

**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 Fiscal Policy

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BILL: SB 1294

INTRODUCER: Senator Grimsley

SUBJECT: Offenses Involving Minors and Vulnerable Persons

DATE: February 26, 2016

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

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<b>Pre-meeting</b>

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**I. Summary:**

SB 1294 increases protections for minors and victims of human trafficking. Specifically the bill:

- Increases the eligible age of a child victim or witness who may testify by closed circuit television from 16 years of age to 18 years of age;
- Increases criminal penalties for human trafficking if the perpetrator inflicts great bodily harm, permanent disability, or permanent disfigurement on the victim of the underlying human trafficking offense to a first degree felony punishable by a life imprisonment;
- Clarifies that it is a second-degree felony if a person permanently brands or directs another to permanently brand another *for the purpose of committing a human trafficking offense*;
- Eliminates a potential defense to human trafficking crimes by specifying that a victim's lack of chastity or the willingness or consent of a victim is not a defense to prosecution if the victim is under 18 years of age at the time of the offense;
- Amends the felony murder law to include the crime of human trafficking as a qualifying felony for the charge of felony murder; and
- Amends the Rape Shield Law include prosecutions for human trafficking and lewd or lascivious offenses in which the admission of certain evidence about the victim is limited.

The Criminal Justice Impact Conference determined that the bill will have a positive insignificant prison bed impact.

The bill is effective July 1, 2016.

## II. Present Situation:

### Victim or Witness Testimony by Closed Circuit Television

#### *Case Law*

The Sixth Amendment to the U.S. Constitution provides, in part: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” In addition to ensuring the defendant the opportunity to cross-examine an adverse witness, the Sixth Amendment serves another role “of compelling [a witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”<sup>1</sup>

Courts have grappled in recent years with the Sixth Amendment right of confrontation in cases in which the testimony of child victims or witnesses is proffered in court. Children of abuse have been considered to be especially vulnerable to harm resulting from testifying in court before an abuser. In addressing the growing concern of the emotional harm to a child victim from testifying in court, many states have authorized the court to allow alternative measures of in-court testimony by a child victim.

In the 1988 United States Supreme Court case of *Coy v. Iowa*, the court reviewed a case in which the state tried a defendant for child sexual abuse.<sup>2</sup> The trial court allowed two child victims to testify in court from behind a screen, in accordance with state statute. The testimony ultimately led to the conviction of the defendant.<sup>3</sup> In ruling that the court unconstitutionally interfered with the defendant’s right to confront the witnesses against him, the Court opined, “It is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter.”<sup>4</sup>

In 1990, the United States Supreme Court took a more flexible approach in applying the Sixth Amendment testimony by child victims. In *Maryland v. Craig*, the Court started its analysis from the proposition that the constitutional right to confrontation is not an absolute right or one which requires a defendant to always have a face-to-face meeting with an adverse witness.<sup>5</sup> Rather, the court held, the purpose of the confrontation clause is to ensure that testimony is reliable and subject to rigorous adversarial testing.<sup>6</sup> The Court established a three-prong test to determine the necessity of allowing a child to testify in an alternative manner to traditional in-court direct and cross-examination. The court must find:

- That allowing the child to testify in an alternative manner is necessary to protect the welfare of the child;
- That the child would be traumatized by the presence of the defendant; and

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<sup>1</sup> *Mattox v. U.S.*, 156 U.S. 237, 242-243 (1895).

<sup>2</sup> *Coy v. Iowa*, 487 U.S. 1012 (1988).

<sup>3</sup> *Id.* at 1014.

<sup>4</sup> *Id.* at 1020.

<sup>5</sup> *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The Court indicated that it intended to expand upon, rather than overrule its decision in *Coy* regarding the application of the Sixth Amendment to child victim testimony. In fact, the Court in *Craig* cited *Coy* for stating, “We leave for another day, however, the question whether any exceptions exist.” *Supra* note 2, at 1021.

<sup>6</sup> *Id.* at 846.

