HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1297 Capital Sexual Battery
SPONSOR(S): Judiciary Committee, Criminal Justice Subcommittee, Baker and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1342

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 3 N, As CS	Hall	Hall
2) Judiciary Committee	16 Y, 7 N, As CS	Hall	Kramer

SUMMARY ANALYSIS

A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony. Under s. 775.082(1), F.S., a capital felony is punishable by a sentence of death or life imprisonment without the possibility of parole.

In *Buford v. State,* 403 So.2d 943 (Fla. 1981), the Florida Supreme Court (FSC) examined the constitutionality of a death sentence for capital sexual battery, holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." Later, in 2008, the United States Supreme Court (USSC) considered the same question in *Kennedy v. Louisiana,* 554 U.S. 407 (2008), and held that in their "independent judgment" the death penalty was not a proportional punishment for child rape.

CS/CS/HB 1297 amends s. 794.011, F.S., to authorize a death sentence for capital sexual battery. The bill creates s. 921.1425, F.S., to require a court to conduct a separate sentencing proceeding to determine whether a defendant convicted of a capital sexual battery offense for which the state is seeking the death penalty should be sentenced to death or life imprisonment. The bill establishes statutory aggravating factors and mitigating circumstances specific to capital sexual battery. Under the bill, a jury must determine if the state has proven, beyond a reasonable doubt, the existence of at least two aggravating factors. If the jury does not unanimously find at least two aggravating factors exist, the defendant is ineligible for a death sentence. If the jury unanimously finds the existence of at least two aggravating factors, the defendant is eligible for death and the jury must recommend to the court whether the defendant should be sentenced to life imprisonment or to death.

Under the bill, if at least eight jurors determine the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death, and the court after considering specified sentencing factors may impose a sentence of life imprisonment or a death sentence. If fewer than eight jurors determine the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment and the court must impose a life sentence. The bill requires the court to enter a written order, after imposing sentence, addressing specified sentencing factors and, when applicable, including the reasons the court did not accept a jury's recommended sentence.

The bill provides legislative findings that: a person who commits capital sexual battery carries a great risk of death and danger to vulnerable members of the state; such crimes destroy the innocence of a young child and violate all standards of decency held by a civilized society; and both *Buford v. State* and *Kennedy v. Louisiana* were wrongly decided and an egregious infringement of the state's power to punish the most heinous of crimes.

The bill requires a court to impose a death sentence notwithstanding existing case law which holds such a sentence unconstitutional under the Florida Constitution and the United States Constitution. However, in any case for which the FSC or the USSC reviews a death sentence imposed for a capital sexual battery offense, and in making such a review reconsiders the holdings in *Buford* and *Kennedy*, and determines a sentence of death remains unconstitutional, the court having jurisdiction over the person previously sentenced to death must resentence the person to life imprisonment. The bill authorizes the state to appeal a sentence of life imprisonment that resulted from a court's failure to comply with the sentencing procedures in s. 921.1425, F.S.

The bill specifies it is applicable to crimes committed on or after October 1, 2023. The bill may have a positive indeterminate impact on state expenditures to the extent the bill results in death sentences being imposed for capital sexual battery and a greater number of death sentences being subject to automatic review by the FSC.

The bill provides an effective date of October 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Capital Sexual Battery

Section 794.011, F.S., criminalizes sexual battery offenses and defines "sexual battery" as oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object.[1]

A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable by death or life imprisonment.[2] Additionally, without regard to the willingness or consent of the victim, which is not a defense to prosecution, a person who is in a position of familial or custodial authority to a person less than 18 years of age and who engages in any act with that person while the person is less than 12 years of age which constitutes sexual battery, or in an attempt to commit sexual battery injures the sexual organs of such person, commits a capital felony if the offender is 18 years of age or older.[3]

Capital Sentencing

Section 775.082(1), F.S., requires a person who has been convicted of a capital felony to be punished by death if a proceeding held to determine sentence under s. 921.141, F.S., results in a determination that such person shall be punished by death, otherwise the person shall be punished by life imprisonment and is not eligible for parole.

