

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.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 692

INTRODUCER: Criminal Justice Committee and Senators Stewart and Harrell

SUBJECT: Sexual Offenses

DATE: February 14, 2022

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Stokes</u> | <u>Cox</u> | <u>CF</u> | Favorable |
| 2. | <u>Stokes</u> | <u>Jones</u> | <u>CJ</u> | Fav/CS |
| 3. | <u>Stokes</u> | <u>Phelps</u> | <u>RC</u> | Pre-meeting |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 692 amends ss. 365.161(1), 491.0112(4), 775.0847(1), 794.011(1), 794.05, 796.07(1), 800.04(1), 825.1025(1), 827.071, 847.001, 872.06(1), 944.35(3), and 951.27(2), F.S., relating to various sexual offenses, to replace the terms “vagina” or “vaginal” with “female genitals.” Additionally, this bill provides that “female genitals” means the labia majora, labia minora, clitoris, vulva, hymen, and vagina.

Section 794.011(3), F.S., provides it is a life felony for a person to commit sexual battery on a person 12 years of age or older, without that person’s consent, and in the process thereof use or threaten to use a deadly weapon, or use actual force likely to cause serious personal injury. This bill expands s. 794.011(3), F.S., to provide it is also a life felony if a person uses or *threatens to use* actual physical force likely to cause serious personal injury or *death*.

The bill amends s. 775.15, F.S., to expand the statute of limitations by one year for victims of sexual battery who were unaware that the sexual battery occurred due to the victim being mentally defective, mentally incapacitated, or physically helpless. Prosecution for such cases may be commenced within one year after the date the victim obtains actual knowledge of the offense or the date on which the offense is reported to law enforcement, whichever occurs first. This applies to any offense which is not otherwise barred from prosecution on or before October 1, 2022.

The bill creates s. 800.06, F.S., which provides for the new crime of lewd or lascivious molestation of a person 16 years of age or older. A person commits a third degree felony when he or she intentionally touches in a lewd or lascivious manner, and without consent, the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 years of age or older, or forces such person to so touch the perpetrator.

The bill amends s. 90.404, F.S., to provide that substantial similarity is not required for admission of evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense, when the defendant is charged with a sexual offense and his or her identity is not at issue.

Additionally, the bill amends ss. 395.0197, 415.102, and 847.0141, F.S., to make conforming cross-reference changes to comply with the act.

This bill may have a positive indeterminate fiscal impact (unquantifiable positive prison bed impact). See Section V. Fiscal Impact Statement.

This bill is effective October 1, 2022.

II. Present Situation:

The term "vagina" is used to describe prohibited sexual conduct in various sections of the Florida Statutes, but is not statutorily defined. Currently, the Florida District Courts of Appeals (DCA) have conflicting opinions on the definition of the term "vagina." Specifically, the Second and Fourth DCAs have held that the vagina has a specific anatomical meaning, and that it is internal.¹ However, the Fifth DCA has held the term vagina includes the entire vulva area not just the internal passageway.²

Florida Statutes

Florida law currently contains a variety of statutes that prohibit acts relating to sexual battery, sexual conduct, obscenity, and sexual abuse. A summary of these laws follows.

Sexual Battery

Section 794.011, F.S., defines the crime of "sexual battery" to mean 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; however, sexual battery does not include an act done for a bona fide medical purpose.³

¹ See *Richards v. State*, 738 So. 2d 415, 419 (Fla. 2nd DCA, 1999)(holding that the vagina should be defined as "the canal between the vulva and the uterus."); *Firekey v. State*, 557 So. 2d 582 (Fla. 4th DCA, 1989)(holding that penetration of the labia does not constitute sexual battery).

² See *Palumbo v. State*, 52 So. 3d 834 (Fla. 5th DCA, 2011).

³ Section 794.011(1)(h), F.S.

Sexual battery is a capital felony⁴ or life felony⁵ when:

- A person 18 years of age or older commits a sexual battery on, or in an attempt to commit a sexual battery injures the sexual organs of, a person less than 12 years of age.⁶
- A person less than 18 years of age commits sexual battery on, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age.⁷
- A person commits sexual battery on 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.⁸
- Without regard to the willingness or consent of the victim, a person who is in a position of familial or custodial authority to a person less than 18 years of age engages in any act, which constitutes sexual battery, with that person while the person is less than 12 years of age, or in an attempt to commit sexual battery injures the sexual organs of the person.⁹

Sexual battery is a first degree felony, punishable by a term of years not exceeding life,¹⁰ when:

