

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 Criminal Justice Committee

BILL: SB 488

INTRODUCER: Senator Fasano

SUBJECT: Sexual Offenses

DATE: March 11, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Pre-meeting
2.			JU	
3.			HR	
4.			BC	
5.				
6.				

I. Summary:

Senate Bill 488 addresses several issues relating to victims of sexual violence and the criminal prosecution of such offenses.

The bill amends the Evidence Code to expand the admissibility of collateral crime or “similar fact” evidence in criminal prosecutions of crimes “of a sexual nature.”

It prohibits a court from granting a request of a defendant in a criminal proceeding for permission 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.

The bill requires licensed facilities providing emergency room services to gather forensic medical evidence from victims who have reported a sexual battery to a law enforcement agency or upon their request for purposes of filing a report in the future.

The bill also amends the statute of limitations for video voyeurism to authorize commencement of prosecutions within one year from either the date upon which the victim learns of the existence of the video recording or from the date the recording is confiscated by law enforcement, whichever occurs first.

The bill adds crimes to the list of offenses for which an additional \$151 dollar surcharge will be assessed against a defendant in order to fund the Rape Crisis Program Trust Fund.

Further, the bill requires the court, upon a victim's request, to order a defendant to undergo HIV testing within 48 hours of the filing of an indictment or information either: 1) when the defendant is charged with a specified sexual offense and the victim is a minor, or an elderly person or disabled adult, regardless of whether it involved the transmission of body fluids; or 2) when the defendant is charged with a specified crime that involves the transmission of body fluids from one person to another.

The bill also provides that victims of sexual violence may receive monetary relocation assistance from the Department of Legal Affairs, and that public schools must include Internet safety within health education curriculum.

This bill substantially amends the following sections of the Florida Statutes: 90.404, 395.1021, 775.15, 794.056, 938.085, 960.003, 960.198, and 1003.42. It creates an undesignated new section of statute. The bill reenacts section 20.435(21)(a) and section 794.055(3)(b), Florida Statutes, to incorporate references to sections of the statutes amended by the bill.

II. Present Situation:

Evidence of Other Crimes Wrongs or Acts

Section 90.404(2)(a), F.S., is the general provision of the Evidence Code 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 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

If the 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.³ When identity is not disputed, finer points of similarity are not

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

² *Id.* at 659-660.

³ 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."

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 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.⁴ 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.
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.⁵

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.

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*.⁶ This section significantly broadened the admissibility of collateral crime evidence in prosecutions of child molestation cases.⁷ The Court noted that the amendments to s. 90.404, F.S., abrogated their prior cases with respect to the admission of such evidence.⁸ 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 s. 90.403, F.S.⁹ Third, the court

⁴ Ch. 2001-221, Laws of Florida.

⁵ s. 847.0135(5), F.S., was added to the offenses in this subsection in Ch. 2008-172.

⁶ *McLean v. State*, 934 So.2d 1248 (Fla. 2006).

⁷ See, *Mendez v. State*, 961 So.2d 1088, 1090 (Fla. 2007).

⁸ *McLean*, at 1259.

⁹ 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*, at 1259 -1261 comparing s. 90.404(2)(b) F.S., and s. 90.403, F.S., with Federal Rules of Evidence 413 relating to sexual assault, 414 relating to child molestation and 403 relating to balancing probative value against prejudice to the defense.

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.

Discovery Rules in Criminal Cases

Rule 3.220, Florida Rules of Criminal Procedure, governs the discovery obligations of a prosecutor and defense attorney in criminal cases. The defendant’s election to participate in the process of pretrial discovery triggers a reciprocal obligation for the defendant.

The prosecutor’s discovery obligation requires disclosure of information and material within the state’s possession or control. It also requires that the state allow the defendant to “inspect, copy, test, and photograph” the information and material, including “any tangible papers or objects that were obtained from or belonged to the defendant.”¹⁰

Treatment of Sexual Assault Victims

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 statute requires that this be done in part through medical examinations conducted for the purpose of collecting physical evidence when required by law enforcement personnel.

Video Voyeurism Statute of Limitation

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.¹¹

A statute of limitation 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 limitation for criminal offenses. Under this section, the time limitations period begins to run the day after an offense is committed.¹² 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.¹³ The statute of limitation for a misdemeanor of the first degree is two years. For second and third degree felonies the statutes of limitation period is generally three years.

One of the essential elements of the video voyeurism offenses is that it occurs without the victim’s knowledge. As a result, the statutes of limitation can expire before a victim becomes aware that the crime has occurred.

¹⁰ Rule 3.220(b)(1)(F), Fl.R.Crim.P.

¹¹ s. 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. s. 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.

¹² s. 775.15(3), F.S.

