SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1316

SPONSOR: Senator Brown-Waite

SUBJECT: Florida Evidence Code

DATE: March 8, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

This bill amends s. 90.404(2), F.S., of the Florida Evidence Code. The bill adds a new paragraph to subsection (2) of s. 90.404, F.S., to provide that, in a criminal case involving child molestation, evidence of the defendant's commission of other acts of child molestation is admissible and may be considered for its bearing on any matter which is relevant. The term "child molestation" means conduct proscribed by s. 794.011, F.S., or s. 800.04, F.S.

The bill also amends paragraph (a) of s. 90.404(2), F.S., to clarify that the enumerated list of issues which can be proven by evidence of other crimes is not an all inclusive list and, accordingly, not limited to the instances specifically identified therein.

The bill further amends s. 90.404(2), F.S., to require the state to provide notice, no later than 10 days before trial, of its intent to offer evidence of other acts of child molestation. The notice must be provided to the defendant or the defendant's attorney.

This bill substantially amends section 90.404(2) of the Florida Statutes.

II. Present Situation:

Section 90.404(2)(a), F.S., which is part of the Florida Evidence Code, currently provides the following:

(2) OTHER CRIMES, WRONGS, OR ACTS.--

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as 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.

Section 90.404(2)(a), F.S., is an exception to the basic exclusionary rule contained in s. 90.404(1), F.S., that evidence of a person's character or a trait of character is inadmissible to

prove action in conformity with it on a particular occasion. This basic prohibition is often called the "propensity rule" and it creates a forbidden inferential pattern. Under the rule, a person's character or propensity to act in a certain way may not be offered as a basis for the inference that on a specific occasion he or she acted in conformity with the propensity or the character trait. *Eleazer & Weissenberger, Florida Evidence, Ch. 404* at 149 (1994). The policy behind this exclusionary rule is that evidence of a person's character or character traits tends to distract the trier of fact from the primary issues of the case and such evidence creates a substantial risk that a finding will be predicated on the trier's attitude toward a person's character as opposed to an objective determination of the facts. *Id.*

Section 90.404(2)(a), F.S., is a codification of the *Williams* rule, which was announced by the Florida Supreme Court in the case of *Williams v. State*, 110 So.2d 654 (Fla. 1959). In *Williams*, the court upheld the admission of the similar fact evidence and expressed the rule both in terms of when such evidence is admissible and when it is not:

> Our view of the proper rule simply is that *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... As we did in *Talley v. State* we emphasize that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible. Nonetheless, relevancy is the test. If found to be relevant for any purpose save that of showing bad character or propensity, then it should be admitted (emphasis in original).

Id. at 659, 660 and 662.

In criminal prosecutions, similar fact evidence that the defendant committed a collateral offense is inherently prejudicial. *Heuring v. State*, 513 So.2d 122, 124 (Fla. 1987). Introduction of such evidence creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the charged offense. *Id.* Such evidence is inadmissible if it is solely relevant to prove bad character or propensity to commit the crime. *Id.* To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. *Id.* The charged and collateral offenses must be not only strikingly similar, but they also must share some unique characteristic or combination of characteristics which sets them apart from other offenses. *Id.*

Even if evidence of other crimes is relevant and not barred by the *Williams* rule (i.e. s. 90.404(2)(a), F.S.) it still may be excluded under s. 90.403, F.S., if its probative value is substantially outweighed by undue prejudice. *Williams v. State*, 621 So.2d 413, 415 (Fla. 1993). Section 90.403, F.S., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Unfairly prejudicial evidence is a type that excessively arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish. *Eleazer & Weissenberger, Florida Evidence,* Ch. 403 at 138 (1994); *Young v. State*, 234 So.2d 341, 348 (Fla. 1970). Usually, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect. *Eleazer,* at 138.

In *Heuring v. State,* 513 So.2d 122 (Fla. 1987), the Florida Supreme Court expanded the *Williams* rule in cases involving sexual battery committed within a familial context. The court recognized that such cases present special problems. *Id.* at 124. Because the victim knows the perpetrator, the enumerated purposes of the *Williams* rule, such as identity, are not at issue. Also, the victim is typically the sole eyewitness and there is little, if any, corroborative evidence. The victim's credibility is the focal issue. *Id.* Accordingly, the court held that in the narrow class of cases involving sexual battery within a familial context similar fact evidence is admissible to corroborate the testimony of the victim. *Id.* at 124-125.

