HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 251 Sexual Offenses
SPONSOR(S): Appropriations Committee, Criminal Justice Subcommittee, Dorworth and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 488

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	De La Paz	Cunningham
2) Appropriations Committee	23 Y, 0 N, As CS	McAuliffe	Leznoff
3) Judiciary Committee			

SUMMARY ANALYSIS

CS/CS/HB 251 creates the "Walk in Their Shoes Act." The bill does the following:

- Expands the admissibility of collateral crime or "similar fact" evidence in cases where a person is charged with child molestation or a sexual offense.
- Allows for courts to consider the use of a registered service or therapy animal in the taking of testimony by children in any proceeding involving a sexual offense.
- Prohibits a court from granting a criminal defendant's request to duplicate or copy material depicting sexual performance by a child or child pornography as long as the state attorney makes the material reasonably available to the defendant for inspection.
- Requires licensed facilities providing emergency room services to gather forensic medical evidence from victims of sexual assault who have reported a sexual battery to a law enforcement agency or who have requested such evidence be gathered for purposes of filing a report in the future.
- Amends the statute of limitations for video voyeurism offenses to authorize commencement of prosecutions within one year from either the date the victim learns of the existence of the video recording or the date the recording is confiscated by law enforcement, whichever occurs first.
- Adds crimes to the list of offenses for which an additional $151 dollar surcharge will be assessed against a convicted defendant in order to fund to the Rape Crisis Program Trust Fund.
- Amends s. 960.003, F.S., to require hepatitis testing to the same extent HIV testing is provided under the section and to provide for follow-up HIV testing if medically appropriate. The bill also amends s. 960.003(2), F.S., to require the court, upon a victim's request, to order specified defendants to undergo hepatitis and HIV testing within 48 hours of the filing of an indictment or information or, if such time has passed, within 48 hours of a victim's request. .
- Requires Internet safety to be taught at public schools.
- Requires a law enforcement officer investigating an alleged sexual battery to provide or arrange for the victim to be transported to an appropriate facility, and to permit the victim to review the officer's final report for accuracy.

The Criminal Justice Impact Conference met on April 4, 2011 and determined the bill will not have an impact on state prison beds. The bill could have a significant negative fiscal impact on the Crimes Compensation Trust Fund. (See "FISCAL COMMENTS")

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

CS/CS/HB 251 creates the "Walk in Their Shoes Act."

Evidence of Other Crimes, Wrongs or Acts

Current Situation

Section 90.404(2)(a), F.S., is the general provision regarding the admission of "similar fact" or collateral crime evidence in criminal proceedings. It provides:

> (a) Similar fact evidence of other crimes, wrongs, or acts 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, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Under this provision, evidence of other crimes or actions (also called "collateral crime" or "similar fact" evidence) is admissible when it is relevant to a matter that is at issue in a trial. Such evidence is not admissible, however, if it is **only** relevant to show a defendant's propensity to commit such crimes or other wrongful acts.

This section is a codification of the standard of admissibility announced by the Florida Supreme Court in Williams v. State.[1] Under this standard, "relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy."[2]

Under this provision, similarity of detail or uniqueness is not required for the admission of similar fact evidence of other crimes, wrongs or acts.[3] Even though similarity is not in and of itself required, it may be necessary to make the evidence relevant to the issue it is offered to prove. For example, if identity of the perpetrator is an issue at trial, then a "fingerprint" type of similarity between the other crimes or wrongs and the charged offense are necessary because without such similarity the evidence is prejudicial to the defendant, but doesn't necessarily prove the defendant actually committed the crime charged.[4] When identity is not disputed, finer points of similarity are not required to establish the relevance of collateral crime evidence to prove other issues such as absence of mistake, plan, opportunity, or preparation.

Additionally, all forms of relevant evidence are scrutinized under s. 90.403, F.S., which precludes the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" (also known as a "403 balancing test").