- A person 18 years of age or older commits sexual battery on a person 12 years of age or older, but younger than 18 years of age without that person's consent, under specified circumstances.^{11, 12}
- A person commits sexual battery on a person 12 years of age or older without that person's consent, under specified circumstances, and that person was previously convicted of specified crimes.¹³

⁴ A capital felony is generally punishable by death or life imprisonment. Section 775.082, F.S. The courts have held that the death penalty may not be imposed for sex offenses. In Florida, the only crime for which the death penalty may be imposed is murder in the first degree. *See Rowe v. State*, 417 So. 2d 981, 982 (Fla. 1982). *See also Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981)(holding that the Eighth Amendment prohibits death penalty for rape or sexual battery, even of a child).

⁵ A life felony is generally punishable by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment and a fine not exceeding \$15,000. Sections 775.082 and 775.083, F.S.

⁶ Section 794.011(2)(a), F.S.

⁷ Section 794.011(2)(b), F.S.

⁸ Section 794.011(3), F.S.

⁹ Section 794.011(8)(c), F.S.

¹⁰ A first degree felony may be punishable by a term of years not exceeding life imprisonment when specifically provided by statute and a fine not exceeding \$10,000. Sections 775.082 and 775.083 F.S.

¹¹ Section 794.011(4)(a), F.S.

¹² Section 794.011(4)(e)1.-7., F.S., provides the following circumstances apply to certain crimes of sexual battery: the victim is physically helpless to resist; the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat; the offender coerces the victim to submit by threatening to retaliate against the victim or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future; the offender, without prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates the victim; the victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact; the victim is physically incapacitated; the offender is in a specified profession or a person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government.

¹³ Section 794.011(4)(d), F.S. Specified crimes include: s. 787.01(2), F.S., relating to kidnapping, or s. 787.02(2), F.S., relating to false imprisonment, when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under this chapter or a lewd act under s. 800.04 or s. 847.0135(5), F.S.; s. 787.01(3)(a)2. or 3., F.S., relating to kidnapping; s. 787.02(3)(a)2. or 3., F.S., relating to false imprisonment; s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; s. 825.1025, F.S., relating to lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person; s. 847.0135(5), F.S., relating to computer pornography; or ch. 794, F.S., relating to sexual battery, except s. 794.011(10), F.S., which criminalizes false allegations against specified persons.

- Without regard to the willingness or consent of the victim, a person who is in a position of familial or custodial authority to a person less than 18 years of age engages in any act, which constitutes sexual battery, with that person while the person is 12 years of age or older but younger than 18 years of age.¹⁴

Sexual battery is a first degree felony, punishable by a term of imprisonment not exceeding 30 years,¹⁵ when:

- A person 18 years of age or older commits sexual battery on a person 18 years of age or older without that person's consent, under specified circumstances.^{16, 17}
- A person younger than 18 years of age commits sexual battery on a person 12 years of age or older without that person's consent, under specified circumstances.^{18, 19}
- A person 18 years of age or older commits sexual battery on a person 12 years of age or older but younger than 18 years of age, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury.²⁰
- A person commits sexual battery on a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury and the person was previously convicted of specified crimes.²¹

Sexual battery is a second degree felony²² when:

- A person 18 years of age or older commits sexual battery on a person 18 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury.²³
- A person younger than 18 years of age commits sexual battery on a person 12 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury.²⁴

¹⁴ Section 794.011(8)(b), F.S.

¹⁵ The maximum term of imprisonment for a first degree felony is generally 30 years imprisonment and a fine not exceeding \$10,000. Sections 775.082 and 775.083 F.S.

¹⁶ See note 12.

¹⁷ Section 794.011(4)(b), F.S.

¹⁸ See note 12.

¹⁹ Section 794.011(4)(c), F.S.

²⁰ Section 794.011(5)(a), F.S.

²¹ Section 794.011(5)(d), F.S. Specified crimes include: s. 787.01(2), F.S., relating to kidnapping, or s. 787.02(2), F.S., relating to false imprisonment, when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under this chapter or a lewd act under s. 800.04 or s. 847.0135(5), F.S.; s. 787.01(3)(a)2. or 3. F.S., relating to kidnapping; s. 787.02(3)(a)2. or 3., F.S., relating to false imprisonment; s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; s. 825.1025, F.S., relating to lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person; s. 847.0135(5), F.S., relating to computer pornography; or ch. 794, F.S., relating to sexual battery, except s. 794.011(10), F.S., which criminalizes false allegations against specified persons.

