

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Criminal Justice Committee

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BILL: SB 1334

INTRODUCER: Senator Lynn

SUBJECT: Sexual Misconduct/Students/Authority Figures

DATE: March 19, 2010

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

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Erickson	Cannon	CJ	<b>Pre-meeting</b>
2. _____	_____	ED	_____
3. _____	_____	JA	_____
4. _____	_____	WPSC	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

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## I. Summary:

The bill reclassifies felony offenses of the third, second, and first degree listed in s. 775.21(4)(a)1., F.S. (sexual predator registration), or s. 943.0435(1)(a)1.a., F.S. (sexual offender registration), if the offense is committed by an “authority figure” of any “educational institution” against a “student” of any “educational institution.” The bill specifically excludes s. 794.011(4)(g), F.S.

The terms “authority figure,” “student,” and “educational institution” are defined in the bill.

This bill creates section 775.0862, F.S., and substantially amends section 921.0022, F.S.

## II. Present Situation:

### **Sexual predator and sexual offender registration**

Persons convicted or adjudicated delinquent of certain sexual offenses are required to register as sexual predators or sexual offenders, as applicable, and meet statutory requirements to report specified, identifying information and to secure identification (if not incarcerated).<sup>1</sup> Reported information is publically available on a website maintained by the Florida Department of Law Enforcement (FDLE).<sup>2</sup>

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<sup>1</sup> See ss. 775.21, 943.0435, 9944.606, 944.607, 985.481, and 985.4815, F.S.

<sup>2</sup> FDLE database of sexual predators and sexual offenders:

<http://offender.fdle.state.fl.us/offender/homepage.do?jsessionid=QWFYLnJFJQyvq7NZJWThmLKJgxywXJjp2XT0Rk16Xd2yfhwWp7T1!-1702573649>

**Offenses precluding education certification and employment**

Section 1012.315, F.S., provides that a person is ineligible for educator certification, and instructional personnel and school administrators are ineligible for employment in any position that requires direct contact with students in a district school system, charter school, or private school that accepts scholarship students under s. 220.187, F.S., or s. 1002.39, F.S., if the person, instructional personnel, or school administrator has been convicted of any felony offense prohibited under any of the statutes or chapters specified. All of the offenses listed in s. 775.21(4)(a)1., F.S. (sexual predator registration), and s. 943.0435(1)(a)1.a., F.S. (sexual offender registration), are listed in s. 1012.315, F.S., but s. 1012.315, F.S., includes some felony sexual offenses that are not listed in the registration statutes:

- Section 787.025(b), F.S. (luring).
- Section 787.025(c), F.S. (luring), where the victim is a minor and the defendant is the victim's parent.
- Section 810.14(3), F.S. (voyeurism).
- Section 810.145(7), (8)(a), and (8)(b), F.S. (video voyeurism).
- Section 826.04, F.S. (incest).
- Section 916.1075(2), F.S. (sexual misconduct with certain forensic clients).

**Sexual offenses requiring forfeiture of retirement benefits**

Section 794.09, F.S., provides that the retirement benefits of a person convicted of a felony committed on or after October 1, 2008, under ch. 794, F.S., are subject to forfeiture in accordance with s. 112.3173, F.S., or s. 121.091, F.S., if the person is a public officer or employee when the offense occurs; the person commits the offense through the use or attempted use of power, rights, privileges, duties, or position of the person's public office or employment position; and the victim is younger than 18 years of age when the offense occurs.<sup>3</sup>

Section 800.05, F.S., which provides that the retirement benefits of a person convicted of a felony committed on or after October 1, 2008, defined in s. 800.04, F.S., are subject to forfeiture in accordance with s. 112.3173, F.S., or s. 121.091, F.S., if the person is a public officer or employee when the offense occurs; the person commits the offense through the use or attempted use of power, rights, privileges, duties, or position of the person's public office or employment position; and the victim is younger than 16 years of age when the offense occurs.<sup>4</sup>

