

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 Committee on Rules

BILL: SB 280

INTRODUCER: Senator Bracy

SUBJECT: Sentencing for Capital Felonies

DATE: February 21, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Hrdlicka</u>	<u>CJ</u>	Favorable
2.	<u>Cellon</u>	<u>Phelps</u>	<u>RC</u>	Pre-meeting

I. Summary:

SB 280 amends the death penalty sentencing statutes to require jury unanimity in death penalty sentencing procedures.

In October 2016, the Florida Supreme Court determined in *Hurst v. State* that in order for the death penalty to be imposed the sentencing phase jury (if the jury was not waived) must vote unanimously for a death sentence.¹ The *Hurst v. State* ruling was applied to the 2016 death penalty sentencing statutes challenged in *Perry v. State*.²

Amending ss. 921.141 and 921.142, F.S., to require unanimity in the jury vote for death will satisfy the constitutional requirements announced by the court in the *Hurst* and *Perry* opinions.³

II. Present Situation:

2016 Death Penalty Sentencing Statute Enacted after *Hurst v. Florida*

Timothy Lee Hurst was convicted in Florida of first-degree murder for fatally stabbing his co-worker in 1998 with a box cutter.⁴ A jury recommended a sentence of death by a seven-to-five vote; thereafter, the trial court entered a sentence of death.⁵ Hurst challenged his sentence arguing before the U.S. Supreme Court that the jury was required to find specific aggravating factors and to issue a unanimous advisory death sentencing recommendation.⁶

¹ *Hurst v. State*, No. SC12-1947 (Fla., Oct. 14, 2016).

² *Perry v. State*, No. SC16-547 (Fla., Oct. 14, 2016); ch. 2016-13, L.O.F. (2016); s. 921.141, F.S. (2016).

³ *Supra*, fn.1 and fn.2.

⁴ *Hurst v. State*, 147 So.3d 435, 437 (Fla. 2014), *rev'd and remanded*, 136 S.Ct. 616 (U.S. 2016).

⁵ *Id.* at page 440.

⁶ *Id.* at page 446.

On the opening day of the 2016 Legislative Session, the U.S. Supreme Court handed down its opinion in *Hurst v. Florida*.⁷

The *Hurst v. Florida* court ruled that “the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.”⁸ Until the *Hurst v. Florida* opinion was issued, Florida’s capital sentencing scheme had withstood challenges based on the 8th, 14th, and 6th Amendments.⁹

In an effort to comply with the U.S. Supreme Court’s opinion, the Legislature passed HB 7101 which became law on March 7, 2016.¹⁰ The new law created the following requirements for Florida’s death penalty sentencing scheme:

- The jury is required to identify each aggravating factor found to exist by a unanimous vote in order for a defendant to be eligible for a sentence of death;
- The jury is required to determine whether the aggravating factors outweigh the mitigating circumstances in reaching its sentencing recommendation;
- If at least ten of the twelve members of the jury determine that the defendant should be sentenced to death, the jury’s recommendation is a sentence of death; if fewer than ten members of the jury determine that the defendant should be sentenced to death, the jury is required to recommend a sentence of life imprisonment without the possibility of parole;
- The judge is permitted to impose a sentence of life imprisonment without the possibility of parole even if the jury recommends a sentence of death;
- The judge may not “override” the jury’s recommendation of a sentence of life imprisonment by imposing a sentence of death; and
- The prosecutor is required to provide notice to the defendant and file notice with the court when the state is seeking the death penalty. The notice must contain a list of the aggravating factors the state intends to prove.¹¹

2016 Death Penalty Statute Found Unconstitutional - The U.S. Supreme Court’s *Hurst v. Florida* Case as Applied by the Florida Supreme Court in *Hurst v. State*

The U.S. Supreme Court remanded Timothy Hurst’s case to the Florida Supreme Court. The state court issued its opinion in October 2016.¹²

Upon applying the *Hurst v. Florida* ruling to the state Hurst case, the Florida Supreme Court found the state’s 2012 statutory death penalty sentencing procedures to be unconstitutional.¹³

⁷ *Hurst v. Florida*, 136 S.Ct. 616 (U.S. 2016); 577 U.S. ____ (2016).

⁸ *Id.* at 619.

⁹ Cruel or unusual punishment, due process, and right to jury trial. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989).

¹⁰ Chapter 2016-13, L.O.F. (2016).

¹¹ Sections 782.04, 921.141, and 921.142, F.S. (2016).

¹² *Hurst v. State*, No. SC12-1947 (Fla., Oct. 14, 2016).