Nevertheless, the charged and collateral offenses must share some unique characteristic or combination of characteristics which sets them apart from other offenses. *Id.* at 124. The Florida Supreme Court has ruled that, although sexual battery on an underage child is a reprehensible offense, it is not so unique in itself that it should be held uniformly admissible under s. 90.404(2), F.S. *Feller v. State,* 637 So.2d 911, 916 (Fla. 1994). Additionally, *Heuring* does not stand for the proposition that any evidence of sexual abuse of a child is *per se* admissible. *Id.* There must be some additional showing of similarity in order for the collateral sex crime evidence to be admissible. *Saffor v. State*, 660 So.2d 668, 672 (Fla. 1995). The additional showing of similarity will vary depending on the facts of the case and must be determined on a case-by-case basis. *Id.* However, the strict similarity in the nature of the offenses and the circumstances surrounding their commission which would be required in cases occurring outside the familial context is relaxed by virtue of the evidence proving that both crimes were committed in the familial context. *Id.* The Florida Supreme Court extended *Heuring* to also apply to situations where a non-family member legitimately exercises parental-type authority over a child or maintains custody of a child on a regular basis. *State v. Rawls*, 649 So.2d 1350, 1353 (Fla. 1994).

Before evidence of a collateral offense can be admitted under the *Williams* rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant. *Audano v. State,* 641 So.2d 1356 (Fla. 2d D.C.A. 1994). In determining the admissibility of collateral crime evidence, the trial court must make two determinations: (1) whether the evidence is relevant or material to some aspect of the offense being tried, and (2) whether the probative value is substantially outweighed by any prejudice. *Id.*, citing ss. 90.403 and 90.404(2)(a), F.S. Since *Williams* rule evidence must have its probative value weighed against its undue prejudice under s. 90.403, F.S., similar fact evidence which is suspect in establishing the defendant's involvement should be excluded since the undue prejudice would substantially outweigh the probative value of the evidence. *Erhardt, Florida Evidence,* s. 404.9 (1999 ed.).

III. Effect of Proposed Changes:

The bill amends subsection (2) of s. 90.404, F.S., in three places. First, the bill adds the phrase "including but not limited to," to subsection (2)(a) of s. 90.404, F.S. This clarifies that the enumerated list of issues of which evidence of other crimes, wrongs, or acts may be relevant to prove is a non-inclusive list and is not statutorily limited to the instances specifically enumerated therein. This clarification is in accordance with existing case law . *See, Saffor v. State,* 660 So.2d 668, 674 (Fla. 1995).

Second, the bill adds a new paragraph (b) to subsection (2) of s. 90.404, F.S. This provision states that in a criminal case where the defendant is charged with a crime involving child molestation,

evidence of the defendant's commission of other acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. For purposes, of this paragraph the term child molestation means conduct proscribed by s. 794.011, F.S. (sexual battery), or s. 800.04, F.S.(lewd or lascivious: battery, molestation, conduct, or exhibition), when committed against a person 16 years of age or younger.

The effect of this change is to substantially relax the *Williams* rule as it applies to criminal cases involving child molestation. Although the Florida Supreme Court relaxed the *Williams* rule for child sexual abuse cases occurring in the familial context in *Heuring,* and relaxed it even further in *Rawls* when it extended *Heuring* to a non-familial, custodial setting, the bill would relax the *Williams* rule for all child molestation cases, regardless of the presence of a custodial or familial setting. Under the bill, any evidence of prior or subsequent acts of child molestation would be admissible regardless of how similar or dissimilar the other acts are compared to the charged crime. However, the evidence would still be subject to the s. 90.403, F.S., scrutiny of weighing its probative value against its prejudicial effect. This relaxed standard is similar to the one contained in Rule 414 of the Federal Rules of Evidence.

Third, the bill re-designates existing paragraph (b) as paragraph (c) of s. 90.404(2), F.S. This paragraph requires the state in criminal actions to provide notice, no fewer than 10 days before trial, of the state's intent to offer evidence of other criminal offenses. The bill adds a requirement that the state provide such notice to the defendant or to the defendant's counsel. Currently, this provision only requires the state to provide the notice to the accused.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.