In the context of prosecutions for sexual offenses, the law surrounding the admission of collateral crime evidence has become confusing. A strict "fingerprint" type standard of similarity that the Florida Supreme Court articulated in connection with cases where identity is in issue has been held to apply in cases involving sexual abuse even where identity of the defendant is not in dispute.[5] In State v. Richman, a rheumatologist was charged with one count of sexual battery against a victim who was

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[1] Williams v. State, 110 So.2d 654 (Fla. 1959).

[2] Id. at 659-60.

[3] *See*, Williams v. State, 621 So.2d 413, 414 (Fla. 1993); Gore v. State, 599 So.2d 978 (Fla. 1992); Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), *cert. denied*, 490 U.S. 1028 (1989); *See also*, C. Ehrhardt, Florida Evidence, Section 404.09, at 222-23 (2010 Edition).

[4] *See*, State v. Savino, 567 So.2d 892 (Fla. 1990). "When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or fingerprint type of information, for the evidence to be relevant."

[5] *See*, State v. Richman, 861 So.2d 1195 (Fla. 2nd DCA 2003), a case involving sexual battery and lewd and lascivious molestation of adult victims where the District Court of Appeal applied the strict similarity requirements that existed in child sexual abuse cases prior to the 2001amendments to s. 90.404(2) (b), F.S., to the case before it. Richman, at 1197 *citing* Kulling v. State, 827 So.2d 311, 314 (Fla. 2nd DCA 2002) *citing* State v. Savino, 567 So.2d 892, 894 (Fla. 1990) .

physically helpless to resist and another count for lewd and lascivious molestation of an elderly or disabled person. His victims were his patients. The state proffered the testimony of seven former patients, each of whom claimed to have been sexually assaulted by Richman. The trial judge first determined that testimony of three of the seven witnesses was admissible, but later changed his mind and disallowed all of their testimony. The Second District Court of Appeal, however, overruled the trial judge and found the testimony admissible.

In a concurring opinion, now Chief Justice Canady stated:

> . . . I believe the strict test set forth in (reference omitted) is not appropriately applied in a case . . . where the identity of the defendant is not at issue. The rationale for requiring a heightened level of similarity in cases where the defendant is identified as the perpetrator based on collateral crimes involving the same modus operandi used in the charged offense is simply not applicable where the similar acts evidence is offered to corroborate the victim's testimony that an offense occurred and to rebut the defendant's contention that the victim's testimony is fabricated.
> . . .
> The justification for applying a relaxed standard of similarity focuses on the appropriateness of using similar acts evidence to support the credibility of a victim who testifies concerning an offense committed when the victim was alone with a person well known to the victim. The rationale for allowing such similar acts evidence is just as compelling when the context is a sexual assault by a physician on a patient in the privacy of the physician's examining room as it is when the context is a sexual assault by a parent on that parent's child in the privacy of the home. Indeed, the rationale is compelling in any context where a defendant who is well known to the victim has been accused of an offense and the critical issue is whether the victim's testimony regarding the offense is a fabrication.[6]

In 2001, the Legislature amended s. 90.404, F.S., to add a new subsection (b) to expand the admissibility of collateral crime evidence in cases involving sexual abuse of children 16 years of age or younger.[7] Section 90.404(2)(b), F.S., provides:

> (b)1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
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> 2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011, s. 800.04, or s. 847.0135(5) when committed against a person 16 years of age or younger.[8]

The conduct proscribed under these statutory sections are the following:

1. Sexual Battery under s. 794.011, F.S.,
2. Lewd or Lascivious Battery under s. 800.04(4), F.S.,
3. Lewd or Lascivious Molestation under s. 800.04(5), F.S.,
4. Lewd or Lascivious Conduct under s. 800.04(6), F.S.,
5. Lewd or Lascivious Exhibition under s. 800.04(7). F.S., and
6. Lewd or Lascivious Exhibition via computer transmission under s. 847.0135(5), F.S.

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[6] Id. at 1200-1203 (Canady concurring).

[7] Ch. 2001-221, L.O.F. For a discussion of issues surrounding the admission of similar fact evidence in child sexual abuse cases prior to Ch. 2001-221, L.O.F. *See,* D. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, New York Law School Journal of Human Rights, Vol. 15, Part 3, 449-481 (Spring 1999).

