

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 Criminal Justice Committee

BILL: SB 704

INTRODUCER: Senators Thrasher and Gaetz

SUBJECT: Capital Felonies

DATE: January 21, 2010 REVISED: 02/03/10

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/1 amendment
2.			JU	
3.			JA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill adds an additional aggravating circumstance for consideration by the judge and jury in a capital sentencing proceeding to determine whether the death penalty is warranted. The new aggravating circumstance is that the capital felony was committed by a person subject to an injunction for protection against domestic violence, repeat violence, sexual violence, dating violence, or a foreign protection order and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

This bill substantially amends section 921.141 of the Florida Statutes.

II. Present Situation:

Capital Sentencing Proceedings

As provided in s. 921.141, F.S., when a defendant is convicted of a capital felony for which a sentence of death or life imprisonment (without parole) are the statutorily-authorized penalties, a separate sentencing proceeding is required upon conviction or adjudication of guilt for the capital felony.

This sentencing proceeding is conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in ch. 913, F.S., to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding is conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and includes matters relating to any of the aggravating or mitigating circumstances enumerated in s. 921.141(5) and (6), F.S. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, s. 921.141, F.S., does not authorize the introduction of any evidence secured in violation of the Florida Constitution or United States Constitution. The state and the defendant or defendant's counsel are permitted to present argument for and against the death sentence.

After hearing all the evidence, the jury deliberates and renders an advisory sentence to the court, based upon the following matters:

- Whether sufficient aggravating circumstances exist as enumerated in s. 921.141(5), F.S.;
- Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The court may or may not follow the recommendation of the jury.¹ Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, enters a sentence of life imprisonment or death, but if the court imposes a death sentence, it is required to set forth in writing its findings upon which the death sentence is based as to the facts:

- That sufficient aggravating circumstances exist as enumerated in s. 921.141(5), F.S, and
- That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Aggravating circumstances are limited to the following circumstances enumerated in s. 921.141(5), F.S.:

- The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.

¹ The jury's recommendation is entitled to "great weight." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975).

- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
- The capital felony was committed by a criminal gang member, as defined in s. 874.03, F.S.
- The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21, F.S., or a person previously designated as a sexual predator who had the sexual predator designation removed.

Mitigating circumstances are not limited to the mitigating circumstances enumerated in s. 921.141(6), F.S.,² which includes the following mitigating circumstances:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.
- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

² See, e.g., *Coday v. State*, 946 So.2d 988 (Fla.2006) (considering non-statutory mitigating circumstances).

Injunction for Protection Against Domestic Violence:

Section 741.30, F.S., creates a cause of action for an injunction for protection against domestic violence.³ An individual who is the victim of domestic violence, or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence, may petition the court for an injunction for protection. The court may grant such relief as it deems proper, including an injunction:

- Restraining the respondent from committing any acts of domestic violence;
- Awarding to the petitioner the exclusive use and possession of the dwelling the parties share or excluding the respondent from the petitioner's residence;
- Awarding to the petitioner temporary custody of the minor children of the parties;
- Establishing temporary support for the minor child or children or the petitioner;
- Ordering the respondent to participate in treatment, intervention or counseling services to be paid for by the respondent;
- Referring the petitioner to a certified domestic violence center; and
- Other relief as the court deems necessary for the protection of the victim of domestic violence.

The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under s. 741.31, F.S. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including, but not limited to, a monetary assessment or a fine. The petitioner or respondent may move the court to modify or dissolve an injunction at any time.

Section 741.31, F.S., provides that it is a first degree misdemeanor⁴ for a person to willfully violate an injunction for protection against domestic violence issued pursuant to s. 741.30, F.S., by:

- Refusing to vacate the dwelling that the parties share;
- Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Committing an act of domestic violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

³ Section 741.28(2), F.S., defines "domestic violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member."

⁴ Pursuant to ss. 775.082 and 775.083, a first degree misdemeanor is punishable by less than one year in jail, a fine not exceeding \$1,000, or jail and a fine.

- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court.

Section 741.31, F.S., also provides that it is a violation of s. 790.233, F.S.,⁵ and a first degree misdemeanor for a person to violate a final injunction for protection against domestic violence by having in his or her care, custody, possession, or control any firearm or ammunition.

Section 741.31, F.S., further requires the court to order the respondent to attend a batterers' intervention program if it finds a willful violation of a domestic violence injunction, unless the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why a batterers' intervention program would be inappropriate. Additionally, any person who suffers an injury and/or loss as a result of a violation of an injunction for protection against domestic violence may be awarded economic damages for that injury and/or loss by the court issuing the injunction. Damages include costs and attorneys' fees for enforcement of the injunction.

Injunction for Protection Against Repeat Violence, Sexual Violence, or Dating Violence

Section 784.046, F.S., creates a cause of action for an injunction for protection against repeat violence,⁶ dating violence,⁷ and sexual violence.⁸ Any person who is the victim of repeat violence or the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against repeat violence on behalf of the minor child may petition for an injunction for protection against repeat violence.