²² The maximum term of imprisonment for a second degree felony is 15 years imprisonment and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

²³ Section 794.011(5)(b), F.S.

²⁴ Section 794.011(5)(c), F.S.

Sexual battery is a third degree felony²⁵ when:

- Without regard to the willingness or consent of the victim, a person who is in a position of familial or custodial authority to a person less than 18 years of age solicits that person to engage in any act which constitutes sexual battery.²⁶

Statutes of Limitations for Sexual Battery

Section 775.15, F.S., sets forth time limitations, also referred to as statutes of limitation, for the prosecution of crimes. Prosecution is barred if it is not commenced within the time limitations provided in this section. The time limitation for prosecuting a criminal case begins to run on the day after the offense is committed, unless otherwise stated. An offense is deemed to have been committed when either every element of the offense has occurred or, if it plainly appears that the legislative purpose is to prohibit a continuing course of conduct, at the time when the course of conduct or the defendant's complicity therein is terminated.²⁷

In part, s. 775.15, F.S., provides time limitations for initiating a criminal prosecution for a felony offense. The general provisions provide that there is:

- No time limitation for prosecuting a capital felony, a life felony, a felony resulting in death.²⁸
- A 4-year time limitation for prosecuting a first degree felony.²⁹
- A 3-year time limitation for prosecuting a second or third degree felony.³⁰

However, a number of exceptions to the time limitation provisions mentioned above exist. Many of these exceptions are specific to certain offenses or types of victims. These exceptions apply, in part, to violations of s. 794.011, F.S., relating to sexual battery. These exceptions include:

- No time limitation for prosecuting:
 - A first or second degree felony sexual battery when the victim is under 18 years of age and he or she reports the crime to law enforcement within 72 hours provided the offense was not barred from prosecution on or before December 31, 1984;³¹
 - A first degree felony sexual battery when the victim is younger than 18 years of age provided the offense was not barred from prosecution on or before October 1, 2003;³²
 - Any felony sexual battery when the victim is younger than 16 years of age provided the offense was not barred from prosecution on or before July 1, 2010;³³
 - A first or second degree felony sexual battery when the victim is 16 years of age or older and reports the crime to law enforcement within 72 hours;³⁴ and

²⁵ The maximum term of imprisonment for a third degree felony is 5 years imprisonment and a fine not exceeding \$5,000. Sections 775.082 and 775.083 F.S.

²⁶ Section 794.011(8)(a), F.S.

²⁷ Section 775.15(3), F.S.

²⁸ Section 775.15(1), F.S.

²⁹ Section 775.15(2)(a), F.S. A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

³⁰ Section 775.15(2)(b), F.S. A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine and a third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

³¹ Section 775.15(13)(a), F.S.

³² Section 775.15(13)(b), F.S.

³³ Section 775.15(13)(c), F.S.

³⁴ Section 775.15(14)(a), F.S.

- Any sexual battery offense, when the victim is younger than 18 years of age when the offense was committed, and the offense was committed on or after July 1, 2020.³⁵
- There is an eight-year time limitation on prosecuting a first or second degree felony sexual battery when the victim is 16 years of age or older at the time of the offense provided the offense was not barred from prosecution on or before July 1, 2015, except for:
 - A first or second degree felony sexual battery when the victim is 16 years of age or older and reports the crime to law enforcement within 72 hours; or
 - A first degree felony sexual battery when the victim is younger than 18 years of age provided the offense was not barred from prosecution on or before October 1, 2003.³⁶

In addition to the time periods prescribed in this section, the prosecution for specific enumerated offenses,³⁷ including sexual battery, and lewd or lascivious offenses, may be prosecuted at any time after the date on which the offender's identity is established, or should have been established through the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence collected at the time of the original investigation. The DNA sample for these prosecutions must be available for testing by the accused.³⁸ This exception applies to offenses that are not otherwise barred on or after July 1, 2006.^{39, 40}

Another exception provides that the applicable period of limitation does not begin to run until the victim of a sexual battery, lewd or lascivious offense, or other specified offense reaches the age of 18 years or the violation is reported to a law enforcement or governmental agency, whichever occurs first. This provision only applies to a victim who was younger than 18 years of age at the time of the offense.⁴¹

Unlawful Activity with Certain Minors

Florida law prohibits a person 24 years of age or older from engaging in sexual activity with a person who is 16 or 17 years of age, regardless of consent. Sexual activity means 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.⁴²

³⁵ Section 775.15(20), F.S.

³⁶ Section 775.15(14)(b), F.S.