[8] Section 847.0135(5), F.S., was added to the offenses in this subsection in Ch. 2008-172, L.O.F.

The 2001 addition to s. 90.404(b),F.S., was challenged on due process grounds and upheld by the Florida Supreme Court in McLean v. State.[9] This section significantly broadened the admissibility of collateral crime evidence in prosecutions of child molestation cases.[10] The Court noted that the amendments to s. 90.404, F.S. abrogated their prior cases with respect to the admission of such evidence.[11] In upholding the statute, the Court adopted standards to govern admission of such evidence designed to protect the due process rights of the accused. First, the court required that the evidence of the collateral crime be proven by clear and convincing evidence. Second, the court required that the trial court balance the probative value of the evidence against the danger of unfair prejudice, pursuant to section 90.403, F.S.[12] Third, the court cautioned that the collateral crime evidence must not become a "feature" of the trial. Finally, the court required that, upon request, the jury be instructed as to the limited purpose for which the evidence may be considered.

Effect of CS/CS/HB 251

CS/HB 251 expands the admission of collateral crime evidence in cases involving sexual abuse. With respect to collateral crime evidence currently admitted under s. 90.404(2)(b), F.S., involving defendants charged with "child molestation," the bill adds new offenses to the list of proscribed conduct which may be admitted into evidence in a criminal trial. The new offenses added are:

s. 787.025(2)(c),F.S.,-	Luring or enticing a child
s. 794.05, F.S., -	Unlawful activity with certain minors
s. 796.03, F.S., -	Procuring person under 18 for prostitution
s. 796.035, F.S., -	Selling or buying of minors into sex trafficking or prostitution
s. 796.045, F.S., -	Sex trafficking
s. 827.071, F.S., -	Sexual performance by a child
s. 847.0145, F.S., -	Selling or buying minors
s. 985.701(1), F.S., -	Sexual misconduct by a juvenile justice employee

The bill also creates a new provision which expands the admission of collateral crime evidence in cases involving defendants charged with a sexual offense to the same extent it is presently admitted in cases involving child molestation. The admission of evidence under this section applies regardless of the age of the victim. The bill adds the same new offenses mentioned above, plus s. 825.1025(2)(b), F.S., relating to lewd or lascivious offenses against an elderly or disabled person, s. 794.011, F.S., relating to sexual battery, and s. 847.0135(5), F.S., relating to lewd or lascivious exhibition via computer transmission, to the list of crimes proscribing conduct which may be admitted into evidence in a criminal trial.

Judicial Proceedings Involving Victim/Witness under the Age of 16 or with Mental Retardation

Current Situation

Section 92.55, F.S., allows the court to enter any order necessary to protect a child under the age of 16 or person with mental retardation who is a victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the child or person with mental retardation is required to testify in open court. The statute also allows the court to enter orders limiting the number of times that a child or person with mental retardation may be interviewed, prohibiting depositions, requiring the submission of questions prior to examination, setting the place and conditions for interviewing or for conducting any other proceeding, or permitting or prohibiting the attendance of any person at any proceeding.

Effect of CS/CS/HB 251

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[9] McLean v. State, 934 So.2d 1248 (Fla. 2006).

[10] *See*, Mendez v. State, 961 So.2d 1088, 1090 (Fla. 2007).

[11] McLean, *supra*, at 1259.

[12] In upholding the statute, the Court compared the new provisions to the comparable federal rules of evidence dealing with the same issue and paralleled the federal court analysis in connection with its second requirement that such evidence be subject to the balancing test required under s. 90.403, F.S. McLean, *supra*, at 1259 -1261 comparing s. 90.404(2)(b) F.S., and s. 90.403, F.S., with Federal Rule of Evidence 413 relating to sexual assault, 414 relating to child molestation and 403 relating to balancing probative value against prejudice to the defense.

CS/CS/HB 251 allows for courts to set conditions on the taking of testimony by children which use a registered service or therapy animal in any proceeding involving a sexual offense.

