

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 Judiciary Committee

BILL: CS/SB 704

INTRODUCER: Judiciary Committee and Senators Thrasher and Gaetz

SUBJECT: Capital Felonies

DATE: March 10, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Fav/1 amendment
2.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

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 or life imprisonment 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, or dating violence, or a foreign protection order that is given full faith and credit in Florida, 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, Florida Statutes.

II. Present Situation:

Capital Sentencing Proceedings

When a defendant is convicted (or upon adjudication of guilt) of a capital felony, a separate sentencing proceeding is conducted to determine whether the defendant should be sentenced to death or life imprisonment. During the proceeding, all relevant evidence, regardless of whether it

would be admissible under the Florida rules of evidence, may be presented, including any aggravating or mitigating circumstances.¹ After hearing the evidence, the jury renders an advisory sentence to the judge based on:

- Whether sufficient aggravating circumstances exist;
- Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances; and
- Whether the defendant should be sentenced to life imprisonment or death based on the aggravating and mitigating circumstances.²

The judge is not required to follow the recommendation of the jury as to the sentencing; however, the jury's recommendation is entitled to "great weight."³ If the court sentences a person to death, the judge must make written findings that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.⁴

The aggravating factors that may be considered are:

- 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.
- 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.

¹ Section 921.141(1), F.S.

² Section 921.141(2), F.S.

³ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); see also *In re Standard Jury Instructions in Criminal Cases – Report No. 2005-2*, 22 So. 3d 17, 21 (Fla. 2009).

⁴ Section 921.141(3), F.S.

- 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.⁵

Section 921.141(6), F.S., provides a list of mitigating factors that a court may consider; however, mitigating factors are not limited by statute like the aggravating factors.⁶ The following are mitigating factors that a court may consider when sentencing a defendant:

- 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.

A conviction and sentence of death is subject to an automatic review by the Florida Supreme Court within two years after the filing of a notice of appeal. Death penalty appeals to the Florida Supreme Court take priority over all other cases.⁷

Injunction for Protection Against Domestic Violence

Section 741.30, F.S., creates a cause of action for an injunction for protection against domestic violence.⁸ 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 domestic violence, may petition the court for an injunction for protection. The court may grant such relief as it deems proper, including an injunction:

⁵ Section 921.141(5), F.S. A court may only consider the aggravating factors provided for by statute.

⁶ See, e.g., *Coday v. State*, 946 So. 2d 988, 1000-03 (Fla. 2006) (discussing use of nonstatutory mitigating circumstances, as well as statutory mitigating circumstances).

⁷ Section 921.141(4), F.S.

⁸ 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."

- 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 100 percent of the timesharing in a temporary parenting plan 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; or
- Other relief as the court deems necessary for the protection of the victim of domestic violence.⁹

If the court believes that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing, that:

- Restrains the respondent from committing any acts of domestic violence;
- Awards the petitioner temporary exclusive use and possession of the dwelling that the parties share or excludes the respondent from the residence of the petitioner; or
- Provides the petitioner a temporary parenting plan.¹⁰

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.¹¹ The court may enforce compliance with the injunction through any appropriate civil and criminal remedies, such as a monetary assessment or a fine.¹² The petitioner or respondent may move the court to modify or dissolve an injunction at any time.¹³

Section 741.31, F.S., provides that it is a first-degree misdemeanor¹⁴ for a person to willfully violate an injunction for protection against domestic violence 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;

⁹ Section 741.30(6), F.S.

¹⁰ Section 741.30(5), F.S.

¹¹ Section 741.30(9), F.S.

¹² *Id.*

¹³ Section 741.30(10), F.S.

¹⁴ A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year or a fine not exceeding \$1,000, or both. Sections 775.082(4) and 775.083(1), F.S.

- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- 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.