Under s. 921.141, F.S.,[4] to sentence a defendant to death when he or she has not waived the right to a sentencing proceeding by a jury, a jury must unanimously find:

- The existence of at least one aggravating factor and that any aggravating factors found to exist were proven beyond a reasonable doubt;
- The aggravating factors are sufficient to impose death;
- The aggravating factors outweigh the mitigating circumstances found to exist; and
- That, based on the prior considerations, the defendant should be sentenced to death. [5]

If a jury does not unanimously determine the defendant should be sentenced to death, the jury's recommendation must be a sentence of life imprisonment and the court must impose the recommended sentence. If, however, a jury unanimously determines a death sentence is appropriate, it must recommend a sentence of death. Thereafter, the judge must consider each aggravating factor found by the jury and all mitigating circumstances, and may impose a sentence of life imprisonment or a death sentence.[6]

The aggravating factors a jury may consider are limited by statute. Section 921.141(6), F.S., provides for the following aggravating factors:

- 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.

[1] S. 794.011(1)(j), F.S.
[2] Punishable as provided in ss. 775.082 and 921.141, F.S.
[3] S. 794.011(8)(c), F.S.
[4] Section 921.142, F.S., governs sentencing for defendants convicted of capital drug trafficking crimes. The statute substantially mirrors s. 921.141, F.S., but differs in the aggravating factors and mitigating circumstances eligible for consideration in a sentencing determination. This bill analysis primarily discusses s. 921.141, F.S., as it is the primary statute governing the imposition of the death penalty, however, the same discussion is applicable to s. 921.142, F.S.
[5] S. 921.141(2), F.S.
[6] S. 921.141(3), F.S.

- 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.
- 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.
- The capital felony was committed by a person subject to specified injunctions or foreign protection orders and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Mitigating circumstances are not limited by statute. Section 921.141(7), F.S., specifies that mitigating circumstances for a capital offense include the following:

- 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.

Section 775.082(2), F.S., sets out the procedure to be followed in the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court (FSC) or the United States Supreme Court (USSC). The court which has jurisdiction over a person previously sentenced to death for a capital felony must cause the person to be brought before the court and must sentence such a person to life imprisonment. A death sentence cannot be reduced as a result of a determination that a

method of execution has been held to be unconstitutional under the Florida Constitution or the U.S. Constitution.[7]

Jury Unanimity Requirements in Capital Sentencing

Florida's Capital Sentencing Scheme (Before 2016)

Under s. 921.141, F.S. (2015), if a defendant was convicted of a capital felony, a separate sentencing proceeding (typically referred to as the "penalty phase") was conducted before the trial jury or, if the defendant pled guilty, before a jury impaneled for only that purpose. During the penalty phase, the jury was required to recommend whether the defendant should be sentenced to death or to life imprisonment. After hearing all the evidence, the jury was required to render an advisory sentence to the judge based on the following factors:

- Whether sufficient aggravating circumstances existed;
- Whether sufficient mitigating circumstances existed which outweighed the aggravating circumstances; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The law required a simple majority vote of the jury to recommend a death sentence, meaning that a jury could recommend the punishment when at least seven jurors were in favor of death. The jury was not required to list any aggravating factors or mitigating circumstances it found or to disclose the number of jurors making such findings; however, the jury was required to find any aggravating circumstances were proven beyond a reasonable doubt.

The judge was not required to sentence a defendant as recommended by the jury. Under this framework, the judge conducted an independent analysis of the aggravating factors and mitigating circumstances. In rendering the sentence, the judge was required to give great weight to the jury's sentencing recommendation, however, he or she was permitted to sentence the defendant as he or she determined was appropriate, notwithstanding the jury's recommendation. If the judge sentenced a person to death, he or she was required to make written findings that sufficient aggravating factors existed and that any mitigating circumstances were insufficient to outweigh the aggravating factors. Each death sentence was subject to automatic review by the FSC.