Access to Evidence for Criminal Proceedings

CS/CS/HB 251 also requires material or property in a criminal proceeding which depicts a sexual performance by a child or child pornography to remain secured or locked in the custody or control of law enforcement, the state attorney or the court. It also prohibits courts from granting any request of a defendant to photo copy or otherwise reproduce such material notwithstanding any court rule or law to the contrary as long as the state attorney makes the material reasonably available. (See "Other Constitutional Issues" section). The bill specifies that material is reasonably available if the state attorney provides ample opportunity at a designated facility for the inspection, viewing, and examination of the property or material that portrays sexual performance by a child or constitutes child pornography by the defendant, his or her attorney, or any individual whom the defendant uses as an expert during the discovery process or at a court proceeding.

Treatment of Sexual Assault Victims

Current Situation

Section 395.1021, F.S., requires medical facilities that perform emergency room services to arrange for rendering of appropriate medical attention and treatment of sexual assault victims. The section requires that this be done in part through medical examinations conducted for the purpose of collecting physical evidence when required by law enforcement personnel.

Effect of CS/CS/HB 251

CS/CS/HB 251 amends s. 395.1021(2), F.S., to provide that the "appropriate medical attention and treatment of sexual assault victims" required under this section includes the gathering of forensic medical evidence necessary for investigation and prosecution either when a victim reports a sexual battery to a law enforcement agency or when the victim requests the evidence to be gathered for a possible future report to law enforcement.

Video Voyeurism Statute of Limitations

Current Situation

Section 810.145, F.S., creates the criminal offenses of video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination. Depending on the circumstances, the offenses under this section are punishable as a first degree misdemeanor, third degree felony or second degree felony.[13]

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. Section 775.15, F.S., provides statutes of limitations for criminal offenses. Under this section, the time limitations period begins to run the day after an offense is committed.[14] An offense is considered committed either when every element of the crime has occurred or, if there is a legislative purpose to prohibit a continuing course of conduct, at the time the course of conduct is terminated.[15] The statute of limitations for a misdemeanor of the first degree is two years. For second and third degree felonies the statute of limitations period is three years.

One of the essential elements of the video voyeurism offenses is that they occur without the victim's knowledge. As a result, the statute of limitations can expire before a victim becomes aware that the crime has occurred.

Effect of CS/CS/HB 251

[13] Section 810.145(6), F.S., provides that the offense is generally a first degree misdemeanor. If, however, the person has a prior conviction, the person is guilty of a third degree felony. Section 810.145(7), F.S. Also, under s. 810.145(8), F.S., persons over 18 years of age responsible for a child under 16, or who are employed at a private school, and persons 24 years of age who commit the offense against a child under 16, commit a third degree felony. If persons under subsection (8) have been previously convicted, the offense is a second degree felony.

[14] Section 775.15(3), F.S.

[15] Id.

CS/CS/HB 251 amends s. 775.15, F.S., to authorize prosecution for any offense of video voyeurism within one year after the date on which the victim obtained actual knowledge of the existence of a recording or the date on which the recording is confiscated by a law enforcement agency, whichever occurs first. The one year period of limitation provided in the bill would be in addition to the applicable time period currently provided for misdemeanor and felony offenses.

Rape Crisis Program Trust Fund

Current Situation

The Rape Crisis Program Trust Fund is created in s. 794.056, F.S. within the Department of Health to provide funds for rape crisis centers in the state. It is funded in part through collections of additional court assessments which consist of a $151 surcharge added to amounts paid by persons pleading guilty or no contest to, or found guilty of, specified sex offenses listed in s. 938.085, F.S., and s. 794.056, F.S.[16]

Effect of CS/CS/HB 251

CS/CS/HB 251 amends ss. 794.056 and 938.085, F.S., to add several new offenses to the list of crimes which will support the financing of the trust fund through the $151 surcharge.[17]

Hepatitis and HIV Testing of Person Charge with Certain Crimes

Current Situation

Section 960.003(1), F.S., provides legislative intent regarding the right of a victim of a crime involving the transmission of body fluids, or the victim of certain sexual offenses who is a minor, an elderly person or a disabled adult, to know at the earliest possible opportunity whether the person charged with the crime has tested positive for HIV. This subsection includes a legislative finding that medical science now recognizes that early diagnosis is a critical factor in the treatment of HIV and that both the victim and the defendant benefit from prompt disclosure of HIV test results.

