The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1342

INTRODUCER: Senator Martin

SUBJECT: Capital Sexual Battery

DATE: March 17, 2023 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Stokes	CJ	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 1342 creates a new section of law to implement a death penalty sentencing procedure for adult persons who commit sexual battery upon a child less than twelve years of age, or who in an attempt to commit the sexual battery injures the sexual organs of the child. The bill creates the same capital felony sentencing procedure for sexual battery upon a child less than twelve years of age, or attempted sexual battery which causes injury to the sexual organs of the child, committed by a person who is in a position of familial or custodial authority. Both of these crimes are currently designated as capital felony offenses.

The bill provides a similar sentencing procedure as provided in ss. 921.141 and 921.142, F.S, which apply in capital murder cases, but contains significant differences. Specifically, the bill requires:

- A jury death recommendation of not less than eight jurors to sentence the capital sexual battery defendant to death. If fewer than eight jurors recommend death, the jury's recommendation must be for life imprisonment without parole.
- The court to enter a death sentence if the jury recommends death in the capital sexual battery case.
- A finding of at least one aggravating factor beyond a reasonable doubt. The bill creates aggravating factors and mitigating circumstances that are customized to a capital sexual battery crime, for the jury's consideration in arriving at a sentencing recommendation.

The bill provides legislative findings and intent as follows:

- A person who commits a sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age carries a great risk of death and danger to vulnerable members of this state.
- Such crimes destroy the innocence of a young child and violate all standards of decency held by civilized society.

- *Buford v. State of Florida*, 403 So. 2d 943 (Fla. 1981), was wrongly decided, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), was wrongly decided, and such cases are an egregious infringement of the states' power to punish the most heinous of crimes.
- It is the intent of the Legislature that the procedure set forth in this s. 794.011, F.S., shall be followed, and a prosecutor must file a notice, as provided in s. 794.011(2)(a), F.S., if he or she intends to seek the death penalty.

The bill may have an indeterminate fiscal impact. See Section V. Fiscal Impact Statement.

The bill becomes effective October 1, 2023.

II. Present Situation:

Capital Felonies for Sexual Battery Cases and the Eighth Amendment

Section 794.011(2)(a), F.S., states that 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 as provided in ss. 775.082, F.S., and 921.141, F.S.[1]

Section 794.011(8)(c), F.S., provides that a person who is in a position of familial or custodial authority who engages in any act with a person 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 or life felony*, punishable as provided in ss. 775.082 and 921.141, F.S.[2]

Sexual battery means 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; however, sexual battery does not include an act done for a bona fide medical purpose.[3]

No one has been executed for a non-murder offense in this country since 1964, although two people were convicted in Louisiana of capital sexual battery of a child and sentenced to death. One of those individuals, Patrick Kennedy, appealed his case to the U.S. Supreme Court, which

[1] Section 775.082, 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 a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole. Section 921.141, F.S., provides that upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082, F.S.

[2] *Id.*; and *see* s. 775.082(3), F.S., setting forth the sentence for a life felony, in general, as: for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

[3] Section 794.011(1)(j), F.S.

struck down Louisiana's law.[4] Five other states have laws allowing the death penalty for sexual battery against a minor, though no one has been sentenced to death in those states.[5]

Historically, capital sexual battery has been punishable by up to a penalty of death in Florida. Although the crimes found in ss. 794.011(2)(a) and (8)(c), F.S., are categorized as capital crimes, life imprisonment without the possibility of parole is the current maximum sentence for these crimes. This is largely due to a string of court cases from the seventies and early eighties ruling on the constitutionality of the death penalty as applied by the states.[6]

In 1977, the U.S. Supreme Court decided *Coker v. Georgia,* a case involving a death sentence for the sexual battery of an adult female.[7] Relying heavily on the *Gregg v. Georgia*[8] decision from the prior term of court, the *Coker* court explained that the Eighth Amendment[9] bars excessive punishment in relation to the offense committed. Therefore, a particular punishment can be excessive if it "is grossly out of proportion to the severity of the crime."[10]

In applying an Eighth Amendment analysis, the *Coker* court said that "judgment should be informed by objective factors to the maximum possible extent...attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions."[11] After performing such a review,[12] the court found that "in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system."[13] The court held that a death sentence is disproportionate punishment for the rape of an adult woman, and is therefore cruel and unusual punishment within the meaning of the Eighth Amendment.[14]

