

**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 Committee on Judiciary

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BILL: SB 868

INTRODUCER: Senator Stewart

SUBJECT: Sexual Battery on a Mentally Incapacitated Person

DATE: January 7, 2022

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

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------|----------------|-----------|--------------------|
| 1. | Ravelo  | Cibula         | JU        | <b>Pre-meeting</b> |
| 2. |         |                | CJ        |                    |
| 3. |         |                | RC        |                    |

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**I. Summary:**

SB 868 expands the actions that constitute the offense of sexual battery of a mentally incapacitated person. As a result, an offender who commits sexual battery on a voluntarily intoxicated victim is subject to the same penalties that apply to the sexual battery of a victim who becomes involuntarily intoxicated.

Under existing law, sexual battery on a mentally incapacitated person is committed when the offender commits sexual battery on a victim who the offender knows has become intoxicated by the administration of a narcotic, anesthetic, or other intoxicating substance *without the victim's consent*. Under the bill, the victim's lack of consent to intoxication is not relevant to the offense and need not be proven by the prosecution at trial.

Under existing law, absent other grounds for an increased penalty, sexual battery on a victim who voluntarily becomes intoxicated is a second degree felony, punishable by up to 15 years' imprisonment. Under the bill, the offense of sexual battery on a victim who the offender knows is intoxicated, voluntarily or involuntarily, is a first degree felony, punishable by up to 30 years' imprisonment.

The bill does not change the laws relating to the ability of an intoxicated person to consent to sexual activity.

The bill takes effect October 1, 2022.

**II. Present Situation:**

Sexual battery means nonconsensual 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>1</sup> The offense is categorized as a second, first, or capital felony depending on certain factors such as the offender’s age, the victim’s age, and certain aggravating circumstances as shown in the table below:

| 794.011 Subsection | Offender’s Age     | Victim’s Age             | Special Circumstances Present                                                                                                                                           | Felony Level |
|--------------------|--------------------|--------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| (2)(a)             | ≥ 18 yrs.          | < 12 yrs.                | Injures the victim’s sexual organs                                                                                                                                      | Capital      |
| (2)(b)             | < 18 yrs.          | < 12 yrs.                | Injures the victim’s sexual organs                                                                                                                                      | Life         |
| (3)                | No age requirement | ≥ 12 yrs.                | Uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury                                                          | Life         |
| (4)(a)             | ≥ 18 yrs.          | ≥ 12 yrs., but < 18 yrs. | Any circumstance listed in s. 794.011(4)(e), F.S.                                                                                                                       | First        |
| (4)(b)             | ≥ 18 yrs.          | ≥ 18 yrs.                | Any circumstance listed in s. 794.011(4)(e), F.S.                                                                                                                       | First        |
| (4)(c)             | < 18 yrs.          | ≥ 12 yrs.                | Any circumstance listed in s. 794.011(4)(e), F.S.                                                                                                                       | First        |
| (4)(d)             | No age requirement | ≥ 12 yrs.                | Any circumstance listed in s. 794.011(4)(e), F.S., and offender was previously convicted of an enumerated sexually motivated offense against a minor                    | First        |
| (5)(a)             | ≥ 18 yrs.          | ≥ 12 yrs., but < 18 yrs. | No physical force or violence likely to cause serious personal injury                                                                                                   | First        |
| (5)(b)             | ≥ 18 yrs.          | ≥ 18 yrs.                | No physical force or violence likely to cause serious personal injury                                                                                                   | Second       |
| (5)(c)             | < 18 yrs.          | ≥ 12 yrs.                | No physical force or violence likely to cause serious personal injury                                                                                                   | Second       |
| (5)(d)             | No age requirement | ≥ 12 yrs.                | No physical force or violence likely to cause serious personal injury but offender was previously convicted of an enumerated sexually motivated offense against a minor | First        |

Section 794.011(4)(e), F.S., lists the following aggravating factors that may enhance a sexual battery offense to a felony of the first degree:

- The victim is physically helpless to resist;
- The offender coerces the victim to submit by threatening the use of force or violence likely to cause serious personal injury to 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 the 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;

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

- The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of the fact;
- The victim is physically incapacitated; or
- The offender is a law enforcement officer, correctional officer, or correctional probation officer, or is an elected official exempt from such certification,<sup>2</sup> or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or 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 the government.

The statutory maximum sentence for a first-degree felony is 30 years' imprisonment, and the maximum sentence for a second-degree felony is 15 years' imprisonment.<sup>3</sup> A person convicted of a capital felony is eligible for a sentence of death.<sup>4</sup>

The focus of SB 868 is on the sexual battery of a "mentally incapacitated" person. A mentally incapacitated person is "temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent."<sup>5</sup> The sexual battery of a mentally incapacitated person is a first degree felony, but the sexual battery of a voluntarily intoxicated person, absent other aggravating circumstances, is a second degree felony. Accordingly, "the Florida sexual battery statute does not place voluntary drug or alcohol consumption on the same footing as involuntary consumption; if they were to be treated as equivalent, the statute would say so."<sup>6</sup>

With respect to the issue of consent to sexual activity, "[t]he prevailing view is that voluntary consumption of drugs or alcohol, does not, without more, render consent involuntary."<sup>7</sup> However, evidence of the victim's mental incapacity is admissible to prove that the consent to sexual activity was not intelligent, knowing, or voluntary; and the court must instruct the jury accordingly.<sup>8</sup>

### III. Effect of Proposed Changes:

The bill eliminates the distinction in criminal penalties for the sexual battery of a voluntarily intoxicated victim and the sexual battery of a victim who the offender knows to be involuntarily intoxicated. Involuntary intoxication occurs when "the offender, without the 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."

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<sup>2</sup> Under s. 943.253, F.S.

<sup>3</sup> Section 775.082(3)(b) and (d), F.S.

<sup>4</sup> Section 775.082(1)(a), F.S.

<sup>5</sup> Section 794.011(1)(c), F.S.

<sup>6</sup> *Coley v. State*, 616 So. 2d 1017, 1023 (Fla. 3d DCA 1993).

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

<sup>8</sup> *See* s. 794.022(4), F.S.

By eliminating the distinction in penalties, the penalty for the sexual battery of a voluntarily intoxicated victim is increased to the penalties of a first degree felony, which include up to 30 years' imprisonment. Under existing law, the offense of sexual battery of a voluntarily intoxicated person, absent aggravating circumstances, is a second degree felony, punishable by up to 15 years' imprisonment. Likewise, the victim's lack of consent to intoxication will no longer need to be proven at trial to satisfy the elements of a first degree felony offense.

The bill does not change the laws relating to the ability of an intoxicated person to consent to sexual activity.

The bill takes effect October 1, 2022.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

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:

SB 868 will likely result in a positive impact on prison beds.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following section of the Florida Statutes: 794.011.

**IX. Additional Information:**

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

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

None.

**B. Amendments:**

None.