

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 1294

INTRODUCER: Senator Grimsley

SUBJECT: Offenses Involving Minors and Vulnerable Persons

DATE: February 15, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Favorable
2.	Brown	Cibula	JU	Pre-meeting
3.			FP	

I. Summary:

SB 1294 increases protections for minors and victims of human trafficking.

Victim or Witness Testimony by Closed Circuit Television

Current law authorizes a victim or witness in certain circumstances who is under the age of 16 or who has an intellectual disability to testify in court by closed circuit television. The bill increases the eligible age of a child victim or witness who may testify by closed circuit television to 17 years of age.

Felony Murder Law

Current law authorizes a person to be charged with murder if a person dies during the commission of certain felonies enumerated in the statutes. The penalty may vary, depending upon other conditions present during the commission of the felony. The bill amends the felony murder law to include the crime of human trafficking as a qualifying felony for the charge of felony murder.

Human Trafficking Statute

Current law penalizes the crime of human trafficking. The bill 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*. The clarification limits the offense of branding to the human trafficking context.

The bill eliminates a potential defense to human trafficking crimes. If the victim of the human trafficking offense is under the age of 18 at the time of the crime, his or her lack of chastity or willingness or consent is not a defense to the human trafficking crime.

Rape Shield Law

Under Florida's Rape Shield Law, certain prior acts or reputation evidence of a victim is inadmissible in prosecutions for sexual battery. The Rape Shield Law is amended to include prosecutions for human trafficking and lewd or lascivious offenses in the list of cases for which the admission of certain evidence about the victim may be limited. These evidentiary protections currently apply only to victims in prosecutions for sexual battery.

II. Present Situation:

Victim or Witness Testimony by Closed Circuit Television

Case Law

The Sixth Amendment to the U.S. Constitution provides, in part: "In 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."¹

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.

State legislatures have variously adopted measures to protect a child victim in providing testimony by requiring or authorizing the court to:

- Close the courtroom to the public while the child testifies;
- Allow child victims to testify on videotape or closed circuit television; and
- Adopt the use of protective aids in the courtroom, such as one-way mirrors or screens to enable the child to testify without seeing the defendant.²

Some states have also created a hearsay exception in law to enable child victims to testify in an out-of-court manner.³

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.⁴ The trial court allowed two child victims to testify in court from behind a screen, in accordance with state statute. The testimony ultimately

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

² Lisa Hamilton Thielmeyer, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 803-804 (Summer 1992).

³ *Id.*

⁴ *Coy v. Iowa*, 487 U.S. 1012 (1988).

led to the conviction of the defendant.⁵ In ruling that the court unconstitutionally interfered with the defendant's right to confront the witnesses against him, the Supreme Court opined, "It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."⁶

In 1990, the United States Supreme Court took a more flexible approach in applying the Sixth Amendment to 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.⁷ Rather, the court held, the purpose of the confrontation clause is to ensure that testimony is reliable and subject to rigorous adversarial testing.⁸ In light of this, the Court established a three-prong test for use in determining the necessity of allowing a child to testify in an alternative manner to traditional in-court direct and cross-examination. The criteria for necessity are:

- The trial court must find the procedure necessary to protect the child;
- Evidence must exist that the child would suffer emotional distress otherwise; and
- The emotional distress cited must be more than minimal.⁹

Florida Law

Florida allows testimony outside the courtroom in limited circumstances by child victims or witnesses and persons with intellectual disabilities. Section 92.54, F.S., provides a procedure for the court to apply in determining whether testimony may be proffered through closed circuit television. In so doing, s. 92.54, F.S., codifies the three-prong test of necessity established in *Maryland v. Craig*.¹⁰

In order to balance the defendant's right to confront his or her accuser with the State's interest in protecting the welfare of children, the court must:

- Determine whether a procedure such as closed circuit television is necessary to protect a child's welfare;
- Find that a substantial likelihood exists that a victim or witness under the age of 16 or who has an intellectual disability would suffer emotional harm otherwise; and
- Find that the emotional distress suffered by the child in the presence of the defendant would be at least moderate emotional harm.¹¹

To initiate the inquiry, a motion must be filed by the victim or witness; the attorney, parent, legal guardian, or guardian ad litem for the victim or witness; the defendant or the defendant's counsel; or the trial judge.¹²

⁵ *Id.* at 1014.

⁶ *Id.* at 1020.

⁷ *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 *Craig Court* cited *Coy* for having said, "We leave for another day, however, the question whether any exceptions exist." *Coy*, *supra* note 4, at 1021.

⁸ *Id.* at 846.

⁹ *Id.* at 855-856.

¹⁰ Section 92.54, F.S.

¹¹ Section 92.54(1), F.S.

¹² Section 92.54(2), F.S.

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.¹³

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.¹⁴

Human Trafficking

Section 787.06(2)(d), F.S., defines human trafficking as “transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person.”

A first-degree felony is committed by any person who knowingly, or in reckless disregard of the facts commits or attempts to commit human trafficking, or benefits financially from human trafficking:

- Through the 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.¹⁵

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

- Involves commercial sexual activity of a child under the age of 18 or a person who is mentally defective or incapacitated;¹⁶ or
- Involves a custodian of a child, including a parent or legal guardian, who sells or otherwise transfers custody or control of a child.¹⁷

In addition to these criminal acts, a second-degree felony is committed if a person is involved in permanently branding 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 removed or repaired, it can be done so only through surgery, laser treatment, or another medical procedure.¹⁸

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. Intent to kill is presumed if under the felony murder rule.¹⁹

¹³ Section 92.54(4), F.S.

¹⁴ Section 92.53(1), F.S.

¹⁵ Section 787.06(3), F.S.

¹⁶ *Id.*

¹⁷ Section 787.06(4), F.S.