Ring v. Arizona, 536 U.S. 584 (2002)

In June 2002, the USSC examined Arizona's capital sentencing scheme in *Ring v. Arizona*.[8] Arizona's law required a judge to determine the presence of aggravating factors and mitigating circumstances and authorized the judge to sentence a defendant to death only if the judge found at least one aggravating factor. The USSC struck down Arizona's law, holding it violated the Sixth Amendment[9] by permitting the sentencing judge alone, without a jury, to find aggravating circumstances justifying the imposition of the death penalty.

In the years following *Ring*, the FSC repeatedly held that Florida's capital sentencing scheme did not violate the Sixth Amendment under *Ring* because s. 921.141, F.S., was distinguishable from Arizona's scheme in that it allowed the jury to make an advisory sentencing recommendation and the judge to impose the sentence.[10]

[7] Section 775.15(1), F.S., sets forth the time limitations to initiate prosecutions for a capital felony. A capital felony may be commenced at any time. Further, if the death penalty is held to be unconstitutional by the Florida Supreme Court or the U.S. Supreme Court, all crimes designated as capital felonies shall be considered life felonies, and prosecution for such crimes may be commenced at any time.
[8] 536 U.S. 584 (2002).
[9] The Sixth Amendment in part provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ." U.S. CONST. amend VI. This right, in conjunction with the Due Process Clause, requires each element of a crime to be proven to a jury beyond a reasonable doubt. Applying this right, the USSC held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any facts increasing the penalty for a defendant must be submitted to a jury and proved beyond a reasonable doubt.
[10] *See, e.g.*, *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) *cert. denied*, 537 U.S. 1067 (2002); *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005).

Hurst v. State, 147 So. 3d 435 (Fla. 2014) (Hurst I)

In 1998, Timothy Lee Hurst was convicted of first-degree murder for fatally stabbing his co-worker with a box cutter. The jury recommended a death sentence by a seven-to-five vote and the trial court sentenced Hurst to death. Hurst challenged his death sentence, arguing it was unconstitutional for two reasons: because Florida law did not require the jury to find specific facts as to the aggravating factors and because Florida law did not require the jury to issue a unanimous sentencing recommendation.[11] The FSC affirmed Hurst's death sentence. In holding the sentence did not violate the USSC's holding in *Ring,* the Court adhered to Florida precedent of not adopting *Ring,* relying on Florida's jury advisory recommendation to distinguish Florida's scheme from Arizona's scheme, and citing to the Eleventh Circuit's recent approval of Florida's capital sentencing scheme.[12] Hurst appealed this denial to the USSC arguing that Florida's capital sentencing scheme violated *Ring* because it allowed the jury to recommend a death sentence with only a simple majority vote, it required the judge to find the facts necessary to impose the death penalty, and it authorized the judge to impose the death penalty.

Hurst v. Florida, 577 U.S. 92 (2016)

In January 2016, in *Hurst v. Florida*, the USSC held Florida's capital sentencing scheme unconstitutional in an eight-to-one opinion.[13] The USSC ruled that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence as a jury's "mere recommendation is not enough."[14] Specifically, the USSC held that a jury must unanimously find the existence of an aggravating factor, making the defendant eligible for a death sentence. A judge's finding of an aggravating factor, in the absence of a jury finding of the same, violates the Sixth Amendment, making Florida's capital punishment scheme unconstitutional. The USSC compared Florida's sentencing scheme to Arizona's in *Ring* and found Florida's distinguishing factor of the advisory jury recommendation to be immaterial. Like the unconstitutional practice in *Ring*, the Court found the judge in *Hurst* performed her own fact finding which increased *Hurst's* authorized punishment, thereby violating the Sixth Amendment. The USSC also expressly overruled its past decisions upholding Florida's law that were issued prior to *Ring* to the extent they allowed a sentencing judge to find an aggravating factor, independent of a jury's factfinding, necessary for the imposition of a death sentence.[15] The case was reversed and remanded to the FSC.