¹³ *Id.* Because *Hurst* was sentenced in 2012, the 2012 sentencing procedures statute, not the new 2016 statute, was applicable in his case on remand from the U.S. Supreme Court. The *Hurst v. State* opinion sets forth the current constitutional requirements for death penalty proceedings in Florida. The *Hurst* requirements have been applied by the Court beginning with the *Perry v. State* case which was decided on the same day as the *Hurst v. State* case. See *Perry*, *supra* fn. 2. (Note that in the *Hurst* case, the court found that Hurst was not entitled to an automatic life sentence. This is because the death penalty itself remains viable – it is only the application of the death penalty sentencing procedures that was addressed by the U.S.

The Florida Supreme Court's opinion in *Hurst v. State* was based on the Sixth Amendment, the Eighth Amendment, Florida's constitutional right to a trial by jury, and Florida jurisprudence as well.¹⁴

Specifically, the court stated: “[W]e hold that the [U.S.] Supreme Court’s decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury.”¹⁵ The court explained all the “critical findings” that must be found unanimously by the jury as:

- The existence of each aggravating factor that has been proven beyond a reasonable doubt;
- The finding that the aggravating factors are sufficient; and
- The finding that the aggravating factors outweigh the mitigating circumstances.

Further, the court stated: “We also hold...that in order for the trial court to impose a sentence of death, *the jury’s recommended sentence of death must be unanimous.*”¹⁶

The Application of *Hurst v. State* in *Perry v. State*

The same day the Florida Supreme Court decided the *Hurst v. State* case, setting forth the constitutional requirements for death penalty sentencing procedures, the court also issued the *Perry v. State* opinion.¹⁷

In *Perry*, the court considered the question of whether the 2016 death penalty sentencing statutes (referred to by the court as “the Act”) could constitutionally apply to cases in which the underlying crime was committed prior to the effective date of the statutes.¹⁸

The court concluded that the 2016 statutes could not constitutionally be applied in pending prosecutions “because the Act requires that only ten jurors, rather than all twelve, recommend a final sentence of death for death to be imposed.”¹⁹

The remaining “critical finding” provisions of the Act in s. 921.141(2), F.S., (2016), were found to pass constitutional muster as construed by the court.²⁰

Supreme Court in *Hurst v. Florida*. Timothy Hurst’s case was remanded by the Florida Supreme Court to the trial court for a new penalty phase proceeding. *Supra* fn. 1.)

¹⁴ *Id.* at pages 35 and 37.

¹⁵ *Id.* at page 4.

¹⁶ *Id.* (emphasis added).

¹⁷ *Perry v. State*, No. SC16-547 (Fla., Oct. 14, 2016).

¹⁸ *Id.* at page 8; ch. 2016-13, L.O.F. (2016), effective March 7, 2016.

¹⁹ *Id.* But see *Patrick Albert Evans v. State*, No. SC16-1946 and *Juan Rosario*, No. SC16-2133, slip opinion page 7; (Fla., Feb. 20, 2017) in which the court decided that pending death penalty trials can go forward under *Hurst* and *Perry* but only if there is a unanimous jury recommendation of death.

²⁰ *Id.* at page 20. These provisions are: jury unanimity in finding the existence of each aggravating factor that has been proven beyond a reasonable doubt; the finding that the aggravating factors are sufficient; and the finding that the aggravating factors outweigh the mitigating circumstances.

The Effect of *Hurst* and *Perry* on Pending Death Penalty Trials and Sentencing Phases

As of January 15, 2017, state attorneys reported a total of 313 pending death penalty cases of which 66 were ready for trial across the twenty judicial circuits.²¹

Because the sentencing phase procedure in place was at least partially unconstitutional due to the lack of jury unanimity in a final recommendation for death, cases in which the state was seeking the death penalty essentially ground to a halt.

In Clearwater, for example, one trial court determined that a trial could proceed if the court modified the jury instructions to incorporate the requirements of the *Hurst* and *Perry* opinions. The defendant sought expedited review of the trial court's decision to proceed and obtained a stay of the case.²² Meanwhile, a trial court in Ocala postponed the penalty phase of a double-murder case, apparently until there are new sentencing phase procedures in place.²³ A Pensacola prosecutor recently dismissed a murder charge against an inmate accused of beating his cellmate to death. According to news reports, the state will seek a new indictment in the case after the "Legislature's review of the death penalty."²⁴

On February 20, 2017, the Florida Supreme Court clarified its *Hurst* and *Perry* decisions in the pending *Evans* and *Rosario* cases. The court ruled that trial courts can proceed with death penalty cases because the unconstitutional provision of the 2016 statutes that requires only a 10-2 jury vote for death is essentially severable from the remaining constitutional provisions.

Going forward with trials will mean that trial courts will be expected to create jury instructions and verdict forms that require a unanimous vote in order for the death penalty to be imposed.