Section 960.003(2)(a), F.S., requires a court, upon request of the victim, to order a defendant to undergo HIV testing in any case where the defendant is formally charged with any of the sexual or violent offenses listed in s. 775.0877(1)(a)-(n), F.S., that involved the transmission of body fluids from one person to another.[18]

Section 960.003(2)(b), F.S., requires a court, upon request of the victim, to order a defendant to undergo HIV testing when the crime involved is a sexual offense under ss. 775.0877(1)(a)-(n), F.S., or

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[16] The sum of $150 from these surcharges are deposited into the trust fund while $1 is paid to the clerk of court as a service charge. Section 938.085, F.S.

[17] The new crimes added are: s. 775.21(6), (10)(a)-(d) and (g), offenses specified in the Florida Sexual Predators Act; s. 787.01(3), kidnapping a child under the age of 13; s. 787.02(3), false imprisonment of a child under the age of 13; s. 787.025, luring or enticing a child; s. 787.06, human trafficking; s. 787.07, human smuggling; s. 794.05, unlawful sexual activity with certain minors; s. 794.08, female genital mutilation; s. 796.03, procuring a person under 18 for prostitution; s. 796.035, selling or buying minors into sex trafficking; s. 796.04, forcing or compelling another to become a prostitute; s. 796.045, sex trafficking; s. 796.05, deriving support from proceeds of prostitution; s. 796.06, renting space to be used for lewdness, assignation or prostitution; s. 796.07(2)(a)-(d) and (i), prostitution; s. 800.03, exposure of sexual organs; s. 800.04, lewd or lascivious offenses committed upon a child under the age of 16; s. 810.14, voyeurism; s. 810.145, video voyeurism; s. 812.135, home invasion robbery; s. 817.025, home or private business invasion by false impersonation; s. 825.102, abuse or aggravated abuse of an elderly or disabled person; s. 825.1025, lewd and lascivious offenses committed on an elderly or disabled person; s. 827.071, sexual performance by a child; s. 836.10, written threats to kill or do bodily injury; s. 847.0133, protection of minors, prohibited acts in connection with obscenity; s. 847.0135(2), computer pornography child exploitation; s. 847.0137, transmission of pornography by electronic device; s. 847.0145, selling or buying minors; or s. 943.0435(4)(c), (7), (8), (9)(a), (13) and (14)(c), offenses specified in the sexual offender registration statute; and s. 985.701, sexual misconduct of a juvenile justice employee.

[18] The offenses are: s. 794.011, relating to sexual battery; s. 826.04, relating to incest; s. 800.04, relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; s. 784.011, 784.07(2)(a), and 784.08(2)(d), relating to assault; s. 784.021, 784.07(2)(c), and 784.08(2)(b), relating to aggravated assault; s. 784.03, 784.07(2)(b), and 784.08(2)(c), relating to battery; s. 784.045, 784.07(2)(d), and 784.08(2)(a), relating to aggravated battery; s. 827.03(1), relating to child abuse; s. 827.03(2), relating to aggravated child abuse; s. 825.102(1), relating to abuse of an elderly person or disabled adult; s. 825.102(2), relating to aggravated abuse of an elderly person or disabled adult; s. 827.071, relating to sexual performance by person less than 18 years of age; s. 796.03, 796.07, and 796.08, relating to prostitution; or s. 381.0041(11)(b), relating to donation of blood, plasma, organs, skin, or other human tissue.

825.1025, F.S., and the victim is a minor, disabled adult or an elderly person, regardless of whether the crime involved the transmission of body fluids from one person to another.

Under both sections, the defendant must undergo testing within 48 hours after the court enters an order compelling the testing.

