

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCB CRJS 16-05 Victim and Witness Protection

**SPONSOR(S):** Criminal Justice Subcommittee; Trujillo

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1382

<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR or BUDGET/POLICY CHIEF</b>
Orig. Comm.: Criminal Justice Subcommittee	11 Y, 0 N	Keegan	White

**SUMMARY ANALYSIS**

Florida law currently has a number of statutes providing for the fair treatment of victims and witnesses. Sections 92.53, 92.54, and 92.55, F.S., 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. For example, protective orders may be entered by the court to allow protected persons to testify via closed circuit television or to limit the frequency or nature of depositions to which the protected person has to attend. Additionally, s. 794.022, F.S., Florida's Rape Shield law, prevents most evidence regarding a victim's prior sexual conduct from being admitted at trial in a prosecution for sexual battery under s. 794.011, F.S. Currently, the Rape Shield law does not apply in other sexual misconduct prosecutions.

The bill broadens the application of ss. 92.53, 92.54, and 92.55, F.S., by increasing the age range for protected persons from victims or witnesses under 16 years of age to victims or witnesses under 18 years of age. Additionally, the bill adds advocates appointed by the court under s. 914.17, F.S., to the list of persons authorized to make a motion for protection under s. 92.55, F.S.

The bill expands the application of the Florida's Rape Shield law to prosecutions under s. 787.06, F.S., relating to human trafficking, and s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of children under 16 years of age.

The bill does not appear to have a fiscal impact on state or local government revenues.

The bill is effective October 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current Situation**

##### Testimony by Victims and Witnesses

Florida law currently has several statutes providing for the fair treatment of victims and witnesses.<sup>1</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>2</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>3</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>4</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>5</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>6</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>7</sup> Only the specified parties<sup>8</sup> may be permitted in the room when the testimony is recorded.<sup>9</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>10</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>11</sup> victims or witnesses under 16 years of age,<sup>12</sup> and persons with an intellectual disability.<sup>13</sup> A motion for protection can be raised by any party to the

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<sup>1</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>2</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>3</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>4</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>5</sup> s. 92.53(1), F.S.

<sup>6</sup> s. 92.53(4), F.S.

<sup>7</sup> s. 92.54(1), F.S.

<sup>8</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.

<sup>9</sup> s. 92.54(3), F.S.

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

<sup>11</sup> "Sexual offense" means any offense specified in s. 775.21(4)(a)1., or s. 943.0435(1)(a)1.a.(I).

<sup>12</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>13</sup> s. 92.55(1)(b), F.S.

case, a parent, a guardian, an attorney, a guardian ad litem, or the court.<sup>14</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>15</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>16</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>17</sup>

### Rape Shield

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>18</sup> These laws are commonly referred to as "Rape Shield" laws.<sup>19</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>20</sup> It applies only to criminal prosecutions for sexual battery under s. 794.011, F.S.,<sup>21</sup> 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>22</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>23</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,

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<sup>14</sup> s. 92.55(2), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> s. 92.55(3), F.S.

<sup>17</sup> s. 92.55(4) and (5), F.S.

<sup>18</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).

<sup>19</sup> See *Lewis v. State*, 591 So. 2d 922, 924 (Fla. 1991); see also ENCYCLOPEDIA BRITANNICA, *Rape Shield Law*, <http://www.britannica.com/topic/rape-shield-law> (last visited Jan. 12, 2016).

<sup>20</sup> *Marr v. Florida*, 494 So. 2d 1139, 1142-43 (Fla. 1986).

<sup>21</sup> Section 794.011, F.S., prohibits various forms of sexual battery.

<sup>22</sup> s. 794.022, F.S.

<sup>23</sup> 28 U.S.C. § 412.

fraud, or coercion, and sex trafficking of a child.<sup>24</sup> The Fourth Circuit illustrated this concept in *United States v. Saunders*, by holding that 28 U.S.C. 412(b)(1)(B) “manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim’s past sexual experiences with third persons, since it is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time.”<sup>25</sup>

### **Effect of the Bill**

The bill broadens the application of ss. 92.53, 92.54, and 92.55, F.S., by increasing the age range for protected persons from victims or witnesses under 16 years of age to victims or witnesses under 18 years of age. Additionally, the bill adds advocates appointed by the court under s. 914.17, F.S.,<sup>26</sup> to the list of persons authorized to make a motion for protection under s. 92.55, F.S.

The bill expands the application of s. 794.022, F.S., Florida’s Rape Shield law, to prosecutions under s. 787.06, F.S., relating to human trafficking, and s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of children under 16 years of age.

Finally, the bill reenacts s. 90.404, F.S., to incorporate amendments made by the bill to s. 794.022, F.S., that are cross-referenced in the reenacted section.

### **B. SECTION DIRECTORY:**

Section 1. Amending s. 92.53, F.S., relating to videotaping the testimony of a victim or witness under age 16 or who has an intellectual disability.

Section 2. Amending s. 92.54, F.S., relating to use of closed circuit television in proceedings involving a victim or witness under the age 16 or who has an intellectual disability.

Section 3. Amending s. 92.55, F.S., relating to judicial and other proceedings involving victim or witness under the age of 16, a person who has an intellectual disability, or a sexual offense victim or witness; special protections; use of registered service or therapy animals.

Section 4. Amending s. 794.022, F.S., relating to rules of evidence.

Section 5. Reenacting s. 90.404, F.S., relating to character evidence; when admissible.

Section 6. Provides an effective date of October 1, 2016.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

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<sup>24</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).

<sup>25</sup> *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991).

<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.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.