- The emotional distress suffered by the child in the presence of the defendant is more than minimal.<sup>7</sup>

### ***Florida Law***

Florida allows testimony by closed circuit television in limited circumstances by child victims or witnesses and persons with intellectual disabilities. Section 92.54, F.S., requires the court to have a hearing to determine whether testimony may be proffered through closed circuit television. At the hearing the court must find that there is a substantial likelihood that a victim or witness under the age of 16 or who has an intellectual disability will suffer as least moderate emotional or mental harm due to the presence of the defendant if he or she is required to testify in open court.<sup>8</sup>

To initiate the hearing, a motion may be filed by the victim or witness; the attorney, parent, legal guardian, or guardian ad litem for the victim or witness; the prosecutor; the defendant or the defendant's counsel; or the trial judge.<sup>9</sup>

During the victim's or witness's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. If so, the court must authorize the defendant to see and hear the testimony of the victim or witness, while ensuring that the victim or witness does not hear or see the defendant.<sup>10</sup>

The same test is required for the admissibility of videotaped testimony of a victim or witness under the age of 16 or who has an intellectual disability.<sup>11</sup>

### **Human Trafficking**

Section 787.06, F.S., is Florida's human trafficking statute and defines "human trafficking" as the "transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person." The statute contains a variety of provisions prohibiting persons from knowingly engaging in human trafficking by using labor or services or through commercial sexual activity.

It is a first-degree felony for any person who knowingly, or in reckless disregard of the facts, engages or attempts to engage in human trafficking, or benefits financially from human trafficking:

- For labor or services of any child, including an unauthorized alien, under the age of 18;
- Through the use of coercion for labor or services or commercial sexual activity of an adult, including an unauthorized alien; or
- Through the transport of a child or an adult from out-of-state for labor or services or commercial sexual activity.<sup>12</sup>

The penalty increases to a life felony if the human trafficking:

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<sup>7</sup> *Id.* at 855-856.

<sup>8</sup> Section 92.54(1), F.S.

<sup>9</sup> *Id.* at (2).

<sup>10</sup> Section 92.54(4), F.S.

<sup>11</sup> Section 92.53(1), F.S.

<sup>12</sup> Section 787.06(3), F.S.

- Involves commercial sexual activity of a child under the age of 18 or a person who is mentally defective or incapacitated; or
- Involves a custodian of a child, including a parent or legal guardian, who sells or otherwise transfers custody or control of a child.<sup>13</sup>

It is a second degree felony for a person to permanently brand, or direct to be branded, a victim of human trafficking. To permanently brand a person is to mark a person's body in such a way that if it is able to be removed or repaired, it can be done so only through surgery, laser treatment, or another medical procedure.<sup>14</sup>

### **Felony Murder**

The felony murder rule is a long-standing doctrine that provides that if a person dies during the course of an enumerated felony, in addition to the underlying felony, any of the defendants may be charged with murder.

First degree felony murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate any felony offense listed in s. 782.04(1)(a)2., F.S. An example of such felony offenses in s. 782.04(1)(a)2., F.S., are drug trafficking, arson, and sexual battery. This offense is a capital felony punishable by death or life imprisonment.<sup>15</sup>

Second degree felony murder is when a human being is killed during the perpetration of, or in the attempt to perpetrate any felony offense listed in s. 782.04(3), F.S. The qualifying felony offenses are identical to the felony offenses listed above. This offense is a first degree felony punishable by life imprisonment.<sup>16</sup>

Third degree felony murder is the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than listed in s. 782.04(4), F.S. This offense is a second degree felony punishable by up to 15 years imprisonment.<sup>17</sup>

Currently, human trafficking is not a felony offense listed in s. 782.04, F.S.

### **Rape Shield Law**

In many U.S. jurisdictions, laws exist to prevent specific instances of the victim's prior sexual conduct from being admitted at trial in a prosecution for sexual battery or other sexual misconduct charges. These laws are commonly referred to as "Rape Shield" laws.<sup>18</sup> Section

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<sup>13</sup> Sections 787.06(3)(g) and (4)(a), F.S.

<sup>14</sup> Section 787.06(4)(b), F.S.

<sup>15</sup> Section 782.04(1)(a), F.S.

<sup>16</sup> *Id.* at (3).

<sup>17</sup> Section 782.04(4), F.S.

<sup>18</sup> See National District Attorney's Association, National Center for Prosecution of Child Abuse, *Rape Shield Statutes* (March 2011), available at <http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf> (last visited Feb. 24, 2016).