Any person who is the victim of dating violence and has reasonable cause to believe he or she is in imminent danger of becoming the victim of another act of dating violence, or any person who has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence, or the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against dating violence on behalf of that minor child, may petition for an injunction for protection against dating violence.

⁵ Section 790.233, F.S., provides that it is a first degree misdemeanor for a person to have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is currently in force and effect, restraining that person from acts of domestic violence, and that has been issued under s. 741.30, F.S.

⁶ "Repeat violence" is defined as "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member." Section 784.046(1)(b), F.S.

⁷ "Dating violence" is defined as "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature." The determination of such a relationship is determined based on consideration of the following factors: a dating relationship that existed within the past six months; the nature of the relationship was characterized by the expectation of affection or sexual involvement between the parties; and the persons involved in the relationship were involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization. Section 784.046(1)(d), F.S.

⁸ "Sexual violence" is defined as any one incident of: sexual battery, as defined in ch. 794, F.S.; a lewd or lascivious act, as defined in ch. 800, F.S., committed upon or in the presence of a person younger than 16 years of age; luring or enticing a child, as described in ch. 787, F.S.; sexual performance by a child, as described in ch. 827, F.S.; or any other forcible felony wherein a sexual act is committed or attempted. For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney. Section 784.046(1)(c), F.S.

A person who is the victim of sexual violence or the parent or legal guardian of a minor child who is living at home who is the victim of sexual violence may petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child if:

- The person has reported the sexual violence to a law enforcement agency and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or
- The respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence and the respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed.

When it appears to the court that an immediate and present danger of violence exists, the court may grant a temporary injunction, which may be granted in an ex parte hearing, pending a full hearing, and may grant such relief as it deems proper. The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.

Section 784.047, F.S., provides penalties for violating an injunction for protection against repeat violence, sexual violence, or dating violence. The statute specifies that a person commits a first-degree misdemeanor if he or she willfully violates an injunction for protection against repeat violence, sexual violence, or dating violence by:

- Refusing to vacate the dwelling that the parties share;
- Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Committing an act of repeat violence, sexual violence, or dating violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party.

Foreign Protection Order

Section 741.315, F.S., provides that an injunction for protection against domestic violence issued by a court of a foreign state must be accorded full faith and credit by the courts of this state and enforced by a law enforcement agency as if it were the order of a Florida court. Penalties provided in ss. 741.31 and 784.047, F.S., are applicable to a foreign protection order accorded full faith and credit pursuant to s. 741.315, F.S.

III. Effect of Proposed Changes:

The bill amends s. 921.141, F.S., to add an additional aggravating circumstance for consideration by the judge and jury in a capital sentencing proceeding to determine whether the death penalty is warranted. The new aggravating circumstance is that the capital felony was committed by a person subject to an injunction for protection against domestic violence, repeat violence, sexual

violence, dating violence, or a foreign protection order, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.⁹

The effective date of the bill is July 1, 2010.

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:

It is unknown if this bill will have a significant workload impact on prosecutors, public defenders, the Attorney General, and capital collateral counsel, since it is not possible at this time to ascertain the extent to which the new aggravating circumstance will be applied to capital felony cases.

A preliminary analysis of SB 704 was provided by the Florida Department of Corrections. The department states:

In Fiscal Year 2008-2009, the Department received 244 inmates with a sentence comprised of a capital felony. In Fiscal Year 2007-2008, the Department received 277 inmates with a sentence comprised of a capital felony. However, the Department *cannot* ascertain how many of these offenders were subject to an injunction or protection order as specified in the bill.

⁹ The bill appears to be limited to situations in which there is an active protection order and not to situations in which a protection order has expired or been dissolved, there is a pending petition for a protection order, or a petition for a protection order was made but denied by the court.

Hence, impact is indeterminate. Final impact to be determined by the Criminal Justice Impact Conference.¹⁰

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of criminal legislation has not yet met to consider SB 704.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Senate professional staff and staff of the Florida Coalition Against Domestic Violence (at Senate staff's request) were unable to locate any statistical data regarding the number of Florida deaths in which the decedent was murdered by the subject of a protective order granted to protect the decedent from the subject. However, there appear to be cases in which this situation occurs. For example, it was reported in the *Florida Times-Union* that in 2008 a Jacksonville man pled guilty to killing his girlfriend and her father within hours after a temporary injunction for protection against the man was made permanent.¹¹

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 962744 by Criminal Justice on February 3, 2010:
Provides for an effective date of October 1, 2010.

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

¹⁰ Analysis of SB 704, Florida Department of Corrections, dated December 10, 2009.

¹¹ See "Former Football Player Pleads Guilty to Killing 2," page B-2, *Florida Times-Union* (December 24, 2008). See also, Matt Coleman, "Protective order fails a mother; The father of her daughter is accused of killing her, her dad," page B-1, *Florida Times-Union* (October 24, 2008).