Section 960.003(3), F.S., requires results of HIV tests ordered under this section to be disclosed to the defendant within 2 weeks after the court receives the results. Results must also be provided to public health agencies and to the victim upon request.[19] Face-to-face counseling services regarding the meaning of test results, the possible need for further testing, and social, medical, and economic consequences of a positive test are also provided under this section.[20]

Section 960.003(4), F.S., requires the court, upon the victim's request, to order HIV testing following a defendant's conviction if the testing required by s. 960.003(2), F.S., has not taken place. The requirement for court ordered HIV testing, pursuant to s. 960.003(2) &(4), F.S., does not apply when the defendant has undergone testing voluntarily.[21]

Effect of CS/CS/HB 251

CS/CS/HB 251 amends s. 960.003(1), F.S., to include hepatitis in the legislative intent and findings described in the subsection.

The bill amends s. 960.003(2), F.S., to add a requirement for the court to order a defendant to undergo hepatitis testing in the same instances where HIV testing is required under this subsection. The bill changes the time period the defendant must undergo testing from within 48 hours after the court's order, to 48 hours after the indictment or information has been filed. The bill also clarifies that in those instances where the victim requests hepatitis and HIV testing after 48 hours has elapsed from the filing of the indictment or information, the testing shall be done within 48 hours of the victim's request. In addition, CS/HB 251 provides for follow-up HIV testing, without an additional court order, when a physician determines further testing to be medically appropriate. The victim and the defendant must be notified of the test results as soon as practicable.

CS/CS/HB 251 also amends s. 960.003(3), F.S., to require the results of hepatitis testing to be provided to the defendant, the victim, and public health agencies in the same manner they are currently provided for HIV testing. The bill also extends to the victim face-to-face counseling services regarding the meaning of hepatitis test results.

CS/CS/HB 251 amends s. 960.003(4), F.S., to require the court, upon the victim's request, to order hepatitis testing following a defendant's conviction if the testing required by s. 960.003(2), F.S., has not taken place. Like the HIV testing provision, hepatitis testing is not required to be ordered under this subsection or subsection (2) when the defendant voluntarily undergoes testing.

Required Instruction

Current Situation

Section 1003.42(2), F.S., requires members of the instructional staff of public schools to teach prescribed courses of study on the following topics related to health and safety:

> (n) Comprehensive health education[22] that addresses concepts of community health; consumer health; environmental health; family life, including an awareness of the benefits of sexual abstinence as the expected standard and the consequences of

[19] Results to public health agencies are provided to the public health agency of the county in which the conviction occurred and, if different, the county of residence of the offender. Section 775.0877, F.S.

[20] Section 381.004, F.S.

[21] Section 960.003(5), F.S.

[22] The health education curriculum for students in grades 7 through 12 shall include a teen dating violence and abuse component that includes, but is not limited to, the definition of dating violence and abuse, the warning signs of dating violence and abusive behavior, the characteristics of healthy relationships, measures to prevent and stop dating violence and abuse, and community resources available to victims of dating violence and abuse.

teenage pregnancy; mental and emotional health; injury prevention and safety; nutrition; personal health; prevention and control of disease; and substance use and abuse.

Effect of CS/CS/HB 251
CS/CS/HB 251 adds Internet safety to the list of topics which must be covered under this section.

Services for Sexual Battery Victims and Law Enforcement Reports
Current Situation
Section 794.052(1)(a), F.S., requires a law enforcement officer investigating a sexual battery to assist the victim in obtaining medical treatment and, if medical treatment is necessary, a forensic examination. In addition, the officer must assist the victim in obtaining advocacy and crisis-intervention services from a rape crisis center.

Effect of CS/CS/HB 251
CS/CS/HB 251 amends s. 794.052(1)(a), F.S., to require a law enforcement officer to provide or arrange for transportation for a victim to an appropriate facility.

The bill also requires a law enforcement officer to permit the victim to review the officer's final report and provide a statement regarding the accuracy of the report.

B. SECTION DIRECTORY:

Section 1. Provides a name for the act: "The Walk in Their Shoes Act."

Section 2. Amends s. 90.404, F.S., relating to character evidence; when admissible.

Section 3. Amends s. 92.55, F.S., relating to service or therapy animals.