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[4] Death Penalty Information Center, Death Penalty for Offenses Other than Murder, available at https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/death-penalty-for-offenses-other-than-murder (last visited March 13, 2023); Death Penalty Information Center, Kennedy v. Louisiana Resource Page, available at https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/significant-supreme-court-opinions/kennedy-v-louisiana-resource-page (last visited March 13, 2023).
[5] Those states are Montana, South Carolina, Oklahoma, Georgia, and Texas. Death Penalty Information Center, Kennedy v. Louisiana Resource Page, available at https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/significant-supreme-court-opinions/kennedy-v-louisiana-resource-page (last visited March 13, 2023).
[6] *Gibson v. State*, 721 So.2d 363 (Fla. 2nd DCA, 1998).
[7] *Coker v. Georgia*, 433 U.S. 584, (1977).
[8] *Gregg v. Georgia*, 428 U.S. 153 (1976), (finding that the Georgia death penalty scheme satisfied the requirements of the Eighth Amendment when imposed for the crime of murder. In a footnote, the *Gregg* court specified: "We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life for example, when capital punishment is imposed for rape, kidnapping, or armed robbery that does not result in the death of any human being." at footnote 35).
[9] The Eighth Amendment to the U.S. Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. Amend VIII.
[10] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
[11] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
[12] *Coker v. Georgia*, 433 U.S. 584, 593-597 (1977).
[13] *Id*.
[14] "We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,'... is an excessive penalty for the rapist who, as such, does not take human life." *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 286, 153 L.Ed.2d 982 (1977); [internal citation: *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)].

In 1981, the Florida Supreme Court, in *Buford v. State,*[15] held that a death sentence for sexual battery by an adult upon a child, is constitutionally prohibited.[16] The court stated that "[t]he reasoning of the justices 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."[17]

Three years after *Buford*, the Florida Supreme Court recognized in *Rusaw v. State* that while the death penalty as punishment for the capital crime of sexual battery of a child is not a constitutional sentence, "[t]he legislature, by setting sexual battery of a child apart from other sexual batteries, has obviously found that crime to be of special concern. Just because death is no longer a possible punishment for the crime described in subsection 794.011(2), F.S., does not mean that the alternative penalty suffers from any defect." [18]

In 2008, the U.S. Supreme Court, in *Kennedy v. Louisiana*, a child sexual battery case for which the defendant was sentenced to death, also began its Eighth Amendment analysis by examining existing statutes and legislation, and statistics on executions for child sexual battery.[19]

Like the *Coker* court, the *Kennedy* court found that there is a national consensus against the death penalty for child sexual battery.[20] This finding led the court to conclude that the death penalty is not a proportional punishment for the sexual battery of a child.[21]

Case Law and Subsequent Statutory Changes Regarding Death Penalty Sentencing Procedure

The Sixth Amendment of the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[22] This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.[23]

The U.S. Supreme Court in *Ring v. Arizona*, applied this right to Arizona's capital sentencing scheme, which required a judge to determine the presence of aggravating and mitigating factors

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[15] *Buford v. State,* 403 So.2d 943 (Fla.1981), *cert. denied,* 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).
[16] *Id.*
[17] *Id.*
[18] *Rusaw v. State*, 451 So.2d 469 (Fla. 1984), referring to life imprisonment without the possibility of parole, ss. 775.082 and 921.141, F.S.
[19] The state court in *Kennedy* explained that since 1993, four more States—Oklahoma, South Carolina, Montana, and Georgia—had capitalized the crime of child rape, and at least eight States had authorized capital punishment for other nonhomicide crimes. By its count, 14 of the then–38 States permitting capital punishment, plus the Federal Government, allowed the death penalty for nonhomicide crimes and 5 allowed the death penalty for the crime of child rape. *Kennedy v. Louisiana,* 554 U.S. 407, 418 (2008). *See also* footnotes 3 and 4 above for recent statistics.
[20] After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape. *Kennedy v. Louisiana,* 554 U.S. 407, 434 (2008).
[21] *Kennedy v. Louisiana,* 554 U.S. 407, 422 (2008).
[22] U.S. CONST. Amend. VI.
[23] *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

and to only sentence a defendant to death if the judge found at least one aggravating factor.[24] The Court struck down the Arizona sentencing scheme, finding it to be a violation of the Sixth Amendment because it permitted sentencing judges, without a jury, to find aggravating circumstances justifying imposition of the death penalty.[25]