**Minors and consent to sexual activity**

The answer to the question of when a minor can legally consent to sexual activity is complex. Under s. 794.011, F.S., the sexual battery<sup>5</sup> statute, there is a legal presumption that a child under 12 is incapable of consenting to sexual activity.<sup>6</sup> However, "the presumption of incapacity to consent ends at age eleven."<sup>7</sup> There are several sexual battery offenses in s. 794.011, F.S., that

<sup>3</sup> See ss. 112.3173(2)(e)7., 112.3137(3), and 121.091(5)(i), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 794.011(1)(h), F.S., defines "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."

<sup>6</sup> *Khianthlat v. State*, 974 So.2d 359, 362 (Fla.2008)

<sup>7</sup> *Id.*

involve a victim 12 or older, and that require that non-consent of the victim be proven.<sup>8</sup> Section 800.04, F.S., punishes lewd or lascivious acts. Acts may involve a victim 12 or older but less than 16 years of age (e.g., lewd molestation committed by an adult upon a victim 12-15 years of age under s. 800.04(5)(c)2., F.S.), a victim less than 16 years of age (e.g., lewd battery under s. 800.04(4)(b), F.S.) or a victim less than 12 years of age (e.g., lewd molestation under s. 800.04(5)(b) and (c), F.S.). Section 800.04, F.S., “eliminates consent as a defense” and this “necessarily implies that the sexual activity<sup>9</sup> may be consensual, but nevertheless, the State, as a matter of policy, will ignore the consent because of its legitimate interest in protecting victims from sexual exploitation.”<sup>10</sup>

A person 16 years of age or older but less than 24 years of age may engage in consensual sexual activity with a 16-year-old or 17-year-old. However, s. 794.05, F.S., prohibits a person 24 years of age or older from engaging in sexual activity with a 16-year-old or 17-year-old, unless the minor is an emancipated minor.<sup>11</sup> Section 794.05, F.S., has been construed to prohibit sexual activity, regardless of consent, between a person 24 years of age or older and a 16-year-old or 17-year-old: “With the enactment in 1996 of section 794.05, sixteen- and seventeen-year-old minors are now protected as are all other minors from consensual sexual activity with adults twenty-four or older.”<sup>12</sup>

Even when victim’s consent is precluded as a defense, victim’s consent is not precluded as a factor that the court may consider in mitigating (reducing) a Criminal Punishment Code sentence.<sup>13</sup> Section 921.0026(2)(f), F.S., provides as a mitigating factor that “[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident.” Regarding an identical mitigating factor that applied under the former sentencing guidelines, the Florida Supreme Court opined:

... [T]rial judges are not prohibited as a matter of law from imposing a downward departure based on a finding that “[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident.” Of course, in 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.<sup>14</sup>

<sup>8</sup> See s. 794.011(3), (4), and (5), F.S.

<sup>9</sup> The definition of “sexual activity” in s. 800.04(1)(a), F.S., is virtually identical to the definition of “sexual battery” in s. 794.011(1)(h), F.S. The term “sexual activity” is relevant to lewd battery and lewd exhibition offenses.

<sup>10</sup> *Khianthalat v. State*, *supra*.

<sup>11</sup> Section 794.05(2), F.S., states that the prohibitions against sexual activity with a minor do not apply to a 16-year-old or 17-year-old “who has had the disability of nonage removed under chapter 743.” “Emancipation” is the “removal of all disabilities of nonage.” *Campbell v. State*, 771 So.2d 1205, 1206 (Fla. 2d DCA 2000), *review denied*, 786 So.2d 578 (Fla.2001). Section 743.01, F.S., authorizes emancipation through marriage. Section 743.015, F.S., authorizes emancipation by court order. Other sections provide for emancipation based on other reasons. See ch. 743, F.S.