¹³ *Id.*

Rape Crisis Program Trust Fund

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.¹⁴

HIV Testing of Person Charged with Certain Crimes

Section 960.003(2)(a), F.S., requires a court to order a defendant to undergo HIV testing upon request of the victim in any case where the defendant is formally charged with any of the sexual or violent offenses listed in s. 775.0877(a)-(n), F.S., that involved the transmission of body fluids from one person to another.¹⁵

Section 960.003(2)(b), F.S., provides for HIV testing upon request of the victim when the crime involved is a sexual offense under ss. 775.0877(a)-(n) or 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.

Relocation Assistance

Section 960.198, F.S., authorizes the Department of Legal Affairs to award a one-time payment of up to \$1,500 on a single claim and a maximum lifetime limit of \$3,000 to a victim of domestic violence who needs immediate relocation assistance to escape domestic violence. In order to qualify for assistance.

- There must be proof that an offense of domestic violence was committed;
- It must have been reported to law enforcement;
- The need for assistance must be certified by a domestic violence center within the state; and
- The center's certification must assert that the victim is cooperating with law enforcement officials.¹⁶

Required Instruction

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:

¹⁴ 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. s. 938.085, F.S.

¹⁵ The offenses are: s. 794.011, F.S., relating to sexual battery; s. 826.04, F.S., relating to incest; 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; ss. 784.011, 784.07(2)(a), and 784.08(2)(d), F.S., relating to assault; ss. 784.021, 784.07(2)(c), and 784.08(2)(b), F.S., relating to aggravated assault; ss. 784.03, 784.07(2)(b), and 784.08(2)(c), F.S., relating to battery; ss. 784.045, 784.07(2)(d), and 784.08(2)(a), F.S., relating to aggravated battery; s. 827.03(1), F.S., relating to child abuse; s. 827.03(2), F.S., relating to aggravated child abuse; s. 825.102(1), F.S., relating to abuse of an elderly person or disabled adult; s. 825.102(2), F.S., relating to aggravated abuse of an elderly person or disabled adult; s. 827.071, F.S., relating to sexual performance by person less than 18 years of age; ss. 796.03, 796.07, and 796.08, F.S., relating to prostitution; or s. 381.0041(11)(b), F.S., relating to donation of blood, plasma, organs, skin, or other human tissue.

¹⁶ Section 960.198(2), F.S.

(n) Comprehensive health education¹⁷ 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 teenage pregnancy; mental and emotional health; injury prevention and safety; nutrition; personal health; prevention and control of disease; and substance use and abuse.

III. Effect of Proposed Changes:

The bill expands the admission of collateral crime evidence to all cases involving crimes “of a sexual nature,” for its bearing on any matter to which it is relevant regardless of the age of the victim. Crimes of a sexual nature, as set forth in the bill are:

- s. 784.048, F.S. - Stalking
- s. 787.01, F.S. - Kidnapping
- s. 787.02, F.S. - False imprisonment
- 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. 825.1025(2)(b), F.S. - Lewd or lascivious offenses against an elderly or disabled person
- s. 827.071, F.S. - Sexual performance by a child
- s. 847.0145, F.S. - Selling or buying minors and
- s. 985.701(1), F.S. - Sexual misconduct by a juvenile justice employee

The bill creates an undesignated new section of law to require a court to deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any material that constitutes child pornography as defined in s. 827.071, F.S. (Sexual Performance by a Child) or s. 847.001, F.S. (Definitions as used in the chapter on Obscenity). Although child pornography is not defined in s. 827.071, F.S., the definition provided in s. 847.001(3), F.S., is “any image depicting a minor engaged in sexual conduct.” The prosecutor must make the material reasonably available to the defendant by providing ample opportunity for the inspection, viewing, and examination of the defendant, defense attorney, or defense expert.

The bill 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.

¹⁷ 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.

The bill 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 bill amends ss. 794.056 and 938.085, F.S., to add new offenses to the list of crimes which will support the financing of the trust fund through the additional \$151 surcharge. These crimes are:

- s. 775.21, F.S. - The Florida Sexual Predators Act,
- s. 787.025, F.S. - Luring or enticing a child,
- s. 787.06, F.S. - Human trafficking,
- s. 787.07, F.S. - Human smuggling,
- s. 794.05, F.S. - Unlawful sexual activity with certain minors,
- s. 794.08, F.S. - Female genital mutilation,
- s. 796.03, F.S. - Procuring a person under 18 for prostitution,
- s. 796.035, F.S. - Selling or buying minors into sex trafficking,
- s. 796.04, F.S. - Forcing or compelling another to become a prostitute,
- s. 796.045, F.S. - Sex trafficking,
- s. 796.05, F.S. - Deriving support from proceeds of prostitution,
- s. 796.06, F.S. - Renting space to be used for lewdness, assignation or prostitution,
- s. 796.07(2)(a)-(d) and (i), F.S. - Prostitution,
- s. 800.03, F.S. - Exposure of sexual organs,
- s. 810.14, F.S. - Voyeurism,
- s. 810.145, F.S. - Video voyeurism,
- 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,
- s. 825.1025, F.S. - Lewd and lascivious offenses committed on an elderly or disabled person,
- s. 827.071, F.S. - Sexual performance by a child,
- s. 836.10, F.S. - Written threats to kill or do bodily injury,
- s. 847.0135(2), F.S. - Computer pornography child exploitation,
- s. 847.0137, F.S. - Transmission of pornography by electronic device,
- s. 847.0145, F.S. - Selling or buying minors, and
- s. 943.0435, F.S. - Sexual offender registration.