In 2016, the U.S. Supreme Court issued the *Hurst v. Florida* opinion finding that Florida's death penalty sentencing process was unconstitutional because "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[26] Thereafter, the Legislature amended ss. 921.141 and 921.142, F.S., to incorporate the following statutory changes:

- The jury is required to identify each aggravating factor found to exist by a unanimous vote in order for a defendant to be eligible for a sentence of death;
- The jury is required to determine whether the aggravating factors outweigh the mitigating circumstances in reaching its sentencing recommendation;
- If at least ten of the twelve members of the jury determine that the defendant should be sentenced to death, the jury's recommendation is a sentence of death;
- The jury is required to recommend a sentence of life imprisonment without the possibility of parole if fewer than ten jurors determined that the defendant should be sentenced to death;
- The judge is permitted to impose a sentence of life imprisonment without the possibility of parole when the jury recommends a sentence of death; and
- The judge is no longer permitted to "override" the jury's recommendation of a sentence of life imprisonment by imposing a sentence of death.[27]

Also in 2016, *Hurst v. State*, on remand from the U.S. Supreme Court, was decided by the Florida Supreme Court. In addition to finding that the prior 2016 statutory amendments to the death penalty sentencing provisions were constitutional, the court also held that "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous."[28]

After the *Hurst v. State* decision in 2016, the Legislature again amended ss. 921.141 and 921.142, F.S., this time to require a unanimous vote of the jury for a sentencing recommendation of death.[29]

The current sentencing proceeding statutes in murder cases are more fully set forth below.

[24] *Ring v. Arizona*, 536 U.S. 584, 592 (2002).
[25] *Id*. at 609.
[26] *Hurst v. Florida*, 577 U.S. 92 (2016). The *Hurst v. Florida* decision was based on the Sixth Amendment and the 2002 U.S. Supreme Court decision in *Ring v. Arizona*, which held that juries rather than judges acting alone must make crucial *factual* determinations that subject a convicted murderer to the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002).
[27] Chapter 2016-13, L.O.F. (2016).
[28] *Hurst v. State*, 202 So.3d 40, 44, (Fla. 2016), *cert. den.*, 137 S.Ct. 2161 (2017).
[29] Chapter 2017-1, L.O.F. (2017).

Florida's Current Sentencing Proceedings in Capital Cases

The statutes governing the proceedings to determine a sentence of either death or life imprisonment without the possibility of parole[30] in capital cases are set forth in ss. 921.141 and 921.142, F.S.[31] The court conducts a sentencing proceeding upon conviction or adjudication of guilt of a defendant in a capital felony.[32] Typically, the proceeding is conducted by the trial judge before the trial jury as soon as practicable.[33]

Aggravating Factors and Mitigating Circumstances

During the sentencing proceeding, the jury (or the judge if the jury is waived by the defendant) considers evidence that is relevant to the nature of the crime and the character of the defendant. The evidence includes matters relating to any of the aggravating factors enumerated in s. 921.141(6). F.S., or mitigating circumstances enumerated in s. 921.141(7), F.S.[34]

The aggravating factors are limited to the following:

- The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

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[30] Section 775.082(1)(a), F.S.

[31] The sentencing proceedings in s. 921.142, F.S., are virtually identical to the sentencing proceedings found in s. 921.141, F.S., except that s. 921.142, F.S., only applies in capital drug trafficking cases, which contains certain aggravating factors relevant to drug trafficking cases.

[32] Sections 921.141(1) and 921.142(2), F.S.

[33] *Id.*

[34] Notice of the prosecutor's intent to present evidence of particular aggravating factors must be served within 45 days after arraignment. Section 782.04(1)(b), F.S. There are 16 different aggravating factors in s. 921.141(6)(a)-(p), F.S., and eight statutory mitigating circumstances in s. 921.141(7), F.S.

- 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 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.[35]

Mitigating circumstances are 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.

Jury Findings and Recommended Sentence

After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury deliberates and determines if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in s. 921.141(6), F.S.[36]

The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

- Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
- Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

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[35] Section 921.141(6)(a)-(p), F.S. See s. 921.142(7)(a)-(j), F.S., for the aggravating factors in a capital drug trafficking felony case.

[36] Section 921.141(2)(a), F.S.; *See* s. 921.142(3)(a), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.