HB 7101 (2016)- Sentencing for Capital Felonies

In March of 2016, the Legislature responded to the USSC's *Hurst v. Florida* ruling by passing HB 7101.[16] Under this new statutory scheme, the jury continued to determine whether an aggravating factor existed, but was required to find each aggravating factor it relied upon unanimously. If the jury:

- Did not unanimously find at least one aggravating factor, the jury was required to recommend a sentence of life imprisonment without the possibility of parole.
- Unanimously found at least one aggravating factor, the defendant was eligible for a sentence of death and the jury was required to make a recommendation to the court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

This recommendation was required to be based on a determination of whether: sufficient aggravating factors exist; whether those factors were sufficient to outweigh any mitigating circumstances which existed; and whether, based on a weighing of those considerations, the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

If at least 10 jurors determined the defendant should be sentenced to death, the jury was required to make a recommendation of a death sentence. If fewer than 10 jurors determined a death sentence was appropriate, the jury was required to recommend a sentence of life imprisonment. If the jury

[11] *See Hurst v. State,* 147 So. 3d 435 (Fla. 2014).
[12] *See Evans v. Secretary, Fla. Dep't of Corrections*, 699 F. 3d 1249 (11th Cir. 2012).
[13] 577 U.S. 92 (2016).
[14] *Id*. at 94.
[15] *Id*. at 102.
[16] Ch. 2016-13, Laws of Fla.

recommended life imprisonment, the judge was required to impose the recommended sentence. If the jury recommended a death sentence, the judge was authorized to impose a death sentence or a sentence of life imprisonment without the possibility of parole after considering each aggravating factor found by the jury and all mitigating circumstances. The judge was only permitted to consider an aggravating factor that was unanimously found by the jury.

Hurst v. State, 202 So. 3d 40 (Fla. 2016) (Hurst II)

In October of 2016, on remand from the USSC, the FSC issued its opinion in *Hurst v. State*. The FSC reasoned that there are three "critical findings," also referred to by the FSC as "facts" or "elements," which must be found by a capital jury before it may consider recommending a sentence of death. These critical findings or "elements" were:

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

Further, the FSC ruled that each of the critical findings must be found *unanimously* by the jury based on Florida's adoption of the common law, the Florida Constitution's right to trial by jury, and the Sixth and Eighth Amendments to the U.S. Constitution. Finally, the FSC ruled that a jury's recommendation of a death sentence must also be *unanimous*. In part, the majority stated: "we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. Although the [U.S.] Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity…."[17]

Perry v. State, 210 So. 3d 630 (Fla. 2016)

On the same day the FSC decided *Hurst II*, it also decided *Perry v. State.* There, the FSC held the Legislature's March 2016 revision to Florida's capital sentencing scheme (HB 7101)[18] unconstitutional because it required only 10 jurors to recommend a death sentence as opposed to a unanimous, 12-member jury. As such, the FSC found the 10-2 jury sentence recommendation requirement could not be applied to pending prosecutions. The Court stated that the revision to the statute could not "be applied constitutionally to pending prosecutions because the [revisions do] not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death" and thus violate the state constitutional right to trial by jury. However, the Court found that the other changes made by HB 7101, which required a unanimous jury finding on all "elements" required to impose a death sentence, were constitutional.

SB 280 (2017)- Sentencing for Capital Felonies

In March of 2017, in response to the FSC's *Hurst II* and *Perry* decisions, the Legislature passed SB 280 to require a jury's recommendation of a death sentence to be unanimous.[19] Under the bill, if the jury did not unanimously determine that the defendant should be sentenced to death, the jury's recommendation was required to be a sentence of life imprisonment without the possibility of parole.

