at 411, n. 10.

In his special concurrence in *Jones v. State*, 619 So.2d 418, 424 (Fla. 5th DCA 1993), Judge Sharp remarked on the policy underlying s. 800.04, F.S. (lewd or lascivious assaults or acts), and various obscenity offenses under ch. 847, F.S. (involving exposure of minors to harmful explicit sexual conduct), and the assumption behind such laws regarding the preclusion of victim's consent as a defense:

> ... Such statutes illustrate a well-established policy in Florida to increase the protection of its children from premature sexual activity and exploitation. The mechanism chosen by the Legislature to enforce this policy is to make it a crime to engage in the prohibited sexual conduct with a child without regard to the child's or even the child's parents' consent. The basic assumption behind such laws is that consent by the child counts for nothing because the child or underage person must be protected from his or her own lack of wisdom and good judgment.

If victim's consent is precluded as a defense to a crime, such consent is irrelevant to the trier-of-fact's determination of the defendant's guilt or innocence regarding that crime.

B. "Willing Participant" Sentencing Mitigation Factor

Under the Criminal Punishment Code, a lowest permissible sentence is scored or calculated based upon sentencing points accrued for the primary offense and additional offenses, if any, before the Court for sentencing, prior offenses, and, if relevant, victim injury and specified point enhancements and multipliers. If the lowest permissible sentence is imprisonment, the sentencing judge must impose imprisonment, unless the judge finds a ground for mitigation of the sentence (which may be mitigation of the prison sentence to a non-prison sanction or a mitigation of the length of the prison sentence). Section 921.0026, F.S., authorizes a court to depart downward from the lowest permissible sentence (i.e., "mitigate"), if there are circumstances or factors that reasonably justify the downward departure. Mitigating factors to be considered include, but are not limited to, those listed in s. 921.0026(2), F.S. (These mitigating factors are essentially the same mitigating factors authorized under s. 921.0016, F.S., which applies to sentencing under the former sentencing guidelines.)

One mitigating factor particularly relevant to victim's consent is s. 921.0026(2)(f): "The victim was an initiator, willing participant, aggressor, or provoker of the incident."

C. In *State v. Rife*, 789 So.2d 288 (Fla. 2001), the Florida Supreme Court considered the following questions certified to the Court by the Fifth District Court of Appeals in *State v. Rife*, 733 So.2d 541 (Fla. 5th DCA 1999) (en banc):

> ALTHOUGH WILLINGNESS OR CONSENT OF THE MINOR IS NOT A DEFENSE TO SEXUAL BATTERY OF A MINOR, MAY IT BE CONSIDERED BY THE COURT AS A MITIGATING FACTOR IN SENTENCING? SHOULD THE MITIGATION ALSO APPLY WHERE THE DEFENDANT WAS CONVICTED OF BEING IN A POSITION OF CUSTODIAL OR FAMILIAL AUTHORITY?

A majority of the Florida Supreme Court answered the certified questions in the affirmative and approved the en banc decision of the Fifth District. *Rife*, 789 So.2d at 288. A majority of the Fifth District had affirmed an order of a trial judge of the Circuit Court of Brevard County imposing a downward departure sentence for Rife, who was convicted of a sexual battery on a seventeen- year-old minor in Rife's custodial care. Rife had sexual relations with the victim. *Rife*, 790 So.2d at 541-544. The statutory mitigator that the trial judge relied upon for the downward departure sentence was s. 921.0016(4)(f), F.S., which authorizes a Court to depart downward from a recommended guidelines sentence when the Court finds that "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident." *Rife*, 790 So.2d at 541. The trial judge determined the victim was a "willing participant," based on his findings that the victim had consented to sexual relations with Rife, was in love with Rife or thought she was in love with him, and fully participated in the incident. *Id.* The trial judge informed Rife that, while the victim's "consent" to the crime for which he was convicted was not a defense to that crime, the judge was taking that consent into consideration for the purpose of a downward departure. *Id.*

On appeal by the State of the trial judge's sentencing order, the Fifth District addressed the issue of "...whether the willing participation of a seventeen- year-old woman in a statutorily prohibited sexual relationship, although not a defense to the crime, can be considered by the judge in determining the appropriate sentence." *Id.* A majority of that Court held that the trial judge had the authority to mitigate Rife's sentence on the basis of the victim's consent or willing participation. *Rife*, 733 So.2d at 543. (This analysis is limited to a discussion of the analysis of the Fifth District and the Florida Supreme Court on this issue. However, it is noted that the Fifth District majority's inquiry did not end with its conclusions regarding this issue; the majority also determined that there was record support that the "willing participant" factor was actually present, and that the trial judge did not abuse his discretion in departing downward. *Rife*, 733 So.2d at 533-534. "... [I]n determining whether this mitigator applies when the victim is a minor, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim." *Rife*, 789 So.2d at 296. A majority of the Florida Supreme Court determined there was ample record support and no abuse of discretion. *Rife*, 789 So.2d at 291-296.).