- o Whether sufficient aggravating factors exist.
- o Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
- o Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.[37]

If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.[38]

Imposition of Sentence

If the jury has recommended a sentence of:

- Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
- Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.[39]

Order of the Court and Automatic Review of the Case

In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, 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. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082, F.S.[40]

A judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of

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[37] Section 921.141(2)(b), F.S.; *See* s. 921.142(3)(b), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.

[38] Section 921.141(2)(c), F.S.; *See* s. 921.142(3)(c), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.

[39] Section 921.141(3), F.S.; *See* s. 921.141(4), F.S., for provisions relating to the imposition of sentence in a capital drug trafficking case.

[40] Section 921.141(4), F.S.; *See* s. 921.142(5), F.S., for provisions relating to the order of the court in capital drug trafficking cases.

appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.[41]

Case Law Interpreting Current Death Penalty Proceeding Requirements in Florida

Death Eligibility Decision is Jury's Only Role in Death Penalty Sentencing Under Poole v. State

Subsequent to the Legislature's 2016 amendments to the death penalty sentencing proceedings in an effort to comply with both *Hurst v. Florida*[42] and *Hurst v. State*[43] the Florida Supreme Court receded from its *Hurst v. State* opinion, eliminating the need for most of the statutory changes made in 2016.[44]

In *Poole v. State,* the Florida Supreme Court opined that the *Hurst v. State* court had gone beyond where the U.S. Supreme Court required in order to bring Florida's death penalty proceedings into compliance with constitutional standards.[45]

The *Poole* court left intact only the requirement that a unanimous jury find a statutory aggravating circumstance by a reasonable doubt standard of proof.[46] This particular part of Florida's death penalty sentencing proceeding is necessary, as the *Poole* court explained, because there are two components to the death penalty sentencing decision-making process: the eligibility decision which is the trier of fact's responsibility, and the selection decision which is the sentencing judge's responsibility.[47]

As to the eligibility decision, the U.S. Supreme Court has required that the death penalty be reserved for only a subset of those who commit murder. "To render a defendant eligible for the death penalty in a homicide case, [the Supreme Court has] indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."[48]

The selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence."[49] The selection decision is a subjective determination to be made by the court. It is not a "fact" or "element" of the offense for the fact-finder to decide.[50]

According to the *Poole* court, the *Hurst v. State* court misinterpreted the *Hurst v. Florida* decision on this key point: the *Hurst v. Florida* decision is about death penalty eligibility.

[41] Section 921.141(5), F.S.; *See* s. 921.142(6), F.S., for provisions relating to the automatic review by the Florida Supreme Court in capital drug trafficking cases.
[42] *Hurst v. Florida*, 577 U.S. 92 (2016).
[43] *Hurst v. State*, 202 So.3d 40 (Fla. 2016), interpreting and applying *Hurst v. Florida*, 577 U.S. 92 (2016).
[44] *Poole v. State,* 297 So. 3d 487 (Fla. 2020), receding from *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[45] *Poole v. State,* 297 So. 3d 487 (Fla. 2020).
[46] *Poole v. State,* 297 So. 3d 487 (Fla. 2020).
[47] *Poole v. State,* 297 So. 3d 487, 501 (Fla. 2020).
[48] *Poole v. State,* 297 So. 3d 487, 501 (Fla. 2020), quoting *Tuilaepa v. California*, 512 U.S. 967, 971-972 (U.S. 1994).
[49] *Id*.
[50] *Poole v. State,* 297 So. 3d 487, 504 (Fla. 2020).

Post-*Poole* if a jury unanimously finds at least one aggravating circumstance exists in a murder case, the defendant is death-eligible.

According to *Poole*, the *Hurst v. State* court had a "mistaken view" of what constitutes an element of an offense which is a fact that a jury must determine exists beyond a reasonable doubt for a defendant to be death eligible. *Hurst v. State*, therefore, mistakenly decided that the Sixth Amendment right to trial by a jury required:

- Unanimous jury findings as to all of the aggravating factors that were proven beyond a reasonable doubt;
- That the aggravating factors are sufficient[51] to impose a death sentence;
- That the aggravating factors outweigh the mitigating factors;[52] and
- A unanimous jury recommendation of a sentence of death.[53]

In sum, the *Poole* court rejected the *Hurst v. State* court's view of a capital jury's role that goes beyond the "fact-finding" required to determine whether a defendant is death eligible.[54]

Other States' Death Penalty Sentencing

Twenty-seven states have death penalty statutes, however there are only 22 states with an active death penalty. Three states have governor-issued moratoriums in place (Oregon, California, and Pennsylvania). The Delaware and Washington state courts have ruled their death penalties unconstitutional. Twenty-three states have abolished the death penalty.[55]

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[51] [F]or purposes of complying with s. 921.141(3)(a), F.S., "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances." For purposes of complying with s. 921.141(3)(a), F.S., "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances"). *Poole v. State,* 297 So. 3d 487, 502 (Fla. 2020).

