

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 555 Sentencing Proceedings in Death Penalty Cases

**SPONSOR(S):** Criminal Justice Subcommittee, Jacques and others

**TIED BILLS:** IDEN./SIM. BILLS: SB 450

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 5 N, As CS	Loyed	Hall
2) Justice Appropriations Subcommittee	8 Y, 6 N	Saag	Keith
3) Judiciary Committee		Loyed	Kramer

### SUMMARY ANALYSIS

Florida's capital sentencing scheme was amended in 2017 to comply with the Florida Supreme Court's (FSC) decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), by requiring jury unanimity for a death sentence recommendation. Sections 921.141 or 921.142, F.S., apply to a capital defendant who does not waive his or her right to a sentencing proceeding by a jury. Under this framework, a jury must consider all the evidence presented regarding aggravating factors and mitigating circumstances and determine if at least one aggravating factor has been proven beyond a reasonable doubt. If the jury does not unanimously find at least one aggravating factor, the defendant is ineligible for a death sentence and must be sentenced to life imprisonment.

If the jury unanimously finds at least one aggravating factor, the defendant is eligible for a death sentence and the jury must make a sentencing recommendation to the court based on a weighing of the following: whether sufficient aggravating factors exist; whether aggravating factors exist which outweigh the mitigating circumstances found to exist; and whether, based on the prior considerations, the defendant should be sentenced to life imprisonment without the possibility of parole or to death. If a unanimous jury determines the defendant should be sentenced to death, the jury must recommend a sentence of death to the court. If any juror does not determine that the defendant should be sentenced to death, the jury must recommend a sentence of life imprisonment to the court.

If the jury recommends a sentence of life imprisonment without the possibility of parole, the court must impose the recommended sentence. If the jury recommends a sentence of death, then the court must consider each aggravating factor unanimously found by the jury and all mitigating circumstances, and may impose a sentence of life imprisonment without the possibility of parole or a sentence of death.

In 2020, in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), the FSC partially receded from its decision in *Hurst* except to the extent that *Hurst* required a jury to unanimously find the existence of at least one aggravating factor beyond a reasonable doubt to make a defendant eligible for a death sentence.

CS/HB 555 amends ss. 921.141 and 921.142, F.S., to revise Florida's capital sentencing scheme by requiring:

- A jury to recommend a sentence of death to the court if at least eight jurors determine a defendant should be sentenced to death; and
- The court to impose a sentence of death when such a sentence is recommended by the jury.

As such, the bill removes the current requirement for a jury to be unanimous in recommending a death sentence and also removes the ability of the court, in cases in which the jury has recommended a death sentence, to consider each aggravating factor found by the jury and all mitigating circumstances, and to determine whether the defendant should be sentenced to death or to life imprisonment.

The bill retains the requirements for: a jury to unanimously find at least one aggravating factor was proven beyond a reasonable doubt to make a defendant eligible for a death sentence, and a court to impose a sentence of life imprisonment without the possibility of parole when a jury recommends such a sentence.

The bill may have an indeterminate fiscal impact on state expenditures, to the extent the bill results in a greater number of death sentences being imposed, by increasing the number of inmates on death row, and increasing the number of automatic reviews of a death sentence that the FSC must perform. However, such reviews are performed as part of the FSC's normal operations and would likely be absorbed within existing resources.

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

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives .**

**STORAGE NAME:** h0555c.JDC

**DATE:** 3/29/2023

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

###### *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 Florida Supreme Court (FSC).

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

In June 2002, the United States Supreme Court (USSC) examined Arizona’s capital sentencing scheme in *Ring v. Arizona*.<sup>1</sup> 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<sup>2</sup> 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

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<sup>1</sup> 536 U.S. 584 (2002).

<sup>2</sup> 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.

scheme in that it allowed the jury to make an advisory sentencing recommendation and the judge to impose the sentence.<sup>3</sup>

*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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

<sup>3</sup> 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).

<sup>4</sup> See *Hurst v. State*, 147 So. 3d 435 (Fla. 2014).

<sup>5</sup> See *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F. 3d 1249 (11th Cir. 2012).

<sup>6</sup> 577 U.S. 92 (2016).

<sup>7</sup> *Id.* at 94.

<sup>8</sup> *Id.* at 102.

<sup>9</sup> Ch. 2016-13, Laws of Fla.

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 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....”<sup>10</sup>

*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)<sup>11</sup> 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.<sup>12</sup> 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.

Section 921.141, F.S., has not been amended since SB 280 became law in 2017.

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

<sup>10</sup> *Hurst v. State*, 202 So. 3d 40, 44-45 (Fla. 2016).

<sup>11</sup> *Supra* note 9.

<sup>12</sup> Ch. 2017-1, Laws of Fla.

In January of 2020, the FSC partially receded from its *Hurst 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 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.<sup>13</sup> 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.

### *Florida’s Capital Sentencing Scheme (Current)*

Section 921.141, F.S.,<sup>14</sup> has remained unchanged since 2017 when the Legislature amended the law to comply with the FSC’s rulings in *Hurst II* and *Perry*. Specifically, 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<sup>15</sup> are sufficient to impose death;
- The aggravating factors outweigh the mitigating circumstances<sup>16</sup> found to exist; and
- That, based on the prior considerations, the defendant should be sentenced to death.<sup>17</sup>

Additionally, 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.<sup>18</sup> 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.<sup>19</sup>

According to the Death Penalty Information Center,<sup>20</sup> the number of death sentences imposed in Florida for the past 10 years are as follows:

### Death Sentences Imposed in Florida (2012-2021)

<sup>13</sup> See *Spaziano v. Florida*, 104 S.Ct. 3154 (1984).