The bill amends s. 960.003, F.S., to require a court to order a defendant to undergo HIV testing *within* 48 hours after the filing of the indictment or information charging him or her with a crime listed in s. 775.0877(1)(a)-(n), F.S. Because the court does not order the testing until requested by the victim, however, it is unclear how the bill's provisions will apply when the request of the victim is made more than 48 hours *after* the filing of formal charges.

The bill extends relocation assistance to victims of sexual violence. Under the bill, the need for assistance must be certified by a rape crisis center. Unlike domestic violence cases, where it is common for the victim to reside with the abuser, and relocation concerns are typical after domestic violence has been reported, offenses involving sexual violence occur in more diverse

and varied surroundings and circumstances. Therefore, the extent to which acts of sexual violence occur under circumstances where the victim would seek relocation is unknown.

The bill adds Internet safety to the list of topics which must be covered in school curriculum under s. 1003.42(2)(n), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Collateral crime evidence

Among the crimes added to s. 90.404(2)(b), F.S., are the crimes of stalking, kidnapping and false imprisonment. Although these crimes may in some instances be committed in conjunction with or to facilitate the commission of sexual crimes, the elements of these crimes standing alone have no sexual component.

Under *McLean*, balancing the probative value of the evidence against the danger of substantial unfair prejudice under s. 90.403, F.S., was a critical component of the Court's analysis in upholding the expansion of collateral crime evidence in cases of child sexual abuse against a due process challenge to Ch. 2002-221, Laws of Florida.

The Court noted that “. . . the less similar the prior acts, the less relevant they are to the charged crime, and therefore the less likely they will be admissible. . . . the less similar the prior acts, the more likely that the probative value of this evidence will be substantially outweighed by the danger of unfair prejudice, . . .”.

Under the provisions of this bill, a person charged with a kidnapping or false imprisonment that doesn't include any fact “of a sexual nature” may find the state seeking to admit into evidence collateral crime evidence of a stalking, for example, also with no facts of a sexual nature surrounding the collateral act. Because the bill expands the range of collateral crimes to include offenses that do not include sexual elements, it may subject the statute to a renewed constitutional challenge based on collateral crimes that are less similar to each other than crimes that have a common feature of including a sexual element to the crime.

Criminal Proceedings in Cases Involving 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. Since that time, the Legislature has passed acts which the court has declared impermissibly procedural.

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. 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. The court 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).

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. In *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. . . ."

The bill'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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Defendants whose crimes are among the newly enumerated crimes requiring that additional costs be assessed against the defendant will be responsible for an additional \$151 surcharge.

C. Government Sector Impact:

The addition of crimes to be included where the defendant pays costs that are a contribution of funds supporting the Rape Crisis Program Trust Fund will increase funding for the trust fund. The extent of its positive fiscal impact on the trust fund is indeterminate at this time.

The expansion of financial relocation assistance to victims of sexual violence will likely have a negative fiscal impact on state government, but the amount of the impact will depend on the number of sexual violence victims who will seek and be granted relocation assistance. The frequency of that occurrence is unknown although it is expected to be a small number of instances in comparison to the number of overall sexual offenses reported.

VI. Technical Deficiencies:

Beginning on line 119 of the bill, in the expansion of the statutes of limitation for crimes of video voyeurism, the phrase “[n]otwithstanding the time periods prescribed in this section . . .” may be construed to render the current two and three year statute of limitations inapplicable. Depending on when the victim learns of the existence of the video recording or the date it is confiscated by law enforcement, the bill may actually shorten the statute of limitations in some instances. If the term “notwithstanding” were changed to “in addition to” the bill would increase the statute of limitations for these offenses in every case.

Also, line 226 of the bill appears to add the phrase “or to a victim of sexual violence” in the wrong place in the subsection amended. It is suggested that this term belongs after the reference to “domestic violence” on line 224, which would then read “maximum of \$3,000 to a victim of domestic violence or sexual violence”. Clarification is also suggested on line 225 of the bill by inserting “or sexual violence” at the end of the line.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

None.

B. Amendments:

None.

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