[52] "The role of the section 921.141(3)(b) selection finding is to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime." *Poole v. State,* 297 So. 3d 487, 503 (Fla. 2020). See also *Rogers v. State*, 285 So.3d 872, 886 (Fla. 2019).

[53] *Hurst v. Florida* does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed. The Supreme Court in *Spaziano* "upheld the constitutionality under the Sixth Amendment of a Florida judge imposing a death sentence even in the face of a jury recommendation of life—a jury override. It necessarily follows that the Sixth Amendment, as interpreted in *Spaziano*, does not require any jury recommendation of death, much less a unanimous one. And as we have also explained, the Court in *Hurst v. Florida* overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance." *See Hurst v. Florida*, 136 S. Ct. at 624. See also *Spaziano v. Florida*, 468 U.S. 447 at 464-65, (1984) holding that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *Poole v. State,* 297 So. 3d 487, 505 (Fla. 2020).

[54] "This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death."

[55] States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums, Britannica ProCon.org, available at https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/; (last visited March 17, 2023); Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings, Death Penalty Information Center, available at https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings (last visited March 17, 2023); and Map: These are the states that allow the death penalty, Joe Murphy, NBC News, October 27, 2021, available at: https://www.nbcnews.com/news/all/map-these-are-states-allow-death-penalty-n1282556 (last visited March 17, 2023).

Of the 22 active death penalty states, only Alabama allows a judge to impose a death sentence based upon a non-unanimous (10-2 jury vote) jury verdict for death. If the jury returns a verdict of death, "the court shall sentence the defendant to death."[56]

Most states with the death penalty impose a life sentence if the jury makes a non-unanimous death recommendation. However, in some instances, if the jury cannot reach a unanimous decision:

- 5 states provide for the state to have another opportunity at a new sentencing hearing with a different jury (Alabama, Arizona, California, Kentucky, and Nevada); and
- Indiana and Missouri juries are considered to be "hung juries," and the judge becomes the decision-maker.
- In Montana, the judge sentences based on a jury finding of aggravating factors.
- In Nebraska, a panel of judges decides the sentence and if the panel is non-unanimous, the sentence must be for life.[57]

III. Effect of Proposed Changes:

Capital Sexual Battery Sentencing

The bill creates s. 921.1425, F.S., to implement a death penalty sentencing process for capital felony offenses in s. 794.011, F.S. There are currently two sexual battery crimes identified as capital offenses. They are:

- Section 794.011(2)(a), F.S., which states that 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 as provided in ss. 775.082, F.S., and 921.141, F.S.,[58] and
- Section 794.011(8)(c), F.S., which provides that a person who is in a position of familial or custodial authority who engages in any act with a person 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 or life felony, punishable as provided in ss. 775.082 and 921.141, F.S.[59]

The bill amends s. 794.011(2)(a), F.S., providing that in all capital felony cases under s. 794.011, F.S., the procedure set forth in s. 921.1425, F.S., must be followed in order to determine a sentence of death or life imprisonment without the possibility of parole.

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[56] Sections 13A-5-46, and.13A-5-47, A.C.
[57] *See* supra note 36.
[58] Section 775.082, 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 a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole. Section 921.141, F.S., provides that upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082, F.S.
[59] *Id.*; and *see* s. 775.082(3), F.S., setting forth the sentence for a life felony, in general, as: for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

The bill provides that if a prosecutor intends to seek the death penalty, he or she must give notice to the defendant and file the notice with the court within 45 days after arraignment in the case. 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. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Section 921.1425, F.S., which creates a death penalty sentencing process for ss. 794.011(2)(a) and (8)(c), F.S., contains legislative findings and intent, as follows:

- A person who commits a sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age carries a great risk of death and danger to vulnerable members of this state.
- Such crimes destroy the innocence of a young child and violate all standards of decency held by civilized society.
- *Buford v. State of Florida*, 403 So. 2d 943 (Fla. 1981), was wrongly decided, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), was wrongly decided, and such cases are an egregious infringement of the states' power to punish the most heinous of crimes.
- It is the intent of the Legislature that the procedure set forth in this s. 794.011, F.S., shall be followed, and a prosecutor must file a notice, as provided in s. 794.011(2)(a), F.S., if he or she intends to seek the death penalty.