State v. Poole, *297 So. 3d 487 (Fla. 2020)*

In January of 2020, the FSC partially receded from its *Hurt II* decision in *State v. Poole*. There, the FSC determined that under USSC precedent and the Florida Constitution the only "*Hurst* element" that truly qualifies as an "element" required to be found unanimously by a jury is the finding of the existence of an aggravating factor which makes the defendant eligible for a death sentence. Further, the FSC reasoned that because the determination of whether the aggravating factors outweigh the mitigating circumstances is not a fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, it is not an "element" and, as such, the Sixth Amendment does not require a jury to make the finding. Finally, the Court found that the *Hurst II* requirement of a unanimous jury

[17] *Hurst v. State,* 202 So. 3d 40, 44-45 (Fla. 2016).
[18] *Supra* note 20.
[19] Ch. 2017-1, Laws of Fla.

recommendation of death was wrongly decided because the USSC had previously explicitly rejected such a requirement by holding that a trial judge, acting alone, could impose a capital sentence.[20] Ultimately, the FSC partially receded from *Hurst* except to the extent that *Hurst* required a jury to unanimously find the existence of a statutory aggravating factor beyond a reasonable doubt for a defendant to be eligible for a death sentence.

Imposing the Death Penalty for Sexual Battery Offenses

Coker v. Georgia, 433 U.S. 584 (1977)

In *Coker v. Georgia*, the USSC determined that, with respect to rape of an adult woman,[21] a sentence of death is grossly disproportionate and excessive punishment forbidden by the Eighth Amendment as cruel and unusual punishment.[22] The defendant in *Coker*, had prior convictions for capital felonies of rape, murder, and kidnapping, however, the USSC found his previous convictions did not change the fact that in the case being punished, the rape did not involve the taking of a life. Distinguishing the crime of rape from the crime of murder, the USSC said, "The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability' is an excessive punishment for the rapist who, as such, does not take human life."

Buford v. State, 403 So.2d 943 (Fla. 1981)

In *Buford*, the Defendant was convicted of first degree murder, sexual battery on a child under 11 years of age, and burglary with intent to commit sexual battery. The trial court imposed two death sentences for the murder and sexual battery convictions. In determining whether a death sentence for the crime of sexual battery of a child violated the Eighth and Fourteenth Amendments to the U.S. Constitution as cruel and unusual punishment, the FSC looked to the USSC's *Coker* decision, explicitly acknowledging that *Coker* did not decide whether a death sentence for the rape of a child under the age of 11 was unconstitutional. However, the FSC went on to explain that "[t]he reasoning in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." The FSC did not explicitly explain why the *Coker* holding regarding the rape of an adult woman should apply equally to the rape of a child under 11 years of age. The death sentence for the defendant's murder conviction was sustained and the death sentence for sexual assault was vacated and he was sentenced to life imprisonment on the sexual assault.

Kennedy v. Louisiana, 554 U.S. 407 (2008)

In this case, the defendant was charged with the aggravated rape of his 8 year old stepdaughter. The jury unanimously determined the defendant should be sentenced to death and the Louisiana Supreme Court affirmed the death sentence. In determining whether the death penalty was cruel and unusual punishment and thus violative of the Eighth Amendment, the USSC examined the number of states with capital rape provisions, finding that of the 36 states plus the Federal Government that had the death penalty, only six of those jurisdictions authorized the death penalty for rape of a child. As such, the Court found there was a national consensus against capital punishment for the crime of child rape.

Consistent with evolving standards of decency, the Court found a distinction between intentional first degree murder and nonhomicide crimes against individual persons, including child rape. The Court went on to conclude that regardless of any restrictions requiring the finding of aggravating factors

[20] *See Spaziano v. Florida*, 104 S.Ct. 3154 (1984).
[21] In subsequent decisions, the USSC has noted that the victim in this case, although characterized as an adult was actually a 16-year-old woman, however, she may have qualified as an adult as she was married, had her own home, and had a child. *See Kennedy v. Louisiana*, 554 U.S. 407, 427 (2008).
[22] At the time the case was decided, Georgia was the only jurisdiction in the United States that authorized a sentence of death for the rape of an adult woman.

necessary to impose a death sentence for child rape, it had "no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakish.'"

