

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 251 Sexual Offenses  
**SPONSOR(S):** Dorworth and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 488

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		De La Paz	Cunningham
2) Appropriations Committee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

HB 251 addresses several issues relating to support for victims of sexual violence and criminal prosecution of such offenses. HB 251:

- Expands the admissibility of collateral crime or “similar fact” evidence in criminal prosecutions of crimes “of a sexual nature.”
- 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.
- 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.
- Amends the statute of limitations for video voyeurism to authorize commencement of prosecutions within one year either from the date the victim learns of the existence of the video recording or the date the recording is confiscated by law enforcement, whichever occurs first.
- Adds crimes to the list of offenses for which an additional \$151 dollar surcharge will be assessed against a convicted defendant in order to fund to the Rape Crisis Program Trust Fund.
- 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, whether or not a sexual offense, that involved the transmission of body fluids from one person to another.
- Expands the availability of financial relocation assistance, currently provided to domestic violence victims, to victims of sexual violence.
- Requires the topic of internet safety to be taught at public schools.

HB 251 has both a positive and a negative fiscal impact on state government which is indeterminate at this time.

The bill has an effective date of July 1, 2011.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Evidence of Other Crimes Wrongs or Acts**

Section 90.404(2)(a), F.S., is the general provision 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.<sup>1</sup> 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.”<sup>2</sup>

Under this provision, similarity of detail or uniqueness is not required for the admission of similar fact evidence of other crimes, wrongs or acts.<sup>3</sup> Even though similarity it is not in and of itself required, it may be necessary to make the evidence relevant to the issue it is offered to prove. For example, if 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.<sup>4</sup> When identity is not disputed, finer points of similarity are not 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 the context of prosecutions for sexual offenses, the law surrounding the admission of collateral crime evidence has become confusing. A strict “fingerprint” type standard of similarity that the Florida Supreme Court articulated in connection with cases where identity is in issue has been held to apply in cases involving sexual abuse even where identity of the defendant is not in dispute.<sup>5</sup> In State v. Richman, a rheumatologist was charged with one count of sexual battery against a victim who was physically helpless to resist and another count for lewd and lascivious molestation of an elderly or

<sup>1</sup> Williams v. State, 110 So. 2d 654 (Fla. 1959).

<sup>2</sup> Id. at 659-660.

<sup>3</sup> See, Williams v. State, 621 So.2d 413, at 414 (Fla. 1993); Gore v. State, 599 So.2d 978 (Fla. 1992); Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), *cert. denied*, 490 U.S. 1028, 104 L.Ed.2d 200, 109 S.Ct. 1765 (1989); *See also*, C. Ehrhardt, Florida Evidence, Section 404.09, at 222-223 (2010 Edition).

<sup>4</sup> 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.”

<sup>5</sup> See, State v. Richman, 861 So.2d 1195 (2<sup>nd</sup> DCA), a case involving sexual battery and lewd and lascivious molestation of adult victims where the District Court of Appeal applied the strict similarity requirements that existed in child sexual abuse cases prior to the 2001 amendments to 90.404(2) (b), F.S., to the case before it. Richman, at 1197 *citing* Kulling v. State, 827 So.2d 311, 314 (2<sup>nd</sup> DCA, 2002) *citing* State v. Savino, 567 So.2d 892, 894 (Fla. 1990) .

disabled person. His victims were his patients. The state proffered the testimony of seven former patients, each of whom claimed to have been sexually assaulted by Richman. The trial judge first determined that testimony of three of the seven witnesses was admissible, but later changed his mind and disallowed all of their testimony. The Second District Court of Appeal, however, overruled the trial judge and found the testimony admissible.

In a concurring opinion, now Chief Justice Canady stated:

. . . I believe the strict test set forth in (reference omitted) is not appropriately applied in a case . . . where the identity of the defendant is not at issue. The rationale for requiring a heightened level of similarity in cases where the defendant is identified as the perpetrator based on collateral crimes involving the same *modus operandi* used in the charged offense is simply not applicable where the similar acts evidence is offered to corroborate the victim's testimony that an offense occurred and to rebut the defendant's contention that the victim's testimony is fabricated.

. . .

The justification for applying a relaxed standard of similarity focuses on the appropriateness of using similar acts evidence to support the credibility of a victim who testifies concerning an offense committed when the victim was alone with a person well known to the victim. The rationale for allowing such similar acts evidence is just as compelling when the context is a sexual assault by a physician on a patient in the privacy of the physician's examining room as it is when the context is a sexual assault by a parent on that parent's child in the privacy of the home. Indeed, the rationale is compelling in any context where a defendant who is well known to the victim has been accused of an offense and the critical issue is whether the victim's testimony regarding the offense is a fabrication.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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.

---

<sup>6</sup> Id. at 1200-1203 (Canady concurring).