794.022, F.S., is Florida's Rape Shield law which codifies of the rule of relevancy that a victim's prior sexual conduct is generally irrelevant in determining the defendant's guilt.<sup>19</sup>

Section 794.022, F.S., applies to prosecutions for sexual battery and provides:

- That the victim's testimony doesn't have to be corroborated by other evidence;
- Specific instances of the victim's prior consensual sexual activity with people other than the offender are inadmissible unless:
  - The evidence may prove that the defendant wasn't the source of physical evidence, such as semen; or
  - Consent by the victim is at issue, and the evidence proves a pattern of the victim's conduct or behavior so similar to the conduct or behavior in the case that it is relevant to the issue of consent;
- The victim's prior sexual conduct is inadmissible;
- Evidence presented to prove the victim's manner of dress at the time of the offense incited the sexual battery is inadmissible;
- If consent is a defense, evidence of the victim's mental incapacity or defect can be admitted to prove that consent was not given; and
- An offender's use of a prophylactic device, or a victim's request that an offender use a prophylactic device, is not independently relevant.<sup>20</sup>

The United States Code also has a Rape Shield statute. In contrast to Florida's Rape Shield law, the federal statute is not limited to sexual battery offenses; rather, the federal statute applies to *any* criminal or civil proceeding involving alleged sexual misconduct.<sup>21</sup> As such, federal courts have repeatedly held that a victim's prior history of sexual behavior, such as exotic dancing or prostitution, is irrelevant and inadmissible in prosecutions for crimes such as sex trafficking, forced labor, sex trafficking by force, fraud, or coercion, and sex trafficking of a child.<sup>22</sup>

### III. Effect of Proposed Changes:

#### **Victim or Witness Testimony by Closed Circuit Television (Section 1, amending s. 92.54, F.S.).**

The bill increases the age of a child victim or witness to testify by closed circuit television from 16 years of age to 18 years of age.

<sup>19</sup> *Marr v. Florida*, 494 So. 2d 1139, 1142-1143 (Fla. 1986).

<sup>20</sup> Section 794.022, F.S.

<sup>21</sup> Rule 412, U.S.C.A.

<sup>22</sup> See *United States v. Rivera*, 799 F.3d 180, 185 (2d Cir. 2015) (“[e]vidence of victims’ prior acts of commercial sex is irrelevant to whether those victims were coerced into working as prostitutes”); *United States v. Roy*, 781 F.3d 416, 420 (8th Cir. 2015) (the victim’s participation in prostitution before or after the alleged incident is irrelevant to whether the defendant threatened her, beat her, or took her money); *United States v. Cephus*, 684 F.3d 703, 708 (7th Cir. 2012) (the victim’s prior history of prostitution was irrelevant to proving that she consented to having her wages withheld and being beaten).

**Human Trafficking (Section 3, amending s. 787.06, F.S.)**

The bill increases criminal penalties for human trafficking if the perpetrator inflicts great bodily harm, permanent disability, or permanent disfigurement on the victim of the underlying human trafficking offense to a first degree felony punishable by a term of imprisonment of up to life. The bill clarifies that if a person permanently brands or directs another to permanently brand another *for the purpose of committing a human trafficking offense*, it is a second degree felony. This clarification limits the offense of branding to human trafficking circumstances.

The bill eliminates a potential defense to human trafficking crimes by specifying that a victim's lack of chastity or the willingness or consent of a victim is not a defense to prosecution if the victim is under 18 years of age at the time of the offense.

**Felony Murder (Section 2, amending s. 782.04, F.S.)**

The bill amends the felony murder statutes to include human trafficking as a qualifying felony for all levels of felony murder.

**Rape Shield Law (Section 4, amending 794.022, F.S.)**

The Rape Shield Law is amended to include prosecutions for human trafficking and lewd or lascivious offenses<sup>23</sup> in which the admission of certain evidence is limited. These evidentiary protections currently apply only to victims in prosecutions for sexual battery.

**Sections 5, 6, 7, 8, 9, and 10**

Sections 90.404, 775.21, 943.0435, 944.606, and 944.607 are amended to correct and clarify cross-references to s. 787.06(3)(h), F.S., (2012).<sup>24</sup>

The bill is effective July 1, 2016.

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

None.

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

None.

**C. Trust Funds Restrictions:**

None.

<sup>23</sup> The offenses in s. 800.04, F.S., are: lewd or lascivious battery, lewd or lascivious molestation, and lewd or lascivious exhibition.

<sup>24</sup> See ch. 2014-160, L.O.F.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference determined that the bill will have a positive insignificant prison bed impact, meaning the need for 10 or fewer additional prison beds.<sup>25</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 90.404, 92.54, 775.21, 782.04, 787.06, 794.022, 943.0435, 944.606, and 944.607.

**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.

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

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<sup>25</sup> 2016 Criminal Justice Impact Conference, *Conference Results*, (January 29, 2016), available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (last visited February 24, 2016).