¹⁸ Section 787.06(4)(b), F.S.

¹⁹ *Gray v. State*, 654 So. 2d 934, 935 (citing *Amlotte v. State*, 456 So. 2d 448, 449-50 (Fla. 1984)).

Florida has a felony murder rule which provides a range of penalties. Section 782.04(1)(a), F.S., treats the death of a person as first-degree murder, chargeable as a capital felony, if the perpetrator is acting from a premeditated design to effect a death. The underlying felony, however, must be an enumerated crime. These crimes are:

- Drug Trafficking;
- Arson;
- Sexual battery;
- Robbery;
- Burglary;
- Kidnapping;
- Escape;
- Aggravated child abuse;
- Aggravated abuse of an elderly person or disabled adult;
- Aircraft piracy;
- Unlawful throwing, placing, or discharging of a destructive device or bomb;
- Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user;
- Carjacking;
- Home-invasion robbery;
- Aggravated stalking;
- Murder of another human being;
- Resisting an officer with violence;
- Aggravated fleeing or eluding with serious bodily injury or death; or
- A felony that is an act of terrorism or is in furtherance of an act of terrorism.²⁰

If the perpetrator does not possess premeditated design during the commission of an enumerated felony, the perpetrator may be charged with first-degree murder, punishable by imprisonment of a length of time up to life imprisonment.²¹

Felony murder in the third degree²² occurs if a person is killed, without any design to effect death, during the commission of any felony other than an enumerated felony.²³

²⁰ Section 782.04(1)(a), F.S. If the person is killed by the person committing or attempting to commit the listed crime, the murder is a capital offense punishable by death or life imprisonment. If the person is killed by a person other than the one committing or attempting to commit the listed crime, the one who is committing or attempting to commit the crime is responsible for the death. Section 782.04(3), F.S., provides that under those circumstances, it is a second degree murder, punishable by 30 years to life imprisonment.

²¹ Section 782.04(2), F.S.

²² Third degree murder is punishable as a second degree felony punishable by up to 15 years imprisonment.

²³ Section 782.04(4), F.S.

Rules of Evidence Applicable to Sexual Offenses

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.²⁴ These laws are commonly referred to as "Rape Shield" laws.²⁵ Section 794.022, F.S., is Florida's Rape Shield law, and it has long been considered a codification of the rule of relevancy that a victim's prior sexual conduct is generally irrelevant in determining the defendant's guilt.²⁶ It 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 sexual history with people other than the offender are inadmissible unless:
 - The evidence is introduced to prove that the defendant wasn't the source of physical evidence, such as semen; or
 - If consent is at issue, 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 reputation for sexual behavior is inadmissible;
- Evidence presented to prove the victim's appearance prompted 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.²⁷

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.²⁸ 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.²⁹

III. Effect of Proposed Changes:

The bill increases protections for minors and victims of human trafficking.

²⁴ Nat'l Dist. Attorney's Ass'n, *Rape Shield Statutes* (March 2011) (at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiMI-Xc06XKAhWFHD4KHVs-ByAQFggcMAA&url=http%3A%2F%2Fwww.ndaa.org%2Fpdf%2FNCPCA%2520Rape%2520Shield%25202011.pdf&usq=AFQjCNGB9ME_OADBm-qIDOCmtYCs3dYB7g) (last visited Feb. 12, 2016).

²⁵ See *Lewis v. State*, 591 So. 2d 922, 924 (Fla. 1991).

²⁶ *Marr v. Florida*, 494 So. 2d 1139, 1142-43 (Fla. 1986).

²⁷ Section 794.022, F.S.

²⁸ Fed. Rules Evid. Rule 412, 28 U.S.C.A.

²⁹ See *United States v. Rivera*, 799 F.3d 180, 185 (2d Cir. 2015) (holding that "[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) (holding that 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) (holding that the victim's prior history of prostitution was irrelevant to proving that she consented to having her wages withheld and being beaten).

Victim or Witness Testimony by Closed Circuit Television

Current law authorizes a victim or witness in certain circumstances who is under the age of 16 or who has an intellectual disability to testify in court by closed circuit television. The bill increases the eligible age of a child victim or witness to testify by closed circuit television to 17 years of age.

Felony Murder

Current law authorizes a person to be charged with murder if a person dies during the commission of an enumerated felony in the felony murder statutes. The bill amends the felony murder statutes to include the crime of human trafficking as a qualifying felony for all levels of felony murder.

Human Trafficking Statute

Human trafficking is generally charged presently as a first-degree felony, punishable by up to 30 years imprisonment. 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. The offense then becomes a first degree felony punishable by a term of imprisonment of up to life.

Additionally, 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. If the victim of the human trafficking offense is under the age of 18 at the time of the crime, his or her lack of chastity or willingness or consent is not a defense to the human trafficking crime.

Rape Shield Law

Under Florida's Rape Shield Law, certain prior acts or reputation evidence of a victim is inadmissible in prosecutions for sexual battery. The Rape Shield Law is amended to include prosecutions for human trafficking and lewd or lascivious offenses in the list of cases for which the admission of certain evidence may be limited. These evidentiary protections currently apply only to victims in prosecutions for sexual battery.

Sections 90.404, 775.21, 943.0435, 944.606, and 944.607 are amended to conform and clarify cross-references to s. 787.06(3)(h), F.S. (2012). Paragraph (h) of s. 787.06(3), F.S., was merged with paragraph (g) of that section by ch. 2014-160, Laws of Florida.

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Based upon the preliminary assessment of the potential prison bed impact of the bill it is anticipated that the bill may have a positive insignificant impact on the number of prison beds necessary to accommodate persons convicted under the new and amended criminal offenses.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

³⁰ 2016 Criminal Justice Impact Conference (CJIC), at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm>.

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.

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