

**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 Criminal Justice

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BILL: SB 1382

INTRODUCER: Senator Flores

SUBJECT: Victim and Witness Protection

DATE: February 5, 2016

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

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Pre-meeting</b>
2.	_____	_____	JU	_____
3.	_____	_____	FP	_____

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**I. Summary:**

SB 1382 broadens the application of the witness or victim protections found in ss. 92.53, and 92.54, F.S., by amending the cut-off age from under the age of 16 to under the age of 18. The bill therefore extends the court's statutory authority to order videotaped or closed circuit testimony if necessary to protect a witness or victim who is a minor from "at least moderate emotional or mental harm due to the presence of the defendant" if the child is required to testify in open court in the defendant's presence.

Likewise, the age is increased from under the age of 16 to under the age of 18 in s. 92.55, F.S., to extend the protections of those court orders intended to protect a victim or witness from "severe emotional or mental harm due to the presence of the defendant." The definition of "sexual offense victim or witness" is also amended in s. 92.55, F.S., extending the age limitation by two years.

In s. 92.55, F.S., as amended by the bill, a person appointed by the court pursuant to s. 914.17, F.S.,<sup>1</sup> will be able to move the court to enter a protective order on behalf of the victim or witness.

Section 794.022, F.S., dealing with rules of evidence is amended to include victims of human trafficking and victims of lewd or lascivious offenses<sup>2</sup> in the list of offenses for which the admission of certain evidence may be limited. The bill provides that victims of those crimes need not have their testimony corroborated nor should specific instances of prior consensual sexual activity with anyone other than the offender be admitted into evidence in a criminal prosecution

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<sup>1</sup> Section 914.17, F.S., provides for a guardian ad litem or other advocate to be appointed by the court to represent the interests of a minor in a criminal proceeding where the minor is a victim of or a witness to child abuse or neglect, a victim of a sexual offense, or a witness to a sexual offense committed against another minor. "Advocate" is not defined in Chapter 914, F.S.

<sup>2</sup> Sections 787.06 and 800.04, F.S.

except under limited circumstances. This section of law is referenced in s. 90.404, F.S., therefore paragraph (b) of subsection (1) of that statute is reenacted by the bill.

The bill becomes effective July 1, 2016.

## II. Present Situation:

### Victim or Witness Testimony

Florida law currently contains a constitutional provision and several statutes providing for certain treatment of victims and witnesses.<sup>3</sup> A number of these statutes authorize the court to provide special protections to a victim or witness who is under 16 years of age or who has an intellectual disability or to a victim or witness of a sexual offense who is under 16 years of age.

Sections 92.53 and 92.54, F.S., authorize a court to enter a protective order after a motion and hearing in camera<sup>4</sup> if the court finds that the protected individual is a victim or witness who is under the age of 16 or has an intellectual disability,<sup>5</sup> and that:

- It is substantially likely the protected individual would suffer at least moderate emotional or mental harm due to the presence of the defendant if the protected individual were required to testify in open court; or
- The court determines that the protected individual is unavailable<sup>6</sup> to testify.

When the above circumstances are met, the court has several options. The court may order the protected individual's testimony be videotaped and used in lieu of testimony in open court.<sup>7</sup> In the event of such an order, the defendant and the defendant's counsel must be permitted to be present at any videotaping, but the court may order the defendant to view the testimony from outside the presence of the protected individual.<sup>8</sup> Alternatively, the court may require that the protected individual's testimony be taken outside the courtroom and shown in the courtroom by means of closed circuit television.<sup>9</sup> Only the specified parties<sup>10</sup> may be permitted in the room

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<sup>3</sup> See, e.g., FLA. CONST. art. I, s. 16; ss. 92.53-55, F.S.; s. 914.25, F.S.; s. 914.27.

<sup>4</sup> A hearing "in camera" means the hearing is held in the judge's chambers or held in a courtroom where all spectators are excluded from being present. DUHAIME'S LAW DICTIONARY, *In Camera Definition*, <http://www.duhaime.org/LegalDictionary/I/InCamera.aspx> (last visited Jan. 14, 2016).

<sup>5</sup> Under the procedure provided in s. 92.53, F.S., "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which manifests before the age of 18 and can reasonably be expected to continue indefinitely. s. 393.063, F.S.

<sup>6</sup> A witness or potential witness is considered unavailable to testify when he or she: 1) Is exempted from testifying by a ruling of a court due to a legal privilege; 2) Refuses to testify concerning the subject matter of his or her statement despite a court order to testify; 3) Has suffered a lack of memory of the subject matter of his or her statement; 4) Is unable to be present or to testify at the hearing because of death, illness or infirmity; or 5) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance by reasonable means. s. 90.804(1), F.S.

<sup>7</sup> Section 92.53(1), F.S.

<sup>8</sup> Section 92.53(4), F.S.

<sup>9</sup> Section 92.54(1), F.S.