Finally, the Court went on to consider the problem of unreliable child testimony in some child rape cases, the issue of removing the incentive for an offender not to kill their child rape victim, and the harm that may be caused to the child victim if he or she was required to give testimony on multiple occasions in a death penalty case. In striking down the death sentence in this case, the Court held that in their "independent judgment" the death penalty was not a proportional punishment for the rape of a child.[23]

Appeal by the State

Section 924.07, F.S., authorizes the state to appeal from:

- An order dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a crime or a violation of probation, community control, or any supervised correctional release.
- An order granting a new trial.
- An order arresting judgment.
- A ruling on a question of law when the defendant is convicted and appeals from the judgment.
- The sentence, on the ground that it is illegal.
- A judgment discharging a prisoner on habeas corpus.
- An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure.
- All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.
- A sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code under ch. 921, F.S.
- A ruling granting a motion for judgment of acquittal after a jury verdict.
- An order denying restitution under s. 775.089, F.S.
- An order or ruling suppressing evidence or evidence in limine at trial.
- An order withholding adjudication of guilt in violation of s. 775.08435, F.S.

Effect of Proposed Changes

CS/CS/HB 1297 amends s. 794.011, F.S., to authorize a death sentence for a person 18 years of age or older who commits sexual battery upon, or in attempting to commit sexual battery injures the sexual organs of, a person less than 12 years of age. If the state attorney intends to seek the death penalty in a capital sexual battery case, the bill requires the state attorney to give notice to the defendant and file the notice with the court within 45 days of the defendant's arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. Under the bill, the court may allow the state to amend the notice upon a showing of good cause.

The bill creates s. 921.1425, F.S., to require a court to conduct a separate sentencing proceeding to determine whether a defendant convicted of a capital sexual battery offense for which the state is seeking the death penalty should be sentenced to death or life imprisonment. Under the bill, the sentencing proceeding must be conducted by the trial judge in front of the trial jury as soon as practicable. If the trial jury is unable to reconvene for the sentencing proceeding, the trial judge may summon a special juror or jurors to determine the defendant's sentence. In a case where the defendant waived a trial jury or pleaded guilty, the sentencing proceeding must be conducted by a jury impaneled to determine his or her sentence, unless the defendant waives a jury.

At the sentencing proceeding, the bill authorizes evidence relevant to the nature of the crime and the character of the defendant to be presented and requires evidence relating to aggravating factors and mitigating circumstances to be presented. The bill establishes statutory aggravating factors specific to capital sexual battery, which include:

[23] *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

- The capital felony was committed by a person previously convicted of a felony violation of s. 794.011, F.S., and under sentence of imprisonment or placed on community control or 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 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.
- The capital felony was committed by a sexual offender who is required to register pursuant to s. 943.0435, F.S., or a person previously required to register as a sexual offender who had such requirement removed.
- The defendant knowingly created a great risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.
- The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.
- The capital felony was committed for pecuniary gain.
- The capital felony was especially heinous, atrocious, or cruel.
- The victim of the capitol felony was particularly vulnerable due to 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 person subject to an injunction issued pursuant to s. 741.30, F.S., or s. 784.046, F.S., or a foreign protection order accorded full faith and credit pursuant to s. 741.315, F.S., and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.
- The victim of the capital felony sustained serious bodily injury.

Once the state provides evidence of two or more aggravating factors, the bill authorizes the state to introduce victim impact evidence. Such evidence must be designed to demonstrate the victim's uniqueness as a human being and the physical and psychological harm to the victim.

The bill also establishes mitigating factors a jury may consider as follows:
- 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 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.

After hearing all the evidence presented regarding aggravating factors and mitigating circumstances, the bill requires the jury to deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least two aggravating factors. If the jury:
- Does not unanimously find at least two aggravating factors, the defendant is ineligible for a sentence of death.
- Unanimously finds at least two aggravating factors, the defendant is eligible for a sentence of death and the jury must make a recommendation to the court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

The bill requires the jury's recommendation to be based on a weighing of the following:
- Whether sufficient aggravators factors exist.
- Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

- Based on the prior considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

Under the bill, if at least eight jurors determine the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death. Upon receiving a jury recommendation of death, the court must consider all aggravating factors and mitigating circumstances, and may impose a sentence of life imprisonment without the possibility of parole or a death sentence.

