SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1070

SPONSOR: Senator Crist

SUBJECT: Imposition of a Death Sentence

DATE: March 3, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable
2.			ACJ	
3.			AP	
4.				
5.				
6.				

I. Summary:

Senate Bill 1070 provides that a person 18 years of age or older when that person committed a capital crime may be sentenced to death. If such person is not sentenced to death, the penalty is life imprisonment without possibility of parole (as provided in current law).The bill also provides that no person younger than 18 years of age when that person committed a capital crime may be sentenced to death. Again, the penalty for such person is life imprisonment without possibility of parole (as provided in current law).

This bill creates s. 921.1415, F.S., and substantially amends s. 775.082, F.S.

II. Present Situation:

A. Minimum Age Threshold for Imposing a Death Sentence

> As of December 31, 2002, 80 persons were on death row under death sentences received for juvenile crimes. These 80 condemned juveniles constituted about 2% of the total death row population of about 3,700. Although all were age 16 or 17 at the time of their crimes, their current ages range from 18 to 42. They were under death sentences in 15 different states and had been on death row from a few months to over twenty-two years....

See V. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes," January 1, 1973-September 30, 2002 (excerpt from undated, unpublished manuscript available on Death Penalty Information Center website).

Professor Streib reports that 21 offenders have been executed since 1974 for crimes committed as juveniles. None of these offenders were juveniles when they were executed.

Twenty of these offenders committed their capital crime at age 17; one committed his crime at age 16. The youngest offender (at time of execution) was 23. Eleven other offenders were in their twenties when executed; the remainder, in their thirties. None of the 21 executions occurred in Florida (the executions occurred in Texas (13), Virginia (3), Georgia (1), Louisiana (1), Missouri (1), Oklahoma (1), and South Carolina (1)). The Florida Department of Corrections' website reports that the last person who was a juvenile at the time of his execution was Lacy Stewart, who was 17 years of age when he was executed in 1948.

As of December 2002, four inmates on Florida's Death Row committed their crimes as juveniles (age 17). Telephone communication with Department of Corrections' staff.

According to the Death Penalty Information Center, 38 states authorize the death penalty for capital crimes (several, however, have carried out few, if any, executions in modern times). Sixteen states only allow a death sentence to be imposed on a person 18 years of age or older, and twenty-two states authorize imposition of a death sentence on a juvenile, as specified in the chart below:

Minimum Death Penalty Ages by State

Minimum Age for Death Penalty Eligibility	States
Age Sixteen (17 States)	Alabama, Arizona*, Arkansas*, Delaware*, Idaho*, Kentucky, Louisiana*, Mississippi*, Missouri, Nevada, Oklahoma*, Pennsylvania*, South Carolina*, South Dakota*, Utah*, Virginia, Wyoming
Age Seventeen (5 States)	Florida#, Georgia, New Hampshire, North Carolina, Texas
Age Eighteen (16 states and 2 federal jurisdictions)	California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Federal civilian government, Federal military

Express minimum age in statute, unless otherwise indicated:
* Minimum age required by U.S. Constitution per U.S. Supreme Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988)
# Minimum age required by Florida Constitution per Florida Supreme Court in *Brennan v. State*, 754 So.2d 1 (Fla. 1999)

Source: Death Penalty Information Center (website)

B. Statutory Authority for Imposition of a Death Sentence on a Juvenile

Section 985.225(1), F.S., provides, in part, the following:

> (1) A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 985.219(8)

> unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult:
> (a) On the offense punishable by death or by life imprisonment....

Section 775.082(1), F.S., provides that "[a] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141, F.S., results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."

Florida statutory law does not articulate any specific minimum-age threshold for imposition of a death sentence. However, the Florida Supreme Court has held that imposition of a death sentence on a person who was 16 years of age or younger when that person committed a capital crime is constitutionally barred. (See discussion, *supra*.)

C. Age as a Mitigator

Section 921.141(6)(g), F.S., provides that the "age of the defendant at the time of the crime" is a circumstance that can be raised in mitigation of a death sentence. The Florida Supreme Court has stated that "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes." *Urbin v. State*, 714 So.2d 411, 418 (Fla. 1998).