<sup>7</sup> Ch. 2001-221, Laws of Florida. For a discussion of issues surrounding the admission of similar fact evidence in child sexual abuse cases prior to Ch. 2001-221 see D. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, New York Law School Journal of Human Rights, Vol. 15, Part 3, 449-481 (Spring 1999).

<sup>8</sup> S. 847.0135(5), F.S., was added to the offenses in this subsection in Ch. 2008-172.

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.<sup>9</sup> This section significantly broadened the admissibility of collateral crime evidence in prosecutions of child molestation cases.<sup>10</sup> The Court noted that the amendments to s. 90.404, F.S. abrogated their prior cases with respect to the admission of such evidence.<sup>11</sup> 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 section 90.403, F.S.<sup>12</sup> Third, the court 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.

### Effect of HB 251

HB 251 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. The bill adds the following offenses to the current list of crimes for which the admission of collateral crime evidence is expanded:

- |                        |   |
|------------------------|---|
| 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), -   | 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  |
| s. 985.701(1), F.S., - | Sexual misconduct by a juvenile justice employee                  |

### **Access to Evidence for Criminal Proceedings**

HB 251 also requires material or property in a criminal proceeding which depicts a sexual performance by a child or child pornography to remain secured or locked in the custody or control of law enforcement, the state attorney or the court. It also prohibits courts from granting any request of a defendant to photo copy or otherwise reproduce such material notwithstanding any court rule or law to the contrary as long as the state attorney makes the material reasonably available. (See section on Other Constitutional Issues). The bill specifies that material is reasonably available if the state attorney provides ample opportunity at a designated facility for the inspection, viewing, and examination of the property or material that portrays sexual performance by a child or constitutes child pornography by the defendant, his or her attorney, or any individual whom the defendant uses as an expert during the discovery process or at a court proceeding.

### **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 bill requires

---

<sup>9</sup> McLean v. State, 934 So.2d 1248 (Fla. 2006).

<sup>10</sup> See, Mendez v. State, 961 So.2d 1088, 1090 (Fla. 2007).

<sup>11</sup> McLean, *supra*, at 1259.

<sup>12</sup> 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, *supra*, at 1259 -1261 comparing s. 90.404(2)(b) F.S. and s. 90.403, F.S., with Federal Rule of Evidence 413 relating to sexual assault, 414 relating to child molestation and 403 relating to balancing probative value against prejudice to the defense.

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

#### Effect of HB 251

HB 251 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.

#### **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.<sup>13</sup>

A statute of limitations 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 limitations for criminal offenses. Under this section, the time limitations period begins to run the day after an offense is committed.<sup>14</sup> 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.<sup>15</sup> The statute of limitations for a misdemeanor of the first degree is two years. For second and third degree felonies the statute of limitations period is three years.

One of the essential elements of the video voyeurism offenses is that they occur without the victim’s knowledge. As a result, the statute of limitations can expire before a victim becomes aware that the crime has occurred.

#### Effect of HB 251

HB 251 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.

#### **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.<sup>16</sup>

#### Effect of HB 251

HB 251 amends ss. 794.056 & 938.085, F.S. to add several new offenses to the list crimes which will support the financing of the trust fund through the additional \$151 surcharge.<sup>17</sup>

---

<sup>13</sup> 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.

<sup>14</sup> S. 775.15(3), F.S.

<sup>15</sup> Id.

<sup>16</sup> 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.

<sup>17</sup> The new crimes added are: s. 775.21, The Florida Sexual Predators Act, s. 787.025, Luring or enticing a child, s. 787.06, Human trafficking, s. 787.07, Human Smuggling, s. 794.05, Unlawful sexual activity with certain minors, s. 794.08, Female genital mutilation, s. 796.03, Procuring a person under 18 for prostitution, s. 796.035, selling or buying minors into sex trafficking, s. 796.04,

### **HIV Testing of Person Charge 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.<sup>18</sup>

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.

#### Effect of HB 251

HB 251 amends these sections to require a court to order a defendant to undergo testing within 48 hours after the filing of the indictment or information. 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.

### **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.<sup>19</sup>

#### Effect of HB 251

HB 251 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. The extent to which acts of sexual violence occur under circumstances where the victim would seek relocation is unknown.

---

Forcing or compelling another to become a prostitute, s. 796.045, Sex trafficking, s. 796.05, Deriving support from proceeds of prostitution, s. 796.06, Renting space to be used for lewdness, assignation or prostitution, s. 796.07(2)(a)-(d) and (i), Prostitution, s. 800.03, Exposure of sexual organs, s. 810.14, Voyeurism, s. 810.145, Video voyeurism, s. 812.135, Home invasion robbery, s. 817.025, Home or private business invasion by false impersonation, s. 825.102, abuse or aggravated abuse of an elderly or disabled person, s. 825.1025, Lewd and lascivious offenses committed on an elderly or disabled person, s. 827.071, Sexual performance by a child, s. 836.10, Written threats to kill or do bodily injury, s. 847.0135(2), Computer pornography child exploitation, s. 847.0137, Transmission of pornography by electronic device, s. 847.0145, Selling or buying minors, or s. 943.0435, Sexual offender registration.