If fewer than eight jurors determine the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment without the possibility of parole and the court must impose the recommended sentence.

The bill requires the court, after imposing sentence, to enter a written order addressing:
- The aggravating factors found to exist;
- The mitigating circumstances reasonably established by the evidence;
- Whether there are sufficient aggravating factors to warrant the death penalty; and
- Whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

The court must also include any reasons it did not accept the jury's recommended sentence in its written order when applicable.

In a case where the defendant waives his or her right to a sentencing proceeding by a jury, the court must consider all the aggravating factors and mitigating circumstances and may impose a sentence of life imprisonment or death. The bill specifies a court may only impose a sentence of death if the court finds that at least two aggravating factors have been proven to exist beyond a reasonable doubt.

If the court does not enter a written order requiring a death sentence within 30 days after entering the defendant's judgment and sentence, the court must impose a sentence of life imprisonment without the possibility of parole.

Under the bill, the FSC must automatically review a judgment of conviction and sentence of death and must render an opinion within two years of the filing of a notice of appeal.

The bill provides legislative intent specifying that the Legislature finds that a person who commits capital sexual battery carries a great risk of death and danger to vulnerable members of the state and that such crimes destroy the innocence of a young child and violate all standards of decency held by a civilized society. Further, the bill proves that the Legislature finds that both *Buford v. State* and *Kennedy v. Louisiana* were wrongly decided and an egregious infringement of the state's power to punish the most heinous of crimes.

Under the bill, a court must impose a sentence of death notwithstanding existing case law which holds such a sentence unconstitutional under the Florida Constitution and the United States Constitution. However, in any case for which the FSC or the USSC reviews a death sentence imposed for a capital sexual battery offense, and in making such a review reconsiders the holdings in *Buford* and *Kennedy*, and determines a sentence of death remains unconstitutional, the court having jurisdiction over the person previously sentenced to death must resentence the person to life imprisonment without the possibility of parole.

The bill amends s. 924.07, F.S., to authorize the state to appeal from a sentence in a capital sexual battery case that resulted from the circuit court's failure to comply with sentencing procedures in s. 921.1425, F.S., including by striking a notice of intent to seek the death penalty, refusing to impanel a capital jury, or otherwise granting relief that prevents the state from seeking a sentence of death.

The bill specifies it is applicable to crimes committed on or after October 1, 2023.

The bill provides an effective date of October 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 794.011, F.S., relating to sexual battery.
Section 2: Creates s. 921.1425, F.S., relating to sentence of death or life imprisonment for capital sexual battery; further proceedings to determine sentence.
Section 3: Amends s. 921.137, F.S., relating to imposition of the death sentence upon an intellectually disabled defendant prohibited.
Section 4: Amends s. 921.141, F.S., relating to sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
Section 5: Amends s. 924.07, F.S., relating to appeal by state.
Section 6: Provides an effective date of October 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on state expenditures. To the extent the bill results in death sentences being imposed, it may increase the number of inmates on death row and the costs associated with their incarceration and execution.

Additionally, the bill requires a death sentence to be subject to automatic review by the FSC and requires a disposition to be rendered within two years of the filing of the notice of appeal. However, the FSC is already responsible for reviewing death sentences for capital felonies and any increased workload would likely be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

The FSC and the USSC have both held that a death sentence for a capital sexual battery offense violates the Eighth Amendment as cruel and unusual punishment. However, the bill acknowledges the current case holdings and specifies that the Legislature finds those decisions were incorrectly decided.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 21, 2023, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment changed the effective date of the bill to October 1, 2023.

On March 31, 2023, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Required a jury to find the existence of at least two aggravating factors to make a defendant eligible for a death sentence.
- Restored the court's ability, after receiving a jury recommendation of a death sentence, to consider each aggravating factor found by the jury and all mitigating circumstances, and to impose a sentence of life imprisonment or a death sentence.
- Authorized the state to appeal a sentence in a capital sexual battery case when the sentence resulted from the court's failure to comply with sentencing procedures under s. 921.1425, F.S.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.