³⁷ Section 775.15(16)(a), F.S., applies these provisions to the following offenses: aggravated battery or any felony battery offense under ch. 784, F.S.; kidnapping offenses under s. 787.01, F.S., or false imprisonment offenses under s. 787.02, F.S.; sexual battery offenses under ch. 794, F.S.; lewd or lascivious offenses under s. 800.04, F.S., s. 825.1025, F.S., or s. 847.0135(5), F.S.; burglary offenses under s. 810.02, F.S.; robbery offenses under s. 812.13, F.S., s. 812.131, F.S., or s. 812.135, F.S.; carjacking offenses under s. 812.133, F.S.; or aggravated child abuse under s. 827.03, F.S.

³⁸ Section 775.15(16)(a), F.S.

³⁹ Section 775.15(16)(b), F.S.

⁴⁰ *Bryson v. State*, 42 So. 3d 852 (Fla. 1st DCA 2010) (holding that the appellants prosecution was not barred, and that s. 775.15(16), F.S., could be applied because appellant's case was not barred at the time that section was enacted).

⁴¹ Section 775.15(13)(a), F.S.

⁴² Section 794.05, F.S. Sexual activity under this section does not include an act done for a bona fide medical purpose. A violation of this section is a second degree felony.

Lewd and Lascivious Offenses

Florida Law contains various sections of law relating to lewd and lascivious offenses. This includes, in part, prohibitions on lewd and lascivious battery of an elderly or disabled person, and lewd and lascivious molestation of a person under the age of 16.

Lewd and Lascivious Battery on an Elderly or Disabled Person

A person commits a lewd and lascivious battery upon an elderly person or disabled person, when he or she encourages, forces, or entices an elderly person or disabled person to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity, when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent.⁴³

Sexual activity, as it relates to lewd and lascivious battery on an elderly or disabled person, means the 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.⁴⁴

Lewd or Lascivious Molestation on Persons Under the Age of 16

A person who intentionally touches 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 forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.⁴⁵

The terms “lewd” and “lascivious” are not defined in statute, but are commonly understood by the courts. The Supreme Court of Florida has found that these terms are in common use, and the plain meaning of the words gives notice as to what conduct is prohibited. The court further stated that the words lewd and lascivious “are synonyms and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.”⁴⁶

An offender 18 years of age or older who commits lewd or lascivious molestation against a victim:

- Less than 12 years of age, commits a life felony.⁴⁷
- Twelve years of age or older but less than 16 years of age, commits a second degree felony.⁴⁸

⁴³ Section 825.1025(2), F.S. A lewd or lascivious battery on an elderly person or disabled person is a second degree felony.

⁴⁴ Section 825.1025(1), F.S. Sexual activity does not include an act done for a bona fide medical purpose.

⁴⁵ Section 800.04(5)(a), F.S.

⁴⁶ *Chesebrough v. State*, 255 So. 2d 675, 677 (Fla. 1971).

⁴⁷ Section 800.04(5)(b), F.S. A life felony is generally punishable by life imprisonment or by a term of imprisonment not exceeding 40 years. Section 775.082, F.S.

⁴⁸ Section 800.04(5)(c)2., F.S. A second degree felony is punishable by up to 15 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

- Twelve years of age or older but less than 16 years of age and the person was previously convicted of specified offenses,⁴⁹ commits a first degree felony.⁵⁰

An offender less than 18 years of age who commits lewd or lascivious molestation against a victim:

- Less than 12 years of age, commits a second degree felony.⁵¹
- Twelve years of age or older but less than 16 years of age, commits a third degree felony.⁵²

The crime of lewd or lascivious molestation does not apply if a victim is 16 years of age or older. Under current law, a person who commits a lewd and lascivious molestation of a person 16 years of age or older may be charged with the first degree misdemeanor⁵³ crime of battery if the touching was against the will of the victim.

While certain types of intentional contact on a person under the age of 16 may be a felony lewd or lascivious molestation, the same contact on a person 16 years of age or older may be a misdemeanor simple battery. A person commits the first degree misdemeanor of battery when he or she:

- Actually and intentionally touches or strikes another person against the will of the other; or
- Intentionally causes bodily harm to another person.⁵⁴

The courts have consistently held that any intentional touching, no matter how slight, is sufficient to constitute a simple battery. The force used in the commission of a battery need not be sufficient to cause injury, and may be committed with nominal contact.⁵⁵