<sup>18</sup> The offenses are: s. 794.011, relating to sexual battery; s. 826.04, relating to incest; s. 800.04, relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; s. 784.011, 784.07(2)(a), and 784.08(2)(d), relating to assault; s. 784.021, 784.07(2)(c), and 784.08(2)(b), relating to aggravated assault; s. 784.03, 784.07(2)(b), and 784.08(2)(c), relating to battery; s. 784.045, 784.07(2)(d), and 784.08(2)(a), relating to aggravated battery; s. 827.03(1), relating to child abuse; s. 827.03(2), relating to aggravated child abuse; s. 825.102(1), relating to abuse of an elderly person or disabled adult; s. 825.102(2), relating to aggravated abuse of an elderly person or disabled adult; s. 827.071, relating to sexual performance by person less than 18 years of age; s. 796.03, 796.07, and 796.08, relating to prostitution; or s. 381.0041(11)(b), relating to donation of blood, plasma, organs, skin, or other human tissue.

<sup>19</sup> Section 960.198(2), F.S.

### **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:

(n) Comprehensive health education<sup>20</sup> 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.

### Effect of HB 251

HB 251 adds internet safety to the list of topics which must be covered under this section.

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

Section 1. Amends s. 90.404(2), F.S., relating to character evidence; when admissible.

Section 2. Creates a new section of Florida Statutes relating to prohibition on reproduction of child pornography.

Section 3. Amends s. 395.1021, F.S., relating to treatment of sexual assault victims.

Section 4. Amends s. 775.15, F.S., relating to time limitations; general time limitations; exceptions.

Section 5. Amends s. 794.056, F.S., relating to the Rape Crisis Program Trust Fund.

Section 6. Amends s. 938.085, F.S., relating to additional cost to fund rape crisis centers.

Section 7. Reenacts s. 20.435, F.S., relating to Department of Health; trust funds.

Section 8. Reenacts s. 794.055, F.S., relating to access to services for victims of sexual battery.

Section 9. Amends s. 960.003, F.S., relating to HIV testing for persons charged with or alleged by petition for delinquency to have committed certain offenses; disclosure of results to victims.

Section 10. Amends s. 960.198, F.S., relating to relocation assistance for victims of domestic violence and sexual violence.

Section 11. Amends s. 1003.42, F.S., relating to required instruction.

Section 12. Provides an effective date of July 1, 2011.

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

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

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

See Fiscal Comments.

---

<sup>20</sup> 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.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

HB 251's addition of crimes to be included in the 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.

HB 251's expansion of financial relocation assistance to victims of sexual violence will 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.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

**Collateral crime evidence**

Among the crimes added to s. 90.404(2)(b) 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, . . ." <sup>21</sup> Under this bill, a person charged with a kidnapping or false imprisonment that doesn't include any fact "of a sexual nature" may have

---

<sup>21</sup> McLean, *supra* at 1259.



the state seeking to admit into evidence collateral crime evidence of a stalking, also with no facts of a sexual nature surrounding the collateral act. Because HB 251 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 for 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.<sup>22</sup> Since that time, the Legislature has passed acts which the court has declared impermissibly procedural.<sup>23</sup>

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.<sup>24</sup> 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. They 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).<sup>25</sup>

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. For 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. . . ."

HB 251'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.

---

<sup>22</sup> *In re Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a))*, 281 So. 2d 204, 205 (Fla. 1973).

<sup>23</sup> See, Allen v. Butterworth, 756 So.2d 52 (Fla. 2000); invalidating legislation to reduce delays in death penalty cases; Haven v. Federal Savings & Loan, Assoc. v. Kirian, 579 So.2d 730, (Fla. 1991), invalidating a statute requiring a court to sever counterclaims for separate trial against a foreclosing mortgagee because it conflicted with court rules. See also, Watson v. First Florida Leasing, 537 So.2d 1370 (Fla. 1989); Johnson v. State, 336 So.2d 93 (Fla. 1976); Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977); Jackson v. Fla. Dept. of Corrections, 790 So.2d 381 (Fla. 2001); Massey v. David, 979 So.2d 931 (Fla. 2008).

<sup>24</sup> Massey v. David, 979 So.2d 931 (Fla. 2008).

<sup>25</sup> *Id.* at 937.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

It should be noted that some of the offenses added to fund the Rape Crisis Program Trust Fund are not sexual offenses. Specifically, 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, and s. 836.10, F.S., Written threats to kill or do bodily injury.

With respect to the amendment in section 4 to the video voyeurism statute of limitations, 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.

Section 10 of the bill appears to add the phrase “or to a victim of sexual violence” in the wrong place in the subsection amended. It appears that this term belongs after the reference to “domestic violence” on line 234. An additional reference to escaping from a sexual violence environment would also clarify the intended effect of the amendment to the subsection.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**