Resolution of this issue required the Fifth District majority to construe legislative intent. *Rife*, 733 So.2d at 542-543. While the majority was cognizant of the fact that the Legislature had precluded victim's consent as a defense to Rife's sexual battery crime and of the State's public policy to protect minors, it concluded that the Legislature had statutorily authorized the judge to impose a downward departure sentence if the judge found that the victim was a "willing participant" in the incident. *Id.* The majority found that the Legislature had not specified in law an exception for this statutory mitigator and the majority was not free to insert into the law such an exception. *Rife*, 733 So.2d at 542-543 and at 534, n. 2. Also, the majority found that logic did not dictate such an exception, reasoning that it did not necessarily follow that the preclusion of a consent defense meant that a judge was precluded from considering victim's consent in determining the appropriate sentence. *Rife*, 733 So.2d at 543.

The Fifth District met en banc in *Rife* because its decision required the Fifth District to recede from its earlier decision in *State v. Smith*, 668 So.2d 639 (Fla. 5th DCA 1996), in which the Court had held that consent of a minor victim can never constitute a valid reason for imposing a downward departure sentence. *Rife*, 733 So.2d at 541-542. The Second District followed the view expressed in *Smith*. *See State v. Harrell*, 691 So.2d 46 (Fla. 2d DCA 1997). *See also State v. Hoffman*, 745 So.2d 985 (Fla. 2d DCA 1998); *State v. Whiting*, 711 So.2d 1212 (Fla. 2d DCA 1998). The First District, which rejected the Fifth District's approach in *Rife*, adopted the view expressed in *Harrell* and certified conflict with the Fifth District's decision in *Rife* as well as its subsequent decision, *State v. Brook*s, 739 So.2d 1223 (Fla. 5th DCA 1999), which followed *Rife*. *See State v. Stalvey*, 795 So.2d 968 (Fla. 1st DCA 2000). Finally, the Third District cited *Whiting* as support in reversing a downward departure sentence. *See State v. Siddal*, 728 So.2d 363 (Fla. 3d DCA 1999).

To answer the certified question presented to the Florida Supreme Court, the Court had to determine "... whether the Legislature intended to provide trial judges with the authority under the sentencing guidelines, section 921.0016(4)(f), to impose a downward departure sentence for crimes involving sexual conduct with minors where the trial court finds that the

minor 'victim was an initiator, willing participant, aggressor, or provoker' of the sexual incident." *Rife*, 789 So.2d at 292.

A majority of the Court found that the sentencing guidelines applied to all felonies, excluding capital felonies. *Rife*, 789 So.2d at 293. It further found that the "plain language" of s. 921.0016(4)(f), F.S., does not limit its applicability to crimes involving adult victims, and that the sexual battery provision applicable to Rife's offense, s. 794.011(8), F.S., only preclude the use of victim's consent as a defense. *Id.*

The State presented three arguments to the Florida Supreme Court. The State's first argument was that the preclusion of a minor victim's consent "as a defense to ... sexual battery on a minor indicates the Legislature's intent that a minor victim's consent or willing participation in sexual behavior with adults cannot be considered for purposes of a downward departure." *Id.* The majority disagreed: "If the Legislature had intended to prohibit downward departures even if the minor consented to the activity, it could have expressly provided for such a prohibition in either the laws governing sexual crimes involving minors or the sentencing guidelines. It did neither." *Id.*

The majority further stated that, to the extent there was any ambiguity regarding "legislative intent created by the confluence of these statutes," the rule of lenity supported its construction. *Rife*, 789 So.2d at 294. This rule, which applies to criminal statutes, including the sentencing guidelines, requires that statutes susceptible to differing constructions be construed most favorably to the accused. The majority's construction of legislative intent was obviously the construction most favorable to the accused.

The State's second argument was that the Court's previous decisions in *Jones v. State*, 640 So.2d 1084 (Fla. 1994) and *J.A.S. v. State*, 705 So.2d 1381 (Fla. 1998), "mandate a contrary result because in both cases we recognized the legislature's strong policy of protecting minors from harmful sexual conduct." *Id.* Again, the majority disagreed. The majority distinguished *Jones* and *J.A.S.* from the case before it: " ... [B]oth *Jones* and *J.A.S.* addressed the question of whether certain sexual conduct could be criminalized even though the minor victim consented. At no point in either case did this Court address the question of whether the minor victims' consensual activity could be a factor that would allow a trial court to depart from the statutory guidelines and impose a lesser sentence." *Rife*, 789 So.2d at 294-295.