The bill requires the court to conduct a separate sentencing proceeding upon the conviction or adjudication of guilt of a defendant of a capital felony under s. 794.011, F.S., to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082, F.S.

The proceeding must be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in ch. 913, F.S., to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.

In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and must include matters relating to any of the aggravating factors and for which notice has been provided pursuant to s. 794.011(2)(a) F.S., or relating to any of the mitigating circumstances.

Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, subsection (2) of s. 941.1425, F.S., may not be construed to authorize the introduction of any evidence secured in violation of the United States Constitution or the State Constitution. The state and the defendant or the defendant's counsel must be permitted to present arguments for or against a sentence of death.

If a defendant has not waived his or her right to a sentencing proceeding by a jury, the jury will hear all of the evidence presented regarding aggravating factors and mitigating circumstances.

The jury must deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor.

The jury must return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

- Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
- Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury must make a recommendation to the court as to whether the defendant must be sentenced to life imprisonment without the possibility of parole or to death. The recommendation must be based on a weighing of all of the following:
  - Whether sufficient aggravating factors exist.
  - Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
  - Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

If at least eight jurors determine that the defendant should be sentenced to death, the jury’s recommendation to the court must be a sentence of death. If fewer than eight jurors determine that 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.

If the jury has recommended a sentence of:

- Life imprisonment without the possibility of parole, the court must impose the recommended sentence of life imprisonment without the possibility of parole.
- Death, the court must impose the recommended sentence of death. The court may impose a sentence of death only if the jury unanimously found at least one aggravating factor to have been proven beyond a reasonable doubt.

If the defendant waives his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.

If a defendant waives his or her right to a sentencing proceeding by a jury and the court imposes a sentence of death, the court must, considering the records of the trial and the sentencing proceedings, 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.

If the court does not issue its order requiring a sentence of death within 30 days after the rendition of the judgment and sentence, the court must impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082, F.S.

The judgment of conviction and sentence of death shall be subject to automatic review by the Florida Supreme Court and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Florida Supreme Court must have priority over all other cases and must be heard in accordance with rules adopted by the Florida Supreme Court.

Aggravating factors are limited to the following:

- The capital felony was committed by a person who was previously convicted of a felony violation of s. 794.011, F.S., and was under a sentence of imprisonment or was 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.
- 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 capital felony was particularly vulnerable due to age or disability, or because the defendant was in a position of familial or custodial authority in relation to 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.

Mitigating circumstances are 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 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.

Once the prosecution has provided evidence of the existence of one or more aggravating factors, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence must be designed to demonstrate the victim's uniqueness as an individual human being and the physical and psychological harm to the victim. Characterizations and opinions about the crime, the defendant, and the appropriate sentence may not be permitted as a part of victim impact evidence.

Notwithstanding s. 775.082(2), F.S., s. 775.15, F.S., or any other provision of law, a sentence of death must be imposed under this section notwithstanding existing case law that holds such a sentence to be unconstitutional under the United States Constitution or the State Constitution. In any case for which the Florida Supreme Court or the United States Supreme Court reviews a sentence of death imposed pursuant to this section, and in making such a review reconsiders the prior holdings in *Buford v. State* and *Kennedy v. Louisiana*, and determines a sentence of death remains unconstitutional, the court having jurisdiction over the person previously sentenced to death must cause such person to be brought before the court, and the court must sentence such person to life imprisonment without the possibility of parole as provided in s. 775.082(1), F.S.

Newly-created s. 921.1425, F.S., applies to any capital felony under s. 794.011, F.S., that is committed on or after October 1, 2023.

The bill specifies that s. 921.141, F.S., does not apply to a person convicted or adjudicated guilty of a capital sexual battery offense under s. 794.011, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be an indeterminate fiscal impact on the criminal trial courts, appellate courts, prosecutors, defense attorneys, and appellate counsel as a result of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 794.011 and 921.141.

This bill creates section 921.1425 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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