⁴⁹ Section 800.04(5)(e)1.-7., F.S., provides the following specified offenses: Kidnapping under s. 787.01(2) F.S., or False Imprisonment under s. 787.02(2), F.S., when the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed against the minor a sexual battery under ch. 794, F.S., or a lewd act under s. 800.04, F.S., or a computer pornography transmission under s. 847.0135(5), F.S.; Kidnapping under s. 787.01(3)(a)2. or 3., F.S., and in the course of committing the kidnapping committed a sexual battery under ch. 794, F.S., or a lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct or lewd or lascivious exhibition under s. 800.04, F.S., or a computer pornography transmission under s. 847.0135(5), F.S.; False Imprisonment under s. 787.02(3)(a)2. or 3., F.S., and in the course of committing the false imprisonment committed a sexual battery under ch. 794, F.S., or a lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct or lewd or lascivious exhibition under s. 800.04, F.S., or a computer pornography transmission under s. 847.0135(5), F.S.; Sexual Battery under ch. 794, F.S., excluding s. 794.011(10), F.S.; Lewd or Lascivious offenses committed against or in the presence of an elderly or disabled person under s. 825.1025, F.S.; Computer Pornography Transmission under s. 847.0135(5), F.S.; or Lewd or Lascivious offenses under s. 800.04, F.S.

⁵⁰ Section 800.04(5)(e), F.S. A first degree felony is generally punishable by up to 30 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S. However, when specifically provided by statute, a first degree felony may be punished by imprisonment for a terms of years not exceeding life imprisonment. Section 775.082, F.S.

⁵¹ Section 800.04(5)(c)1., F.S.

⁵² Section 800.04(5)(d), F.S. A third degree felony is punishable by up to five years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S.

⁵³ A first degree misdemeanor is punishable by up to a year in county jail and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

⁵⁴ Section 784.03(1), F.S.

⁵⁵ *State v. Hearn*, 961 So. 2d 211, 218-19 (Fla. 2007).

Obscenity, Sexual Performance by a Child, Child Pornography

Obscenity

Chapter 847, F.S., governs obscenity, which includes in part, laws relating to: the prohibition of certain acts in connection with obscene, lewd, etc. materials; the regulation of harmful materials and the sale or distribution to minors; and computer pornography, prohibited computer usage, and traveling to meet minors.

For purposes of this chapter the term “obscene,” means the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interests;
- Depicts or describes, in a patently offensive way, sexual conduct; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵⁶

Sexual Performance by a Child

Section 827.071, F.S., provides that it is a second degree felony to employ, authorize, or induce a child younger than 18 years of age to engage in a sexual performance,⁵⁷ or for a parent, legal guardian, or custodian of such child to consent to the participation by such child in a sexual performance.⁵⁸ It is also a second degree felony for any person to produce, direct, or promote any performance which includes sexual conduct by a child less than 18 years of age.⁵⁹

A person may not possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.⁶⁰

Additionally, it is a third degree felony for a person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.⁶¹

Possession or Promotion of Child Pornography

Section 775.0847, F.S., reclassifies violations of s. 827.071, F.S., relating to sexual performance by a child; s. 847.0135, F.S., relating to computer pornography, prohibited computer usage, and traveling to meet a minor; s. 847.0137, F.S., relating to transmission of pornography by

⁵⁶ Section 847.001(10), F.S. A mother’s breastfeeding of her baby is not under any circumstance “obscene.”

⁵⁷ Section 827.071(1)(i), F.S., defines “sexual performance” to mean any performance or part thereof which includes sexual conduct by a child less than 18 years of age. Additionally, s. 827.071(1)(c), F.S., defines “performance” to mean any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

⁵⁸ Section 827.071(2), F.S.

⁵⁹ Section 827.071(3), F.S.

⁶⁰ Section 827.071(4), F.S.

⁶¹ Section 827.071(5), F.S.

electronic device or equipment; and s. 847.0138, F.S., relating to transmission of material harmful to minors to a minor by electronic device or equipment, to the next higher degree if:

- The offender possesses 10 or more images of any form of child pornography⁶² regardless of content; and
- The content of at least one image contains one or more of the following:
 - A child who is younger than the age of 5.
 - Sadoomasochistic abuse⁶³ involving a child.
 - Sexual battery involving a child.
 - Sexual bestiality involving a child.
 - Any movie involving a child, regardless of length and whether the movie contains sound.⁶⁴

The following definitions apply to the above-described offenses:

- “Sexual battery” means 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; however, “sexual battery” does not include an act done for a bona fide medical purpose.⁶⁵
- “Sexual bestiality” means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.⁶⁶
- “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadoomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or if such person is female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstances constitute “sexual conduct.”⁶⁷

Prohibition of Certain Obscene Telephone Calls

A person commits a second degree misdemeanor⁶⁸ if he or she makes, or knowingly permits the use of a telephone or telephone facility under his or her control to make any obscene or indecent communication by means of a telephone, in person or through an electronic recording device, in exchange for payment.⁶⁹

For purposes of s. 365.161, F.S., “obscene” means the status of communication which:

- The average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interests;

⁶² Section 775.0847(1)(b), F.S., defines “child pornography” to mean any image depicting a minor engaged in sexual conduct.