D. The 2002 Amendment to Florida's Constitution to Prohibit "Cruel and Unusual" Punishments

In the 2002 General Election, Florida voters approved an amendment to Article I, Section 17, of the Florida Constitution that, among other things, prohibits "cruel and unusual" punishments. (This amendment took effect January 7, 2003.) The Eighth Amendment of the United States Constitution also prohibits "cruel and unusual" punishments. Prior to the 2003 amendment of Section 17, that section prohibited "cruel or unusual" punishments.

The Florida Supreme Court has stated that the "cruel or unusual" punishment prohibition of the former Section 17 was more expansive than the Eighth Amendment.

> Because the clause contains the conjunction "or," it has been interpreted to mean that our state's constitutional framers intended alternative prohibitions or guarantees. The use of the disjunctive provides protection against both "cruel punishments" *and* "unusual punishments." *Allen v. State*, 636 So.2d 494, 497 n. 5 (Fla.1994): *Tillman v. State*, 591 So.2d 167, 169 n. 7 (Fla. 1991); *see also Armstrong v. Harris*, 773 So.2d 7, 17 n. 26 (Fla.2000), *cert. denied*, 532 U.S. 958, 121 S.Ct. 1487, 149 L.Ed.2d 374 (2001). Thus, the Florida Constitution provides a greater freedom in this regard than does the federal. "In short: '[T]he federal Constitution ... represents the floor for basic freedoms; the state constitution, the ceiling.'" *Traylor v. State*, 596 So.2d 957, 962 (Fla.1992) (quoted in *Armstrong*, 733 So.2d at 17).

Philipps v. State, 807 So.2d 713, 718-719 (Fla. 2d DCA 2002) (footnote omitted).

The Second District in *Philipps* further noted the following:

> Although the concept that the Florida Constitution provides a ceiling for basic freedoms has been outlined by the Florida Supreme Court in *Traylor* and *Armstrong*, the court has not fully delineated the contours of those rights in other cases. By and large, the Florida analysis of what constitutes a "cruel or unusual" penalty has followed the federal "cruel and unusual" analysis....

Philipps, 807 So.2d at 719.

E. Federal and Florida Case Decisions

Where the Florida Supreme Court has indicated a difference between the Section 17 and the Eighth Amendment is in relation to the proportionality review it conducts in capital cases and the issue of imposing a death sentence on a person who committed a capital crime as a juvenile (hereinafter referred to as the "minimum-age issue"). To date, case law which discusses or interprets Section 17 in relation to proportionality review and the minimum age issue is limited to discussion or interpretation of Section 17 prior to its 2003 amendment.

"Proportionality review" has been described by the Florida Supreme Court as a consideration of the "totality of circumstances" in a capital case and a comparison of that case with other capital cases. *Urbin*, 714 So.2d at 416. Proportionality review is not required under the United States Constitution, *see Pulley v. Harris*, 465 U.S. 37 (1984), but the Florida Supreme Court has held that it has a "variety of sources in Florida law," including the prohibition against "unusual" punishments in the former Section 17.

> The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. (footnote omitted) Art. I, Sec. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. *Id.* Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, Sec. 9, Fla. Const.; *Porter* [*v. State*, 564 So.2d 1060, 1064 (Fla.1990)].
>
> Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, Sec. 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction. *See id*. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

The minimum-age issue was first addressed by the United States Supreme Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality), in which the Court concluded that the Eighth and Fourteenth Amendments "prohibit the execution of a person who was under 16 years of age at the time of his or her offense." *Thompson*, 487 U.S. at 840. The decision relied on an analysis that focused on "three primary categories of factors": "relevant legislative enactments; past jury determinations; and proportionality of punishment based on the degree of culpability held by such young persons." J. Harrison, "The Juvenile Death Penalty In Florida: Should Sixteen-Year-Old Offenders Be Subject To Capital Punishment?", 1 *Barry L. Rev.* 159, 167 (Summer 2000). (footnote omitted).

Shortly after *Thompson*, the Florida Supreme Court in *LeCroy v. State*, 533 So.2d 750 (Fla. 1988), held that "there is no constitutional bar to the imposition of the death penalty on persons who are seventeen years of age at the time of the commission of the offense." *LeCroy*, 533 So.2d at 758. The Court's analysis focused primarily on relevant legislative enactments. The Court stated that "[w]hatever merit there may be in the argument that the legislature has not consciously considered and decided that persons sixteen years of age and younger may be subject to the death penalty, and that issue is not present here, it cannot be seriously argued that the legislature has not consciously decided that persons seventeen years of age may be punished as adults." *LeCroy*, 533 So. 2d at 757. The Court noted and distinguished *Thompson* from the case before it based on a number of factors, including that *Thompson* did not "suggest an intention to draw an arbitrary bright line" between 17-year olds and 18-year olds. *Id.*