<sup>10</sup> Only the judge, prosecutor, the defendant and his or her attorney, any video equipment operators, and interpreter, or any other person who is not going to be a witness in the case and, in the opinion of the court, benefits the well-being of the protected individual. s. 92.54(3), F.S.

when the testimony is recorded.<sup>11</sup> The judge may require the defendant to view the testimony from the courtroom, but must permit the defendant to observe and hear the person's testimony.<sup>12</sup>

Section 92.55, F.S., authorizes the court to enter a wide variety of protective orders to protect victims and witnesses under 16 years of age, sexual offense<sup>13</sup> victims or witnesses under 16 years of age,<sup>14</sup> and persons with an intellectual disability.<sup>15</sup> A motion for protection can be raised by any party to the case, a parent, a guardian, an attorney, a guardian ad litem, or the court.<sup>16</sup> The court must find that such order is necessary to protect the person from severe emotional or mental harm due to the defendant's presence if the person is required to testify in open court.<sup>17</sup>

The court is required to consider a lengthy list of factors, including, but not limited to the age of the person, the nature of the offense, and the functional capacity of the person if he or she has an intellectual disability.<sup>18</sup>

The court may enter orders taking the following actions, in addition to any other relief available under the law:

- Limit the number of times that the person may be interviewed;
- Prohibit depositions of the person;
- Require the submission of questions prior to examination of the person;
- Set the place and conditions for interviewing the person or for other proceedings;
- Permit or prohibit the attendance of any person at a proceeding; and
- Permit the use of a service animal during the person's testimony in any sexual offense proceeding.<sup>19</sup>

### **Inadmissible Evidence**

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.<sup>20</sup>

<sup>11</sup> Section 92.54(3), F.S.

<sup>12</sup> Section 92.54(4), F.S.

<sup>13</sup> "Sexual offense" means any offense specified in s. 775.21(4)(a)1., F.S. (Sexual Predator criteria), or s. 943.0435(1)(a)1.a.(I), F.S. (Sexual Offender criteria).

<sup>14</sup> A "sexual offense victim or witness" means a person who was under 16 years old when he or she was the victim of or a witness to a sexual offense. s. 92.55(1)(a), F.S.

<sup>15</sup> Section 92.55(1)(b), F.S.

<sup>16</sup> Section 92.55(2), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Section 92.55(3), F.S.

<sup>19</sup> Section 92.55(4) and (5), F.S.

<sup>20</sup> Nat'l Dist. Attorney's Ass'n, *Rape Shield Statutes*, NAT'L DIST. ATTORNEY'S ASS'N (March 2011) (available 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&usg=AFQjCNGb9ME\\_OADBM-qIDOCmtYCs3dYB7g](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&usg=AFQjCNGb9ME_OADBM-qIDOCmtYCs3dYB7g)) (last visited Jan. 12, 2016).

These laws are commonly referred to as “Rape Shield” laws.<sup>21</sup> 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.<sup>22</sup> It applies only to criminal prosecutions for sexual battery under s. 794.011, F.S., 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
  - When consent is at issue, the evidence proves a pattern of the victim’s conduct or behavior that is 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;
- When consent is a defense, evidence of the victim’s mental incapacity or defect can be admitted to prove that consent was not given;
- 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>23</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>24</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>25</sup>

### III. Effect of Proposed Changes:

The bill broadens the application of the witness or victim protections found in ss. 92.53, and 92.54, F.S., by amending the cut-off age from under the age of 16 to under the age of 18. This will allow the court to protect a witness or victim who is a minor from “at least moderate emotional or mental harm due to the presence of the defendant” if the child is required to testify in open court in the defendant’s presence. The bill extends the court’s statutory authority to order videotaped or closed circuit testimony.

<sup>21</sup> See *Lewis v. State*, 591 So. 2d 922, 924 (Fla. 1991).

<sup>22</sup> *Marr v. Florida*, 494 So. 2d 1139, 1142-43 (Fla. 1986).

<sup>23</sup> Section 794.022, F.S.

<sup>24</sup> 28 U.S.C. § 412.

<sup>25</sup> 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 be beaten).

Likewise the age is increased from under the age of 16 to under the age of 18 in s. 92.55, F.S., to extend the protections of those court orders intended to protect a victim or witness from severe emotional or mental harm due to the presence of the defendant. The definition of “sexual offense victim or witness” is also amended in s. 92.55, F.S., extending the age limitation by two years.

In s. 92.55, F.S., as amended by the bill, a person appointed by the court pursuant to s. 914.17, F.S.,<sup>26</sup> will be able to move the court to enter a protective order on behalf of the victim or witness.

Section 794.022, F.S., dealing with rules of evidence is amended to include victims of human trafficking and victims of lewd or lascivious offenses<sup>27</sup> in the list of offenses for which the admission of certain evidence may be limited. The bill provides that victims of those crimes need not have their testimony corroborated nor should specific instances of prior consensual sexual activity with anyone other than the offender be admitted into evidence in a criminal prosecution except under limited circumstances. This section of law is referenced in s. 90.404, F.S., therefore paragraph (b) of subsection (1) of that statute is reenacted by the bill.

The bill becomes 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.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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<sup>26</sup> Section 914.17, F.S., provides for a guardian ad litem or other advocate to be appointed by the court to represent the interests of a minor in a criminal proceeding where the minor is a victim of or a witness to child abuse or neglect, a victim of a sexual offense, or a witness to a sexual offense committed against another minor. “Advocate” is not defined in Chapter 914, F.S.

<sup>27</sup> Sections 787.06 and 800.04, F.S.

C. **Government Sector Impact:**

To the extent to which the court orders the videotape and closed circuit television authorized in the bill, there may be additional costs incurred by the court.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 92.53, 92.54, 92.55, 794.022, and 90.404.

**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.