⁶³ Section 775.0847(1)(c), F.S., defines “sadoomasochistic abuse,” to mean flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

⁶⁴ Section 775.0847(2), F.S.

⁶⁵ Sections 775.0847(1)(d), 827.071(1)(f), and 847.001(14), F.S.

⁶⁶ Sections 775.0847(1)(e), 827.071(1)(g), and 847.001(15), F.S.

⁶⁷ Sections 775.0847(1)(f), 827.071(1)(h), and 847.001(16), F.S.

⁶⁸ A second degree misdemeanor is punishable by a term of imprisonment up to 60 days and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

⁶⁹ Section 356.161(2), F.S.

- Describes, in a patently offensive way, deviate sexual intercourse, sadomasochistic abuse, sexual battery, bestiality, sexual conduct, or sexual excitement; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Additionally, s. 365.161, F.S., provides, in part, the following definitions:

- “Sexual battery,” means oral, anal, or vaginal penetration by, or union with, the sexual organ of the one and the mouth, anus, or vagina of the other.⁷⁰
- “Sexual bestiality,” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.⁷¹

Abuse of a Dead Human Body

A person who mutilates, commits sexual abuse upon, or otherwise grossly abuses the dead human body commits a second degree felony. An act done for a bona fide medical purpose or any other lawful purpose does not violate this law.⁷²

For purposes of this section, “sexual abuse” means:

- Anal or vaginal penetration of a dead human body by the sexual organ of a person or by any other object;
- Contact or union of the penis, vagina, or anus of a person with the mouth, penis, vagina, or anus of a dead human body; or
- Contact or union of a person’s mouth with the penis, vagina, or anus of a dead human body.⁷³

Prostitution

Florida Law defines prostitution as the giving or receiving of the body for sexual activity for hire.⁷⁴ For purposes of prostitution, sexual activity means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation.⁷⁵

Section 796.07(2), F.S., prohibits various acts relating to prostitution, providing in part, that it is unlawful:

- For a person 18 years of age or older to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation.
- To solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation.
- To purchase the services of any person engaged in prostitution.

Sexual Misconduct by Certain Professionals

Certain professionals are prohibited from engaging in sexual activity with specified individuals. This prohibition extends to consensual sexual activity.

⁷⁰ Section 365.161(1)(d), F.S.

⁷¹ Section 365.161(1)(e), F.S.

⁷² Section 872.06(2), F.S.

⁷³ Section 872.06(1), F.S.

⁷⁴ This definition excludes sexual activity between spouses. Section 796.07(1)(a), F.S.

⁷⁵ Section 796.07(1)(d), F.S. Sexual activity does not include acts done for bona fide medical purposes.

Employees of the Department of Corrections (DOC) or a private correctional facility are prohibited from engaging in sexual misconduct with an inmate or an offender supervised by the DOC in the community. Such sexual misconduct is a third degree felony.⁷⁶

Additionally, it is a third degree felony for a psychotherapist to commit sexual misconduct with a client, or former client when the professional relationship was terminated primarily for the purpose of engaging in sexual contact. A second or subsequent violation is a second degree felony.⁷⁷

Sexual misconduct means the 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.⁷⁸

Blood Tests of Inmates

Section 951.27, F.S., provides that each county and municipal detention facility must have a written procedure to establish the conditions under which an inmate will be tested for infectious disease.⁷⁹

Except as otherwise provided, the results of such blood tests are confidential and exempt. One such exception to this exemption is that a victim, or the victim's parent or legal guardian, may request the results of any human immunodeficiency virus test performed on an inmate who has been arrested for a sexual offense involving oral, anal, or vaginal penetration by, or union with, the sexual organ of another.

Admission of Evidence

Similar fact evidence of other crimes, wrongs, or acts is not admissible when such evidence is relevant solely to prove bad character or propensity. However, such similar fact evidence is admissible when relevant to prove a material fact in issue, including, but not limited to:

- Proof of motive.
- Opportunity.
- Intent.
- Preparation.
- Plan.
- Knowledge.
- Identity.
- Absence of mistake or accident.⁸⁰

However, s. 90.404(2)(b), F.S., provides that in a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other

⁷⁶ Section 944.35, F.S. Sexual misconduct does not include acts done for bona fide medical purposes.