Section 4. Creates a new section of Florida Statutes relating to prohibition on reproduction of child pornography.

Section 5. Amends s. 395.1021, F.S., relating to treatment of sexual assault victims.

Section 6. Amends s. 775.15, F.S., relating to time limitations; general time limitations; exceptions.

Section 7. Amends s. 794.052, F.S., relating to sexual battery; notification of victim's rights and services.

Section 8. Amends s. 794.056, F.S., relating to the Rape Crisis Program Trust Fund.

Section 9. Amends s. 938.085, F.S., relating to additional cost to fund rape crisis centers.

Section 10. Reenacts s. 20.435, F.S., relating to Department of Health; trust funds.

Section 11. Reenacts s. 794.055, F.S., relating to access to services for victims of sexual battery.

Section 12. Amends s. 960.003, F.S., relating to hepatitis and HIV testing for persons charged with or alleged by petition for delinquency to have committed certain offenses; disclosure of results to victims.

Section 13. Amends s. 1003.42, F.S., relating to required instruction.

Section 14. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference met on April 4, 2011 and determined the bill will not have an impact on state prison beds.

Judicial impact of collateral crime evidence
The Office of State Court Administrator (OCSA) provided a judicial impact statement on the original version of this bill. Although the language of the original bill in this section was revised, in terms of the bill's reach in expanding the admissibility of this evidence, it is largely similar to the bill in its current form as a committee substitute. OSCA's impact statement of the original bill says in part:

> There will probably be a substantial increase in the number of pretrial hearings in cases where the defendant is charged with a sexually-related crime and the state has evidence that the defendant committed other sexually-related crimes. The OSCA analysis, however, provides no basis to substantiate the claim of an increase in the number of pretrial hearings. Under current law, where the state has collateral crime evidence against a defendant, courts already conduct pretrial hearings to determine the admissibility of such evidence. The impact of CS/HB 251's amendment to this section of law would be to alter the outcome of those hearings rather than increase the number of hearings held. There will be more instances where the evidence is admissible under the bill than under the stricter standards of the current law. In addition, with easier standards for admissibility of evidence in these cases, there may be fewer appellate reversals of trial court decisions to admit collateral crime evidence, which could result in fewer retrials.

Rape Crisis Program Trust Fund
This bill will have a positive fiscal impact on the Rape Crisis Program Trust Fund. According to the Florida Department of Law Enforcement, in 2009 there were 1,850 people convicted of the additional offenses in this bill that would require payment of the $151 surcharge ($1 goes to the courts). Assuming all those convicted paid the surcharge, this would generate approximately $277,500 for the Rape Crisis Program Trust Fund to fund sexual battery victims' services.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Criminal Proceedings for Child Pornography

The Florida Supreme Court has held that the authority granted to it under Section 2, of Article V of the Florida Constitution to adopt rules of practice and procedure is exclusively its own.[23] Since that time, the Legislature has passed acts which the court has declared impermissibly procedural.[24]

In 2008 in the case of Massey v. David, the Supreme Court reviewed a statute that conditioned the award of expert witness fees as taxable costs upon a requirement that the expert witness furnish the opposing party with a written report within a certain number of days.[25] In Massey, the Supreme Court articulated how statutes containing a mixture of substance and procedure are analyzed in order to determine their constitutional validity in view of the Supreme Court's procedural rulemaking authority. They explained:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not *impermissibly intrude* on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail. (citations omitted). If a statute is clearly substantive and "operates in an *area of legitimate legislative concern,*" this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch. (citations omitted) However, where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed "incidental," and that statute is unconstitutional. (emphasis added).[26]

When a statute "impermissibly" intrudes on the practice and procedure of the courts or when legislation is within a "legitimate area of legislative concern" is unclear. For Massey, the Court found that the statute's requirement of a report submitted to the opposing party conflicted with the lack of such a provision in the court rule and the statute was invalidated.

Florida Rule of Criminal Procedure 3.220(b) relating to discovery in criminal cases mandates that the state must "disclose to the defendant and permit the defendant to inspect, copy, test, and photograph . . . any tangible papers or objects that were obtained from or belong to the defendant. . . ."