<sup>12</sup> *State v. Cunningham*, 712 So.2d 1221, 1223 (Fla. 5th DCA 1998), *review denied*, 728 So.2d 201 (Fla.1998).

<sup>13</sup> See ss. 921.0026 and 921.00265, F.S.

<sup>14</sup> *State v. Rife*, 789 So.2d 288, 296 (Fla.2001). See the following cases in which the court indicated the trial court could consider the “willing participant” mitigating factor: *Rivera v. State*, 1 So.3d 1158 (Fla. 2d DCA 2009) (s. 794.05, F.S.); *Shuler v. State*, 947 So.2d 1259 (Fla. 5th DCA 2007) (s. 794.05, F.S.); *Holland v. State*, 953 So.2d 19 (Fla. 2d DCA 2007) (lewd battery offense under s. 800.04, F.S.); and *Knox v. State*, 814 So.2d 1185 (Fla. 2d DCA 2002) (sexual battery offense under s. 794.011(8), F.S.).

### III. Effect of Proposed Changes:

The bill creates s. 775.0862, F.S., which reclassifies<sup>15</sup> felony offenses of the third, second, and first degree listed in s. 775.21(4)(a)1., F.S. (sexual predator registration) or s. 943.0435(1)(a)1.a., F.S. (sexual offender registration), if the offense is committed by an “authority figure” of any “educational institution” against a “student” of any “educational institution.” The bill specifically excludes s. 794.011(4)(g), F.S.

The term “authority figure” is defined as “a school officer, a teacher or other instructional person, an administrator or other school administrative person, a school volunteer, an educational support employee, or an education service provider who is employed by, under contract with, working at, or providing volunteer services to an educational institution.”<sup>16</sup>

The term “educational institution” is defined as “an entity providing instructional programs of study by means of regular classes, activities, or courses, including virtual courses, to students in early learning programs or in prekindergarten through grade 12.”

The term “student” is defined as “any early learning or prekindergarten through grade 12 child who is enrolled in an educational institution.”

The bill requires the reclassification to occur as follows:

- In the case of a felony of the third degree,<sup>17</sup> the offense is reclassified to a felony of the second degree.<sup>18</sup>
- In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree.<sup>19</sup>
- In the case of a felony of the first degree, the offense is reclassified to a life felony.<sup>20</sup>

In order to determine applicable offenses for the purpose of reclassification, Senate professional staff examined the statutes listed in ss. 775.21(4)(a)1., and 943.0435(1)(a)1.a., F.S., and applied the following limiting criteria from the bill:

<sup>15</sup> Generally, a felony reclassification provision increases the degree of a felony by one degree. This increase in felony degree increases the maximum penalty for the offense and results in the accrual of more sentence points, which are used to determine the scored lowest permissible sentence. *See* s. 921.0024, F.S.

<sup>16</sup> The terms “school officer,” “teacher,” “instructional person,” “administrator or other school administrative person,” “school volunteer,” “educational support employee,” and “education service provider” are not defined in the bill. Most of these terms are defined in s. 1002.01, F.S. “Teacher” is not specifically defined in that section but “instructional personnel” is defined to include classroom teachers. The meaning of “administrator or other school administrative person” may be similar to the definition in that section of “administrative personnel.” Where a term is undefined, courts may look “to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense.” *State v. Hagan*, 387 So.2d 943, 945 (Fla.1980).

<sup>17</sup> A third degree felony is punishable by imprisonment in state prison not exceeding 5 years, a fine not exceeding \$5,000, or both. *See* ss. 775.082 and 775.083, F.S.

<sup>18</sup> A second degree felony is punishable by imprisonment in state prison not exceeding 15 years, a fine not exceeding \$10,000, or both. *See* ss. 775.082 and 775.083, F.S.

<sup>19</sup> A first degree felony is generally punishable by imprisonment in state prison not exceeding 30 years, a fine not exceeding \$10,000, or both. *See* ss. 775.082 and 775.083, F.S.