⁷⁷ Section 491.0112, F.S.

⁷⁸ See ss. 491.0112, and 944.35, F.S.

⁷⁹ Section 951.27(1), F.S.

⁸⁰ Section 90.404(2)(a), F.S.

crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. Similarly, s. 90.404(2)(c), F.S., provides that in a criminal case in which the defendant is charged with a sexual offense, evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense is admissible and may be considered for its bearing on any matter to which is relevant.

While the statutory construction of s. 90.404(2)(b), F.S., relating to child molestation, and s. 90.404(2)(c), F.S., relating to sexual offenses, is the same, the courts have interpreted these sections differently. Courts have applied s. 90.404(2)(c), F.S., to require "significant similarity between the collateral evidence and the charged crime, evidence so similar and specific that it resembles a clear pattern of conduct."⁸¹ In contrast, courts have held in regards to s. 90.404(2)(b), F.S., that "under the plain language of the rule, relevant collateral crime evidence is admissible to corroborate a victim's testimony 'regardless of whether the charged and collateral offenses occurred in the familial context or whether they share any similarity.'"⁸²

III. Effect of Proposed Changes:

This bill amends multiple statutes relating to various sexual offenses, to replace the terms "vagina" or "vaginal" with "female genitals." Additionally, this bill provides that "female genitals" means the labia majora, labia minora, clitoris, vulva, hymen, and vagina.

Specifically, the bill amends the following sections to replace the term "vagina" or "vaginal" with "female genitals":

- Section 365.161(1), F.S., which provides definitions relating to the prohibition of certain obscene telephone communications.
- Section 491.0112(4), F.S., which provides definitions relating to sexual misconduct by a psychotherapist.
- Section 775.0847(1), F.S., which provides definitions relating to the possession or promotion of certain images of child pornography.
- Section 794.011(1), F.S., which provides definitions relating to sexual battery.
- Section 794.05, F.S., which provides definitions relating to unlawful sexual activity with certain minors.
- Section 796.07(1), F.S., which provides definitions relating to the prohibition of prostitution.
- Section 800.04(1), F.S., which provides definitions relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.
- Section 825.1025(1), F.S., which provides definitions relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person.
- Section 827.071, F.S., which provides definitions relating to sexual performance by a child.
- Section 847.001, F.S., which provides definitions relating to obscenity.
- Section 872.06(1), F.S., which provides definitions relating to abuse of a dead human body.
- Section 944.35(3), F.S., which provides definitions relating to prohibited sexual misconduct.
- Section 951.27(2), F.S., relating to the blood test of inmates.

⁸¹ *Reyna v. State*, 302 So. 3d 1025, 1031 (Fla. 4th DCA 2020).

⁸² *Pridemore v. State*, 301 So. 3d 454, 459 (Fla. 4th DCA 2020)(quoting *McLean v. State*, 934 So. 2d 1248, 1259 (Fla. 2006).

Section 794.011(3), F.S., provides it is a life felony for a person to commit sexual battery on a person 12 years of age or older, without that person's consent, and in the process thereof use or threaten to use a deadly weapon, or use actual force likely to cause serious personal injury. This bill expands s. 794.011(3), F.S., to provide it is also a life felony if a person uses or *threatens to use* actual physical force likely to cause serious personal injury or *death*.

The bill amends s. 775.15, F.S., to expand the statute of limitations by one year for victims of sexual battery who were unaware that the sexual battery occurred due to the victim being mentally defective, mentally incapacitated, or physically helpless. Prosecution for such cases may be commenced within one year after the date the victim obtains actual knowledge of the offense or the date on which the offense is reported to law enforcement, whichever occurs first. This applies to any offense which is not otherwise barred from prosecution on or before October 1, 2022.

The bill creates s. 800.06, F.S., which provides for the new crime of lewd or lascivious molestation of a person 16 years of age or older. A person commits a third degree felony when he or she intentionally touches in a lewd or lascivious manner, and without consent, the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 years of age or older, or forces such person to so touch the perpetrator.

The bill amends s. 90.404, F.S., to provide that substantial similarity is not required for admission of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense, when the defendant is charged with a sexual offense and his or her identity is not at issue.

Additionally, the bill amends ss. 395.0197, 415.102, and 847.0141, F.S., to make conforming cross-reference changes to comply with the act.