CS/HB 251's provision prohibiting the court from granting a defendant's request to copy this particular type of evidence conflicts with the mandate of rule 3.220 and could subject it to a court challenge on the basis that this provision invades the Supreme Court's "exclusive" authority to adopt rules of practice and procedure.

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[23] *In re Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a))*, 281 So.2d 204, 205 (Fla. 1973).

[24] *See*, Allen v. Butterworth, 756 So.2d 52 (Fla. 2000); invalidating legislation to reduce delays in death penalty cases; Haven v. Federal Savings & Loan, Assoc. v. Kirian, 579 So.2d 730, (Fla. 1991), invalidating a statute requiring a court to sever counterclaims for separate trial against a foreclosing mortgagee because it conflicted with court rules. *See also*, Watson v. First Florida Leasing, 537 So.2d 1370 (Fla. 1989); Johnson v. State, 336 So.2d 93 (Fla. 1976); Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977); Jackson v. Fla. Dept. of Corrections, 790 So.2d 381 (Fla. 2001); Massey v. David, 979 So.2d 931 (Fla. 2008).

[25] Massey v. David, 979 So.2d 931 (Fla. 2008).

[26] Id. at 937.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It should be noted that some of the offenses added to fund the Rape Crisis Program Trust Fund are not sexual offenses. Specifically, s. 812.135,F.S., home invasion robbery, s. 817.025, F.S., home or private business invasion by false impersonation, s. 825.102, F.S., abuse or aggravated abuse of an elderly or disabled person, and s. 836.10, F.S., written threats to kill or do bodily injury.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 22, 2011, the Criminal Justice Subcommittee adopted a strike-everything amendment and reported the bill favorably as a Committee Substitute. The amendment made the following changes to HB 251:

- Names the act the "Walk in Their Shoes Act."
- Revises the bill's changes to s. 90.404(2), F.S., to leave the existing provision regarding the admission of collateral crime evidence in cases involving child molestation unchanged except for the addition of new offenses describing proscribed conduct which may be admitted into evidence in a criminal trial. The amendment also created a separate provision expanding the admission of collateral crime evidence in cases where a defendant is charged with a sexual offense.
- Clarifies that the one year statute of limitations period provided in the bill for video voyeurism offenses is in addition to current statute of limitations periods rather than in lieu of them.
- Specifies which offenses within the Florida Sexual Predator Act and the sexual offender registration statute are added to those crimes subject to the $151 surcharge which supports the Rape Crisis Program Trust Fund. The amendment also adds other sexual offenses to the group of offenses subject to the surcharge.
- Adds hepatitis testing to s. 960.003, F.S., which currently requires court ordered HIV testing for crimes specified in s. 960.003(2), F.S, and requires a court to order a defendant to undergo such testing within 48 hours after the indictment or information is filed, or within 48 hours of the victim's request.
- Requires the results of hepatitis testing to be provided to the defendant, the victim, and public health agencies in the same manner they are currently provided for HIV testing.
- Provides victims face-to-face counseling services currently provided with respect to HIV testing, to include such services with respect to hepatitis testing.
- Requires hepatitis testing upon a defendant's conviction for crimes specified in s. 960.003(2), F.S., when such testing has not been done after a victim's request.
- Provides for follow-up HIV testing when medically appropriate without the need for additional court order.
- Corrects a drafting issue in the bill section relating to providing victims of sexual violence financial relocation assistance.
- Requires a law enforcement officer to provide transportation for a sexual violence victim to an appropriate facility, and to permit the victim to review the officer's final report for accuracy.

This analysis is drafted to the Committee Substitute.

On April 15, 2011, the Appropriations Committee adopted two amendments and reported the bill favorably as a Committee Substitute. The first amendment allows for courts to set conditions on the taking of testimony by children which use a registered service or therapy animal in any proceeding involving a sexual offense.

The second amendment deletes section 12 of the bill relating to relocation assistance for victims of sexual violence.

This analysis is drafted to the Committee Substitute.