<sup>20</sup> A life felony is generally punishable by imprisonment in state prison for life or for a term not exceeding 40 years, a fine not exceeding \$15,000, or both. *See* ss. 775.082 and 775.083, F.S.

- The victim must be a child (definition of “student”).
- The offense must be “against” a student.
- An applicable offense must be a felony of the third degree, second degree, or first degree (as indicated in the reclassification provision).
- Section 794.011(4)(g), F.S. (sexual battery by a law enforcement officer or other specified persons) is specifically excluded.

Based on these considerations, it appears that any felony of the third degree, second degree, or first degree listed in the following sections<sup>21</sup> is subject to reclassification under the bill:

- Section 787.01, F.S., relating to kidnapping.
- Section 787.02, F.S., relating to false imprisonment.
- Section 787.025(2)(c), F.S., relating to an adult luring or enticing a victim under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose.<sup>22</sup>
- Section 794.011, F.S., relating to sexual battery, but excluding s. 794.011(4)(g) and (10), F.S.<sup>23</sup>
- Section 794.05, F.S., relating to unlawful sexual activity with certain minors.
- Section 796.03, F.S., relating to the procuring a person under the age of 18 for prostitution.
- Section 796.035, F.S., relating to selling or buying of a minor into sex trafficking or prostitution.
- Section 800.04, F.S., relating to lewd or lascivious acts committed upon or in the presence of a person less than 16 years of age.
- Section 827.071, F.S., relating to sexual performance by a child.
- Section 847.0133, F.S., relating to knowingly selling, etc., any obscene material to a minor.
- Section 847.0135, F.S., relating to computer transmission of lewd or lascivious exhibitions, but excluding s. 847.0135(6), F.S.<sup>24</sup>
- Section 847.0137, F.S., relating to transmission of pornography.
- Section 847.0138, F.S., relating to transmission of material harmful to a minor.
- Section 847.0145, F.S., relating to selling or buying a minor.
- Section 985.701(1), F.S., relating to a Department of Juvenile Justice (DJJ) employee engaging in sexual misconduct with a juvenile offender detained or supervised by DJJ or in DJJ’s custody.

<sup>21</sup> While the registration statutes list s. 825.1025, F.S., relating to lewd or lascivious battery on an elderly person or disabled adult, this offense does not meet the criterion of the bill that the victim must be a child (definition of “student”), and therefore, is excluded.

<sup>22</sup> Section 787.025, F.S., contains two third degree felonies: s. 787.025(2)(b), F.S.; and s. 787.025(2)(c), F.S. The registration statutes only list s. 787.025(2)(c), F.S. While the offense in s. 787.025(2)(b), F.S., meets the felony degree criterion in the bill, it does not meet the criterion in the bill that the offense be listed in s. 775.21(4)(a)1., F.S., or s. 943.0435(1)(a)1.a., F.S., and therefore is excluded. Excluded also is the criterion in the registration statutes relevant to s. 787.025(2)(c), F.S., that the defendant cannot be the victim’s parent. While this criterion has relevancy in determining who may be excluded from registration, the elements of the offense do not exclude a parent. A felony reclassification requires a conviction for an underlying offense; the conviction is based on meeting the burden of proof on the elements of the offense.

<sup>23</sup> The registration statutes exclude s. 794.011(10), F.S., which cannot be committed “against” a “student” as required by the bill. Therefore, this offense is excluded.

<sup>24</sup> Section 847.0135(6), F.S., is a misdemeanor offense, and therefore, is inapplicable to felony reclassification. It also does not meet other criteria of the bill.

The bill provides that for purposes of sentencing under ch. 921, F.S., relating to the Criminal Punishment Code (Code), and determining incentive gain-time eligibility under ch. 944, F.S., a felony offense that is reclassified as provided in s. 775.0862, F.S., is ranked one level above the ranking under s. 921.0022, F.S., the offense severity ranking chart of the Code, or s. 921.0023, F.S., which ranks noncapital felonies not listed in the chart based on their felony degree.