III. Effect of Proposed Changes:

The Florida Supreme Court decided in October 2016 that without jury unanimity in a final recommendation of death, the death sentence could not constitutionally be imposed in pending cases.²⁵

²¹ Data on file with Criminal Justice Committee staff.

²² The defendant, Patrick Albert Evans, obtained a stay of the trial proceedings from the Florida Supreme Court. *Patrick Albert Evans v. State*, Case No. SC16-1946 (Fla., Oct. 28, 2017); see also *Juan Rosario v. State*, Case No. SC16-2133 (Fla., December 14, 2016), consolidated with the *Evans* case. On February 20, 2017, the court clarified its *Hurst* and *Perry* decisions, holding that death penalty trials may be held but there must be a unanimous vote for the death sentence in order for death to be imposed.

²³ *Sentencing delayed after double-murder conviction*, Nicky Gorny, Ocala Star Banner,

<http://www.ocala.com/news/20161017/sentencing-delayed-after-double-murder-conviction> (last visited December 2, 2016).

²⁴ *State waits out death penalty legislation*, Emma Kennedy, Pensacola News Journal,

<http://www.pnj.com/story/news/crime/2017/01/09/state-waits-out-death-penalty-legislation/96351110/> (last visited January 10, 2017).

²⁵ *Perry v. State*, No. SC16-547 (Fla., Oct. 14, 2016); ch. 2016-13, L.O.F. (2016); s. 921.141, F.S. (2016). The *Perry* court did find, however, that the statutory provisions in ss. 921.141(2)(b) and 921.142(3)(b), F.S., could constitutionally apply in cases in which the underlying crime was committed prior to the effective date of the 2016 chapter law. Those provisions are: jury unanimity in finding the existence of each aggravating factor that has been proven beyond a reasonable doubt; the finding that the aggravating factors are sufficient; and the finding that the aggravating factors outweigh the mitigating circumstances. See also *Hurst v. State*, No. SC12-1947 (Fla., Oct. 14, 2016); and fn. 22.

The 2016 death penalty sentencing statutes, which were enacted in response to the U.S. Supreme Court's *Hurst v. Florida* opinion, require that a jury recommend a death sentence by at least a 10-2 vote.²⁶

The bill amends ss. 921.141 and 921.142, F.S., to require a unanimous vote of the jury for a recommendation of death.

This bill is effective upon becoming a law.

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 unlikely that this bill will have a fiscal impact to the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Opinions based on *Hurst* and *Perry* indicate a pattern of case disposition.

The Florida Supreme Court has issued opinions almost weekly related to death penalty sentencing procedures, the 2016 statutes, *Hurst v. State*, and *Perry v. State* since *Hurst* and *Perry* were decided in October 2016. A review of the court's opinions indicates the following patterns:

²⁶ Chapter 2016-13, L.O.F. (2016); ss. 921.141 and 921.142, F.S. (2016).

- In cases where the defendant waived a penalty phase jury, there is no valid *Hurst* claim.²⁷
- The court will not automatically vacate a death sentence that was the product of a non-unanimous jury recommendation, but will instead conduct a harmless error review.²⁸ If the jury's recommended death sentence was the result of a vote that was less than unanimous (a *Hurst* claim), the court has determined that the sentencing error was not harmless, vacated the death sentences, and remanded the cases to the trial court for a new penalty proceeding.²⁹
- Cases in which the jury's death sentence recommendation was unanimous have been upheld.³⁰

The Florida Supreme Court has ruled on the retroactive application of *Hurst*.

On December 22, 2016, the Florida Supreme Court issued two opinions addressing whether the *Hurst v. State* decision would apply retroactively.³¹

The opinions rely upon language in the *Hurst v. Florida* opinion discussing the application of the *Ring v. Arizona* decision to Florida's death penalty sentencing scheme.³²

It is the date of the *Ring* opinion (2002) that has become the Florida Supreme Court's bright line for deciding *Hurst*'s retroactivity.³³ If a sentence became final prior to the *Ring* decision, the

²⁷ *Davis v. State*, No. SC13-1 (Fla., Nov. 10, 2016); *Wright v. State*, No.13-1213 (Fla., Nov. 23, 2016); *Knight v. State*, *Knight v. Jones*, Nos. SC13-820, SC-14-567 (Fla., Dec. 15, 2016).

²⁸ The harmless error analysis places the burden on the state, as the beneficiary of the error, to prove that there is no reasonable possibility that the error contributed to the conviction or to the sentence recommended in the sentencing proceeding. Where the Court finds that the error was not harmless the case must be remanded to "correct" the error. *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986); *Zack v. State*, 753 So.2d 9, 20 (Fla. 2000).