This bill is effective October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) estimates that this bill has a positive indeterminate fiscal impact (unquantifiable positive prison bed impact). It is not known how many additional offenders could be charged under the expanded definition in the bill.⁸³

Additionally, the CJIC estimates that SB 878, which has been included by amendment in this bill, to have a positive indeterminate fiscal impact (unquantifiable positive prison bed impact). This bill amends multiple sex crime statutes, replacing “vagina” with “female genitals.” The bill further amends s. 794.011(3), F.S., to make it a life felony for a specified sexual battery when a perpetrator uses *or threatens to use* actual physical force likely to cause serious personal injury *or death*.⁸⁴

This bill also amends s. 775.15, F.S., to expand the statute of limitations by one year for certain victims of sexual battery.

Per DOC, in FY 18-19, there were 1,348 new commitments to prison under the statutes amended in this bill. In FY 19-20, there were 1,145 new commitments, and in FY 20-21, there were 857 new commitments. For s. 794.011(3), F.S., specifically, there were 47 new commitments in FY 18-19, 44 new commitments in FY 19-20, and 26 new commitments in FY 20-21. It is not known how many additional offenders could be charged under these expanded definitions. Furthermore, under s. 794.011, F.S., there were 504 new commitments in FY 18-19, 424 in FY 19-20, and 274 in FY 20-21, though it is not known what number of these involved “mentally defective, mentally incapacitated, or physically helpless” victims, nor is it known how many additional offenders would enter prison due to the new language under s. 775.15, F.S.⁸⁵

⁸³ See Criminal Justice Impact Conference, *Summary on SB 692, Sexual Offense Definition* (February 7, 2022)(on file with the committee on Criminal Justice).

⁸⁴ See Criminal Justice Impact Conference, *Summary on SB 878, Sexual Offenses* (February 7, 2022)(on file with the committee on Criminal Justice).

⁸⁵ *Id.*

Finally, this bill creates s. 800.06, F.S., adding an unranked, 3rd degree felony (Level 1 by default) for someone who “who intentionally touches in a lewd or lascivious manner, and without consent, the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person 16 years of age or older, or forces a person 16 years of age or older to so touch the perpetrator, commits lewd or lascivious molestation of a person 16 years of age or older.”

Per FDLE, in FY 18-19, there were 125 people arrested for the second degree misdemeanors of lewd and lascivious behavior (s. 798.02, F.S.) and unnatural and lascivious act (s. 800.02, F.S.). In FY 19-20, there were 63 people arrested, and in FY 20-21, there were 50 people arrested. It is not known how many of those arrested fit the definition of the conduct described under s. 800.06, F.S. It is possible that this conduct might currently fall under simple battery, a high volume misdemeanor offense that elevates to a Level 1, 3rd degree felony if a second or subsequent battery occurs after a prior conviction (168,345 arrests over the last three fiscal years). However, it cannot be determined where these offenses are currently captured, nor how many arrests occur for these acts in a given year.⁸⁶

In FY 18-19, the incarceration rate for a Level 1, 3rd degree felony was 9.5 percent, and in FY 19-20 the incarceration rate was 8.2 percent. In FY 20-21, the incarceration rate for a Level 1, 3rd degree felony was 8.1 percent.⁸⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 90.404, 365.161, 395.0197, 415.102, 491.0112, 775.0847, 775.15, 794.011, 794.05, 796.07, 800.04, 825.1025, 827.071, 847.001, 847.0141, 872.06, 944.35, and 951.27.

This bill creates section 800.06, of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on February 8, 2022:

This committee substitute:

⁸⁶ *Id.*

⁸⁷ *Id.*

- Amends multiple sections of law to reference the term “female genitals,” rather than the term “vagina.”
- Creates a new crime related to lewd or lascivious molestation of a person 16 years of age or older. Specifically, it is a third degree felony for a person to intentionally touch the breasts, genitals, genital area, or buttocks of a person 16 years of age or older, without that person’s consent, in a lewd or lascivious manner. Additionally, it is a third degree felony to force a person 16 years of age or older to so touch the perpetrator.
- Expands the statutes of limitations by one year for certain victims of sexual battery.
- Provides that substantial similarity is not required to admit evidence of other crimes, wrongs, or acts involving a sex offense, when the defendant is charged with a sex offense, and identity is not at issue.
- Provides that it is a life felony to commit a sexual battery on a person 12 years of age or older, without that person’s consent, and threatens to use force likely to cause serious personal injury or death.
- Removes revisions made to ch. 39, F.S.

B. Amendments:

None.