The bill amends s. 921.0022(2), F.S., to indicate that the reclassification of the degree of the felony through the application of s. 775.0862, F.S., to any offense listed in the offense severity ranking chart of the Code shall not cause the offense to become unlisted and is not subject to the provisions of s. 921.0023, F.S.

The effective date of the bill is October 1, 2010.

### **Other Potential Implications:**

Reclassification is effectively based on an authority figure of any educational institution having a conviction for a relevant felony offense in s. 775.21, F.S., or s. 943.0435, F.S., against a student of any educational institution. The bill does not specify that the “authority figure” has to exercise authority over the “student.” Further, the “authority figure” does not even have to be employed, work under contract, or volunteer at the educational institution in which the student is enrolled.

For example, a teacher at one school committing lewd battery against a student enrolled at another school would be subject to the reclassification provisions. The defendant most likely would know or at least should know that the victim is a “student” based on his or her age, but the victim may not necessarily know the defendant is an “authority figure.” Effectively, the reclassification is based on the defendant’s status as an “authority figure,” regardless of whether the defendant exercises or is able to exercise any authority by reason of his or her position over the victim or whether the victim reasonably believes the defendant is in a position to exercise such authority.

It is possible that an “authority figure” under the age of 24 who engages in sexual activity with a student 16 years of age or 17 years of age might not fall under s. 794.05, F.S., if the sexual activity was consensual, and therefore, may not have an offense relevant to reclassification.

The bill does not contain a provision on forfeiture of retirement benefits similar to ss. 794.09 and 800.05, F.S. Consequently, the only offenses subject to reclassification under the bill that will require forfeiture of retirement benefits are sexual battery offenses under ch. 794, F.S., and lewd offenses under s. 800.04, F.S., if the offender was a public officer or employee when the offense occurred.

While most of the felony sexual offense are listed in s. 775.21(4)(a)1., F.S., or s. 943.0435(1)(a)1.a., F.S., these statutes do not list every felony sexual offense (or offense involving unlawful acts upon a person’s a sexual organ).<sup>25</sup>

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<sup>25</sup> See s. 787.025(2)(b), F.S. (repeat luring); s. 794.08, F.S. (female genital mutilation); s. 796.04, F.S. (forcing a person to become a prostitute); s. 796.045, F.S. (sex trafficking); s. 796.07, F.S. (repeat prostitution); s. 796.08, F.S. (criminal

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has determined that SB 1334 will have an indeterminate prison bed impact.<sup>26</sup>

**VI. Technical Deficiencies:**

Senate professional staff (staff) has attempted to determine applicable offenses for reclassification based on review of ss. 775.21(4)(a)1., F.S., and 943.0435(1)(a)1.a., F.S., and limiting criteria in the bill. However, were the bill to become law and a court to determine that, notwithstanding staff's interpretation, it is unclear whether a particular offense is subject to reclassification, this finding could favor the accused under the rule of lenity. The "rule of lenity," which is codified at s. 775.021(1), F.S., "ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."<sup>27</sup> A better approach would be to list the offenses subject to reclassification in the new section created by the bill.

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transmission of HIV); s. 810.14, F.S. (voyeurism); s. 810.145, F.S. (video voyeurism); s. 826.04, F.S. (incest); s. 827.08, F.S. (impregnating a child); s. 847.011, F.S. (acts in connection with obscenity or lewdness); and s. 847.012, F.S. (acts in connection with materials harmful to a minor).

<sup>26</sup> Office of Economic and Demographic Research, The Florida Legislature, <http://edr.state.fl.us/conferences.htm>

<sup>27</sup> *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432, (1997). If a law is "indefinite and susceptible of differing constructions, the rule of lenity applies; the statute must be construed in the manner most favorable to the accused." *Richardson v. State*, 2003 WL 21697171, p. 2 (Fla. 4th DCA 2004) (unpublished opinion).