The next decision by the Florida Supreme Court regarding the minimum-age issue focused on a person sentenced for a capital crime committed at age 15. In *Allen v. State*, 636 So.2d 494, 498 (Fla. 1994) (per curium with opinion), the Court did not engage in any analysis of relevant legislative enactments as it had done in *LeCroy*. In a rather cursory analysis, the Court focused on the fact that there was a "scarcity of death penalties imposed on persons less than sixteen years of age." *Allen*, 636 So.2d at 497. On the basis of this fact, the Court concluded that "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime," and such sentence is prohibited by Section 17. In a footnote, the Court noted that under Section 17, unlike the Eighth Amendment, alternatives were intended, citing to *Tillman*, *infra*. *Allen*, 636 So.2d at 497 n. 5. Finally, the Court remarked that it could "not countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where their crimes are similar." *Id.* (footnote omitted)

While the *Allen* Court believed that *Thompson* also supported the results it had reached, it did not rely on *Thompson* in its analysis, *Allen*, 636 So.2d at 498 n. 7, nor did it rely on the Eighth Amendment, *see Brennan v. State*, 754 So.2d 1, 6 (Fla.1999).

In *Stanford v. Kentucky*, 492 U.S. 361 (1989) (plurality), the United States Supreme Court discerned "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age," and concluded that such punishment did not "offend" the Eighth Amendment. *Stanford*, 492 U.S. at 379. The Court engaged in the type of analysis it had used in *Thompson.*

Ten years after *Stanford*, the Florida Supreme Court again addressed the minimum-age issue. In *Brennan v. State*, 754 So.2d 1 (Fla. 1999), the Court held that the imposition of a death sentence on Brennan for a crime he committed when he was 16 years of age constituted "cruel or unusual punishment" under Section 17. The Court agreed with Brennan that the reasoning in *Allen* compelled the same results in the instant case, which the Court found to be virtually identical to *Allen* "both because of the infrequency of the imposition of the death penalty on juveniles age sixteen at the time of the crime and because, since 1972, each death sentence imposed on a defendant who was sixteen at the time of the crime has been overturned by this Court." *Brennan*, 754 So.2d at 7. Therefore, the Court agreed that its decision in *Allen* interpreting the Florida Constitution compelled "the finding that the death penalty is cruel or unusual punishment if imposed on a defendant under the age of seventeen." *Id.*

The Court stated that the decision in *Stanford* was not binding on its state constitutional analysis, but that it was "mindful" that in that case "five members of the United States Supreme Court held that it was not per se cruel and unusual punishment under the Eighth Amendment to impose the death penalty on an individual sixteen or seventeen years of age at the time of the crime." *Id*. However, the Court believed that "there is an important aspect of the *Stanford* opinion that further supports our determination that the imposition of the death penalty in this case would be unconstitutional under both the Florida and the United States Constitutions...." *Brennan*, 754 So.2d at 8. The Court was persuaded that the *Stanford* holding was specific to the type of state laws reviewed in that case, and found those laws to be distinguishable from Florida's laws. *Id.* The Court stated that in *Stanford*, Justice Scalia, the author of the plurality opinion, had noted the "individualized consideration" given to the defendant's age in the state laws it reviewed, *e.g.*, laws requiring individualized consideration of the maturity and moral responsibility of a juvenile defendant before certifying the juvenile for trial as an adult. *Id.*, quoting *Stanford*, 492 U.S. at 375. *But see Brennan*, 754 So.2d at 14, 21-22 (Harding, C.J., joined by Wells, J. and Overton, Senior Justice, concurring in part and dissenting in part) (Justice Harding argued that the majority had taken Justice Scalia's discussion of the individualized considerations out of context; if placed in context, the discussion indicated that Justice Scalia was only concerned with the general concept of individualized testing for maturity and moral responsibility, a concern Justice Harding believed was addressed by the age mitigator in Florida law).