<sup>14</sup> 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.

<sup>15</sup> The aggravating factors a jury may consider are limited to those enumerated in s. 921.141(6), F.S., and include factors such as: the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person, the capital felony was especially heinous, atrocious, or cruel, and the victim of the capital felony was a person less than 12 years of age.

<sup>16</sup> The mitigating circumstances a jury may consider are enumerated in s. 921.141(7), F.S., and include factors such as: the defendant has no significant history of prior criminal activity, the age of the defendant at the time of the crime, and the existence of any other factors in the defendant’s background that would mitigate against imposition of the death penalty.

<sup>17</sup> S. 921.141(2), F.S.

<sup>18</sup> In October of 2022, convicted murderer Nicholas Cruz, who plead guilty to killing 17 people at Marjory Stoneman Douglas High School in February of 2018, was sentenced to life imprisonment without the possibility of parole. The sentencing jury foreman reported that three jurors voted against the death penalty.

<sup>19</sup> S. 921.141(3), F.S.

<sup>20</sup> *Death Sentences in the United States Since 1977, By State and By Year*, <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> (last visited Mar. 10, 2023).

2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
20	15	11	9	3	3	7	7	7	2

### Other States

Twenty-seven other states<sup>21</sup> and the federal government have a capital punishment scheme.<sup>22</sup> The way in which a death sentence may be imposed varies amongst jurisdictions; however, capital sentencing schemes can be grouped into three primary categories, including those in which:

- A unanimous jury recommendation is required to impose a death sentence;<sup>23</sup>
- A non-unanimous jury recommendation is permitted to impose a death sentence;<sup>24</sup> and
- A judge may impose a death sentence after a jury finding of eligibility.<sup>25</sup>

While a majority of other states require a unanimous jury recommendation to impose a death sentence, several states authorize a court to impanel one or more new juries during the penalty phase of a capital case if the initial jury is not able to reach a unanimous recommendation of either life imprisonment or a death sentence.<sup>26</sup>

### Effect of Proposed Changes

CS/HB 555 amends ss. 921.141 and 921.142, F.S., to revise Florida's capital sentencing scheme by requiring:

- A jury to recommend a sentence of death to the court if at least eight jurors determine a defendant should be sentenced to death; and
- The court to impose a sentence of death when such a sentence is recommended by the jury.

As such, the bill removes the current requirement for a unanimous jury to recommend a death sentence and also removes the ability of the court, in cases in which the jury has recommended a death sentence, to consider each aggravating factor found by the jury and all mitigating circumstances, and to determine whether the defendant should be sentenced to death or to imprisonment without the possibility of parole.

The bill retains the requirements for: a jury to unanimously find at least one aggravating factor was proven beyond a reasonable doubt to make a defendant eligible for a death sentence, and a court to impose a sentence of life imprisonment without the possibility of parole when a jury recommends such a sentence.

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

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 921.141, F.S., relating to a sentence of death or life imprisonment for capital felonies.

**Section 2:** Amends s. 921.142, F.S., relating to a sentence of death or life imprisonment for capital

<sup>21</sup> Three states - California, Oregon, and Pennsylvania have a moratorium on the death penalty. *States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums*, <https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/> (last visited Mar. 10, 2023).

<sup>22</sup> *Facts about the Death Penalty*, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited Mar. 10, 2023).

<sup>23</sup> See, e.g., Cal. Penal Code § 190.4 (b) (requiring a unanimous jury recommendation of a death sentence in order for capital punishment to be imposed by the court).

<sup>24</sup> See, e.g., AL Code § 13A-5-46 (f)-(g) (requiring at least ten-out-of-twelve jurors to concur in order for a jury to recommend the death penalty).

<sup>25</sup> See, e.g., Mont. Code Ann. § 46-18-301 (1)-(2)(a) (allowing for the trial court judge alone to impose the death penalty if the jury finds a defendant to be eligible); Neb. Rev. Stat. Ann. § 29-2521 (1) (allowing for a three-judge panel to decide whether to impose the death penalty after a defendant is deemed eligible).

<sup>26</sup> See, e.g., Ariz. Rev. Stat. Ann. § 13-752 (K) (authorizing a new jury to be impaneled if a jury is not unanimous in its recommendation of a death sentence or life imprisonment without the possibility of parole).

drug trafficking felonies.

**Section 3:** 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 a greater number of death sentences being imposed, it may increase the number of inmates on death row and the costs associated with their incarceration and execution.

Additionally, s. 921.141(4), F.S., 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. To the extent that the bill results in an increased number of death sentences being imposed, the FSC will be required to review more sentences within the required timeframe. However, such reviews are performed as part of the FSC's normal operations and 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:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

The bill implicates the United States Constitution's Fifth Amendment Due Process Clause, the Sixth Amendment right to trial by jury, and the Eighth Amendment prohibition on cruel and unusual punishment as well as the right to a jury trial in Florida's Constitution.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On March 7, 2023, the Criminal Justice adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill in that it:

- Required the court to sentence a defendant as recommended by the jury, rather than performing an independent evaluation of aggravating factors and mitigating circumstances to determine the sentence after receiving the jury's advisory recommendation.
- Removed the requirement for the court to set forth specified findings in writing if it imposes a death sentence.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.