The term “student” is defined as “any early learning or prekindergarten through grade 12 child who is enrolled in an educational institution.” “Child” is not defined in the bill or in s. 1.01, F.S., which defines frequently used terms in the Florida Statutes. If the intent is that a student must be under 18 years of age, the word “minor” should be substituted. A minor is defined in s. 1.01(13), F.S., as including “any person who has not attained the age of 18 years.” If the intent is to include students of an educational institution of any age, the word “child” should be deleted.

Although not critical to the bill, the bill contains archaic language. The bill provides that, “[f]or purposes of sentencing under chapter 921 and *determining incentive gain-time eligibility under chapter 944*, a felony offense that is reclassified under this subsection is ranked one level above the ranking under s. 921.0022 or s. 921.0023 of the offense committed.” (Emphases provided). According to the Florida Department of Corrections, the phrase “and determining incentive gain-time eligibility under chapter 944” is only relevant for purposes of awarding gain-time on sentences for offenses committed on or after January 1, 1994, and before October 1, 1995, but it is not relevant for awarding gain-time on sentences for offenses committed on or after October 1, 1995.<sup>28</sup>

## VII. Related Issues:

The bill is identical to a bill filed in the 2009 Session, CS/SB 1892. According to one television news report, the substance for that bill was developed by students at Armwood High School in Seffner, Florida, and was presented at the “Ought to be a Law” competition held by the School District of Hillsborough County in January of 2009.<sup>29</sup>

Based on its review of records from the Florida Department of Education (DOE), the *Orlando Sentinel* reported in 2008 that at least 150 teachers had “been disciplined in the past three years after being accused of sexual misconduct with students....”<sup>30</sup> The *Sentinel* stated: “Some of the

<sup>28</sup> Under s. 944.275(4)(b)(2), F.S., the rate of gain-time on sentences for offenses committed from January 1, 1994, to October 1, 1995, was tied to the offense severity ranking under s. 921.0012, F.S., or s. 921.0013, F.S. Under s. 944.275(b)(3), F.S., on sentences for offenses committed on or after October 1, 1995, gain-time is applicable at a uniform rate of 10 days per month, with a requirement that at least 85% of the sentence be served (assuming the inmate is otherwise eligible for gain-time). Therefore, any legislation creating a new crime or enhancing the punishment for an old crime on or after October 1, 1995, does not need to include this phrase in identifying the punishment for the crime. The various dates in the gain-time statute (s. 944.275, F.S.) were included to comply with constitutional prohibitions against *ex post facto* laws.

<sup>29</sup> “Teachers convicted of sex with students could face prison,” WTSP-TV/10 Connects, St. Petersburg, Florida (<http://www.wtsp.com/includes/tools/print.aspx?storyid=102949>) (last updated March 26, 2009).

<sup>30</sup> Denise Maria Balona, “SEX-CRIME TEACHERS- Florida plagued by arrests, disciplinary actions for misdeeds, including 34 recent local cases,” *Orlando Sentinel*, Section A, p. A1 (November 16, 2008). All information in this paragraph is from this source. The *Sentinel* noted:

Mark Pudlow, a spokesman for the state’s teachers union, the Florida Education Association, said disciplinary numbers also might be inflated in that some teachers give up fighting false accusations because the investigative process is so stressful.

“The process can be long -- and a lot of times, I’ve heard stories of teachers not wanting to put a student through anything further,” he said.

A case can take years to resolve. It starts with an investigation by the education department and, upon a finding of probable cause, goes to a quasi-judicial panel of educators, law-enforcement officials, and others that hear the facts and determines penalties.



most severe cases resulted in arrests and criminal convictions for offenses such as secretly watching a boy change and shower, tricking elementary-school girls into touching a man's genitals and having sex with minor students." However, the *Sentinel* also found from its review of DOE records "that a lot of the alleged misconduct did not rise to the criminal level."

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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