²⁹ *Simmons v. State*, No. SC14-2314 (Fla., Dec. 22, 2016); *Franklin v. State*, No. SC13-1632 (Fla., Nov. 23, 2016); *Johnson v. State*, No. SC14-1175 (Fla., Dec. 1, 2016); *Williams v. State*, No. SC14-814 (Fla., Jan. 19, 2017); *Armstrong v. State*, *Armstrong v. Jones*, Nos. SC14-1967, SC15-767 (Fla., Jan. 19, 2017); *Kopsho v. State*, *Kopsho v. Jones*, Nos. SC15-1256, SC15-1762 (Fla., Jan. 19, 2017); *Calloway v. State*, No. SC10-2170 (Fla., Jan. 26, 2017); *McGirth v. State*, *McGirth v. Jones*, Nos. SC15-953, SC16-341 (Fla., Jan. 26, 2017).

³⁰ *Davis v. State*, No. SC11-1122 (Fla., Nov. 10, 2016); *King v. State*, No. SC14-1949 (Fla., Jan. 26, 2017). It should be noted that the court is taking into account the U.S. Supreme Court's admonishment in *Hurst v. Florida* that the court should not substitute the jury's recommendation for the factual findings required by the Sixth Amendment as the court conducts its harmless error review in these cases (see pages 47-48 in the *King* opinion.). Data gathered by the Clerk of the Florida Supreme Court showing jury sentencing votes in direct appeal death cases by calendar year of disposition by the court (2000 – 2016) indicates that 21% had unanimous death recommendations. See chart available on page 9, Florida Senate Bill Analysis, SB 7068 (2016); supplemental data provided by e-mail from Florida Supreme Court staff, November 30, 2016, on file with Criminal Justice Committee staff.

³¹ *Mosely v. State*, *Mosely v. Jones*, Nos. SC14-436, SC14-2108 (Fla., Dec. 22, 2016); *Asay v. State*, *Asay v. Jones*, Nos. SC16-223, SC16-102, SC16-628 (Fla., Dec. 22, 2016).

³² *Hurst v. Florida*, 136 S.Ct. 616 (U.S. 2016); 577 U.S. ____ (2016); In *Ring* the court ruled that juries rather than judges acting alone must make crucial factual determinations that subject a convicted murderer to the death penalty. The decision was clear as to its application to the Arizona death penalty sentencing scheme wherein the judge, without any input whatsoever from the jury beyond the verdict of guilty on the murder charge, made the sentencing decision. The court was not clear about whether Florida's "hybrid" sentencing scheme was effected by the *Ring* decision. (Florida's "hybrid" process provided for a jury recommendation of death or life from the jury, but the judge made the ultimate decision after considering the jury recommendation.) *Ring v. Arizona*, 536 U.S. 584 (2002).

³³ "[A] major development occurred in 2016, when the United States Supreme Court finally held in *Hurst v. Florida* that the 'analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's.'" *Mosely v. State*, *Mosely v. Jones*, Nos. SC14-436, SC14-2108 (Fla., Dec. 22, 2016), at page 42.

defendant is not entitled to *Hurst* relief.³⁴ If, however, the sentence became final on or after the date of the *Ring* opinion, *Hurst* applies.³⁵ For those defendants entitled to *Hurst* relief if the jury did not vote unanimously for a death sentence, based on case histories since *Hurst*, it appears those cases will be remanded for new penalty phases if the *Hurst* error was not harmless.³⁶

The Florida Public Defender Association indicated in its bill analysis that the court's decision on the application of retroactivity would "significantly increase both the workload and associated costs of public defender offices for several years to come."³⁷

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 921.141 and 921.142.

This bill reenacts the following sections of the Florida Statutes: 775.082, 782.04, 794.011, and 893.135.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

³⁴ *Asay v. State, Asay v. Jones*, Nos. SC16-223, SC16-102, SC16-628 (Fla., Dec. 22, 2016), at page 12. Note that the ruling included a lifting of Asay's stay of execution which was entered on March 2, 2016. See also *Gaskin v. State*, No. SC15-1884 (Fla., Jan. 19, 2017). A sentence becomes final on the disposition of the petition for writ of certiorari by the U.S. Supreme Court if filed, or 90 days after the Florida Supreme Court's decision affirming a judgment and sentence becomes final if the petition for certiorari review is not filed. Rule 3.851, FLRCrP.

³⁵ *Mosely v. State, Mosely v. Jones*, Nos. SC14-436, SC14-2108 (Fla., Dec. 22, 2016), at page 61.

³⁶ *Supra*, fn. 29.

³⁷ *2017 Agency Bill Analysis – SB 280*, Florida Public Defender Association, February 1, 2017, on file with the Criminal Justice Committee staff.