The Court noted that proportionality analysis required it "to compare similar defendants, facts and sentences," but found it difficult to conduct such analysis because "the death penalty has not been upheld for any other defendant who was sixteen years old at the time of the crime...." *Brennan*, 754 So.2d at 10. The Court found this difficulty "highlights the inherent problems in upholding the death penalty under these circumstances." *Id.*

The United States Supreme Court has not addressed the minimum-age-issue since its opinion in *Stanford*, though individual judges have discussed the issue. *See e.g.*, *In re Stanford*, 123 S.Ct. 472 (Mem) (2002) (Justice Stevens, dissenting, joined by Justices Souter, Ginsburg and Breyer). The Florida Supreme Court has not addressed the minimum-age issue since *Brennan*.

The 2003 amendment of Section 17 does raise a question regarding its possible effect on the *Brennan* decision and the *Allen* decision. Both cases interpreted Section 17 as it appeared prior to the 2003 amendment. In 1998, Florida voters passed an amendment to Section 17 identical to the amendment they passed in 2002. A challenge to the ballot summary of that amendment was pending before the Court when it decided *Brennan*, but the Court did not consider the 1998 amendments to Section 17 in its analysis because this was a new issue not raised nor briefed on appeal, the ballot summary case was pending, and it had "serious questions" regarding the amendment's retroactive applicability. *Brennan*, 754 So.2d at 6 n.4. Subsequent to *Brennan*, the ballot summary was stricken, thereby nullifying the amendment. *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000).

Another change made by the 2003 amendment of Section 17 is that it requires that the prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, be construed in conformity with decisions of the United States Supreme Court which interprets the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

While *Stanford* wasn't binding in *Brennan*, it might be binding in a future case in which *Stanford* was on point on the issue before the Court. The Court believed that *Stanford*, as the Court interpreted *Stanford*, supported its decision in *Brennan* in regard to imposing a death sentence on a person who committed a capital crime at age 16. If, at some future date, the Court's interpretation of *Stanford* were deemed on point on the issue of imposing a death sentence on a person who committed a capital crime at age 17, it might completely bar death sentencing of juveniles, notwithstanding *LeCroy*.

Conversely, were the Court in some future case involving a minimum-age issue in which *Stanford* is on point, to adopt Justice Harding's interpretation of *Stanford* in the *Brennan* case, it appears there would be no constitutional bar on imposing a death sentence on a person who committed a capital crime at age 16 and *LeCroy* would likely remain controlling precedent on imposing a death sentence on a person who committed a capital crime at age 17, essentially the state of the law as it existed *pre-Brennan*.

If the Legislature prohibited death sentencing of a person who committed a capital crime as a juvenile, as do some states and two federal jurisdictions, the minimum-age issue would no longer be an issue.

F. Life Imprisonment without Possibility of Parole

In regard to life imprisonment without parole for first degree murder, the Legislature clearly intended this sanction to be imposed "regardless of whether the offender is an adult or child." *Phillips v. State*, 807 So.2d 713, 719 (Fla. 2d DCA 2002). While the Supreme Court's reasoning in *Allen* was grounded "largely upon the historical fact that more than fifty years had elapsed since that penalty had been imposed" on a person under 17 years of age, "there has been no similar lapse" regarding juveniles receiving a sentence of life imprisonment without possibility of parole." *Phillips*, 807 So.2d at 720. "Sentences imposed on juveniles of life imprisonment are not uncommon in Florida Courts." *Blackshear v. State*, 771 So.2d 1199, 1201 (Fla. 4th DCA 2000).

III. Effect of Proposed Changes:

Senate Bill 1070 creates s. 921.1415, F.S., which provides that a person 18 years of age or older when that person committed a capital crime may be sentenced to death. The bill also provides that no person younger than 18 years of age when that person committed a capital crime may be sentenced to death.

The bill also amends s. 775.082, F.S., Florida's general penalties section, to provide that a person convicted of a capital crime when that person was younger than 18 years of age must be sentenced to life imprisonment without possibility of parole. A person who is convicted of a capital crime when that person is 18 years of age or older must be sentenced to death if the proceeding to determine sentence according to s. 921.141, F.S., results in a death-sentence finding, otherwise that person must be sentenced to life imprisonment without possibility of parole. The specification of life imprisonment without possibility of parole as the penalty if a death sentence is not imposed or imposable is simply a restatement of current law. Under current law, life imprisonment without possibility of parole is the only sanction for a capital felony if a death sentence is not imposed or imposable.

The bill takes effect 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. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There should be no adverse fiscal impact as a result of this bill. According to information received from Department of Corrections' staff there are four individuals currently on Florida's Death Row who were juveniles (age 17) when they committed their crime.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.