Any person who suffers an injury or loss as a result of a violation of an injunction for protection against domestic violence may receive economic damages by the court issuing the injunction. Damages include costs and attorneys' fees for enforcement of the injunction.¹⁵

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,¹⁶ dating violence,¹⁷ and sexual violence.¹⁸ A person who is the victim of repeat or dating violence, or has reason to believe he or she is in imminent danger of becoming a victim of dating violence, or the parent or legal guardian of a minor child who is living at home and who seeks an injunction for protection against repeat or dating violence on behalf of the minor child may petition for an injunction.

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 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.

¹⁵ Section 741.31(6), F.S.

¹⁶ "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.

¹⁷ "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 existence 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.

¹⁸ "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.

If an immediate and present danger of violence exists, the court may grant a temporary injunction *ex parte*, pending a full hearing, and may grant such relief as it deems proper.¹⁹ The court may enforce a violation of an injunction for protection through a civil or criminal contempt proceeding. The court may enforce compliance with the injunction by imposing a monetary assessment on the respondent.²⁰ The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.²¹

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. *Ex parte* foreign injunctions for protection may not be enforced in Florida unless the respondent has been given notice and an opportunity to be heard within a reasonable time after the order is issued. A person who willfully violates a foreign protection order accorded full faith and credit commits a misdemeanor of the first degree.²²

III. Effect of Proposed Changes:

This 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 or life imprisonment 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, or dating violence, or a foreign protection order that is given full faith and credit in Florida, and was committed against the petitioner who obtained the injunction or protection order, or any spouse, child, sibling, or parent of the petitioner.

¹⁹ Section 784.046(6), F.S.

²⁰ Section 784.046(9), F.S.

²¹ Section 784.046(10), F.S.

²² See ss. 741.31(4) and 784.047, F.S.

The bill does not specify whether the injunction for protection can be a temporary ex parte injunction or if it must be a permanent injunction. The bill also appears to be limited to situations in which there is an active protection order and not to situations where a protection order has expired or been dissolved, there is a pending petition for a protection order, or there was a petition for a protection order, but it was denied by the court.

The effective date of the bill is October 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. The Office of the State Courts Administrator (OSCA) analyzed HB 259, which is substantially similar to this bill. The OSCA anticipates that the bill will only have a minimal impact on the judicial workload because other aggravated circumstances usually apply to capital felony cases, so this factor would not be the only one used in seeking a sentence of death.²³

According to the Florida Department of Corrections:

²³ Office of the State Courts Administrator, *Judicial Impact Statement – HB 259* (Nov. 9, 2009) (on file with the Senate Judiciary Committee).

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.

Hence, impact is indeterminate. Final impact to be determined by the Criminal Justice Impact Conference.²⁴

The Criminal Justice Impact Conference (conference), which provides the final, official estimate of the prison bed impact of criminal legislation, met on February 23, 2010, to consider this bill. According to the conference, this bill will not have a prison bed impact.²⁵

VI. Technical Deficiencies:

None.

VII. Related Issues:

Professional staff of the Senate Committee on Criminal Justice and staff of the Florida Coalition Against Domestic Violence (at the request of professional staff) 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. However, there appear to be cases in which this situation occurs. For example, in 2008 the *Florida Times-Union* reported that 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.²⁶

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 9, 2010:

The committee substitute changes the effective date of the bill from July 1, 2010, to October 1, 2010.

B. Amendments:

None.

²⁴ Florida Dep't of Corrections, *SB 704 – Capital Felonies* (Dec. 10, 2009) (on file with the Senate Committee on Judiciary).

²⁵ Office of Economic and Demographic Research, The Florida Legislature, *Criminal Justice Impact Conference 2010 Legislature* (Feb. 23, 2010), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the “2010 Conference Results” link) (last visited Mar. 4, 2010).

²⁶ See Matt Coleman, *Protective order fails a mother; The father of her daughter is accused of killing her, her dad*, FLA. TIMES-UNION, Oct. 24, 2008, at B-1; Scott Butler, *Former Football Player Pleads Guilty to Killing 2*, FLA. TIMES-UNION, Dec. 24, 2008, at B-2, *Florida Times-Union*, Dec. 24, 2008.

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