The State's third argument was that "providing judges with the discretion to mitigate defendants' sentences based on a minor victim's willing participation in a sexual act with an adult would weaken the laws and public policy of protecting minors." *Rife*, 789 So.2d at 295. Again, the majority disagreed. Its response was succinct: "This argument should be directed to the Legislature." *Id.*

Concluding its discussion of the sentencing mitigation issue, the majority stated:

> In deciding the issues in this case, we do not ignore the State's important interest in protecting minors from harmful sexual conduct and from possible sexual exploitation by adults. Nor does the willing participation of the victim excuse the criminal acts of the

> defendant. Our decision is based on statutory construction and, based on these principles, we do not find that the Legislature intended to preclude a trial court from utilizing section 921.0016(4)(f) as a basis for imposing a downward departure sentence. As the majority opinion of the en banc Fifth District succinctly explained:
>
> > [I]f consent were a defense to this criminal charge, there would be no need to mitigate in this instance. Although remorse is never a defense to a criminal charge, the legislature has made it a mitigating factor to be considered by the judge. Likewise, the legislature has made the willing participation of the victim a mitigating factor. And the legislature did not limit the applicability of this factor ... to only those victims "of age."
>
> *Rife*, 733 So.2d at 543.

Id.

Justice Quince, in her dissent, which was joined by Justice Wells, agreed with the dissenting opinion of Judge Thompson in the Fifth District decision, which she described as stating "that the consent of a minor to sexual acts performed on her by an adult cannot be used to support a downward departure from the sentencing guidelines." *Rife*, 789 So.2d at 296 (Quince, J., dissenting, and Well, J., concurring in this dissent). Justice Quince stated that it seemed "ironic that consent is not a defense to the crime of sexual battery of a minor by one in familial or custodial authority but can be used to negate the punishment for the offense," *id.*, and she quoted in support the following remarks of Judge Thompson in his dissenting opinion (*Rife*, 733 So.2d at 548 (Thompson J. dissenting)):

> First, this statute, section 794.011(8)(b), and others like it are designed to further the state's compelling interest in protecting minors from sexual exploitation and sexual abuse from adults. *See generally*, *Jones v. State*, 640 So.2d 1084 (Fla.1994) (Kogan, J. concurring); *Schmitt v. State*, 590 So.2d 404 (Fla.1991), *cert. denied*, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992); *State v. Sorakrai*, 543 So.2d 294 (Fla. 2d DCA 1989). Unlike the others, however, this statute is specifically directed toward defendants who are "in a position of familial or custodial authority." *State v. Whiting*, 711 So.2d 1212 (Fla. 2d DCA 1998). This is not a statute that could apply to star-crossed lovers who engage in consensual sex, and are close in age. *See e.g.*, *B.B. v. State*, 659 So.2d 256 (Fla.1995). Here, the statute seeks to penalize an adult who preys upon children, and who takes advantage of his or her status to exploit children. The trial court, therefore, should not be able to use as a mitigator that which is statutorily prohibited as a defense at trial. To do so eviscerates the statute and subverts its underlying public policy. *See Whiting*; *State v. Smith*, 668 So.2d 639 (Fla. 5th DCA 1996).
> 733 So.2d at 548.

Rife, 789 So.2d at 296-297.

Justice Quince concluded that "[t]he fact that a sixteen-year-old consented to a sexual relationship with a forty-nine year old man, who had taken on the responsibility of her care, is not mitigating," and declared that she would "answer the certified question in the negative

and hold consent by the minor is not a mitigating factor to sexual battery under section 794.011(8)(b).” *Rife*, 789 So.2d at 297.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 232 amends s. 921.0026, F.S., to provide that the fact that the victim was an initiator, willing participant, aggressor, or provoker of the incident or consented to the incident is not a mitigating factor (i.e., a factor that may be used to support a reduction in a sentence) to any offense contained in ch. 794, F.S. (sexual battery), or s. 800.04, F.S. (lewd or lascivious assaults or acts), in which consent is not a defense to the offense, if the victim was more than 5 years older than the victim at the time of the offense, unless the court makes a written finding, supported by evidence in the record, that the victim knowingly and intentionally mislead or knowingly and intentionally deceived the defendant regarding the victim’s actual age.

The Florida Supreme Court majority in the *Rife* case, *infra*, indicated that Florida law did not specifically preclude the sentencing judge from considering the willingness or consent of a minor victim as a mitigating factor in sentencing a defendant for sexual battery of a minor, even if such consent is not a defense to that sexual battery. If this was the Legislature’s intent, only the Legislature could provide this intent, the Court indicated. The CS provides this intent.

It is uncertain if *Rife* has application beyond sexual battery of a minor, though victim’s consent is precluded as a defense to other sexual offenses, such as lewd or lascivious assaults or acts proscribed by s. 800.04, F.S. There is no such preclusion of victim’s consent as a mitigating factor regarding those other sexual offenses. Therefore, the same facts that supported the majority’s conclusions in *Rife* regarding consideration of a minor victim’s consent as a mitigating factor in sentencing for sexual battery on a minor appear to be equally present regarding those other sexual offenses in which a minor victim’s consent is not a defense. The CS applies to sexual offenses under ch. 794, F.S., as well as s. 800.04, F.S.

The CS takes effect upon becoming a law.

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) determined that SB 232 is likely to have an insignificant prison bed impact. An analysis of CS/SB 232 was not available at the time this analysis was completed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.