~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

March 3, 2011

**H. 3667**

Introduced by Rep. Bannister

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Read the first time February 15, 2011.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 3667) to amend Section 16‑3‑655, as amended, Code of Laws of South Carolina, 1976, relating to criminal sexual conduct with a minor offenses, so as to provide, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

JAMES H. HARRISON for Committee.

**A** **BILL**

TO AMEND SECTION 16‑3‑655, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES, SO AS TO PROVIDE FOR CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE WHEN THE ACTOR IS OVER THE AGE OF FOURTEEN AND COMMITS CERTAIN ACTS WITH A CHILD UNDER THE AGE OF SIXTEEN, TO PROVIDE AN EXCEPTION FOR CERTAIN CONSENSUAL CONDUCT, AND TO PROVIDE A PENALTY; AND TO REPEAL SECTION 16‑15‑140 RELATING TO COMMITTING OR ATTEMPTING TO COMMIT A LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 16‑3‑655 of the 1976 Code, as last amended by Act 289 of 2010, is further amended to read:

“Section 16‑3‑655. (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

(1) the actor engages in sexual battery with a victim who is less than eleven years of age; or

(2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23‑3‑430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23‑3‑430(D).

(B) A person is guilty of criminal sexual conduct with a minor in the second degree if:

(1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or

(2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

(C) A person is guilty of criminal sexual conduct in the third degree if the actor is over the age of fourteen and wilfully and lewdly commits or attempts to commit, a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years old, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if he is eighteen years of age or less when he engaged in consensual lewd or lascivious conduct with another person who is at least fourteen years of age.

(D)(1) A person convicted of a violation of subsection (A)(1) is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty‑five years, no part of which may be suspended ~~or~~ nor probation granted, or must be imprisoned for life. In the case of a person pleading guilty or nolo contendere to a violation of subsection (A)(1), the judge must make a specific finding on the record regarding whether the type of conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. In the case of a person convicted at trial for a violation of subsection (A)(1), the judge or jury, whichever is applicable, must designate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. If the person has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out‑of‑state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age, he must be punished by death or by imprisonment for life, as provided ~~by~~ in this section. For the purpose of determining a prior conviction under this subsection, the person must have been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent on a separate occasion, prior to the instant adjudication, for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out‑of‑state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age. In order to be eligible for the death penalty pursuant to this section, the sexual battery constituting the current offense and any prior offense must have involved sexual or anal intercourse by a person or intrusion by an object. If any prior offense that would make a person eligible for the death penalty pursuant to this section occurred prior to the effective date of this act and no specific finding was made regarding the nature of the conduct or is an out‑of‑state or federal conviction, the determination of whether the sexual battery constituting the prior offense involved sexual or anal intercourse by a person or intrusion by an object must be made in the separate sentencing proceeding provided ~~by~~ in this section and proven beyond a reasonable doubt and designated in writing by the judge or jury, whichever is applicable. If the judge or jury, whichever is applicable, does not find that the prior offense involved sexual or anal intercourse by a person or intrusion by an object, then the person must be sentenced to imprisonment for life. For purposes of this subsection, imprisonment for life means imprisonment until death.

(2) A person convicted of a violation of subsection (A)(2) is guilty of a felony and, upon conviction, must be imprisoned for not less than ten years nor more than thirty years, no part of which may be suspended ~~or~~ nor probation granted.

(3) A person convicted of a violation of subsection (B) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years ~~according to~~ in the discretion of the court.

(4) A person convicted of a violation of subsection (C) is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

~~(D)~~ (E) If the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant pursuant to this section, a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to ~~subsections (D)~~ items (1) and ~~(D)~~(2), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, ‘life imprisonment’ means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. No person sentenced to life imprisonment, pursuant to this subsection, is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. Under no circumstances may a female who is pregnant be executed, so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death imposed pursuant to this section to life imprisonment ~~under~~ pursuant to the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(1) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant pursuant to this section, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty‑four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pled guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only ~~such~~ evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States, or the State of South Carolina, or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(2) In sentencing a person, upon conviction or adjudication of guilt of a defendant pursuant to this section, the judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(i) The victim’s resistance was overcome by force.

(ii) The victim was prevented from resisting the act because the actor was armed with a dangerous weapon.

(iii) The victim was prevented from resisting the act by threats of great and immediate bodily harm, accompanied by an apparent power to inflict bodily harm.

(iv) The victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing his resistance.

(v) The crime was committed by a person with a prior conviction for murder.

(vi) The offender committed the crime for himself or another for the purpose of receiving money or a thing of monetary value.

(vii) The offender caused or directed another to commit the crime or committed the crime as an agent or employee of another person.

(viii) The crime was committed against two or more persons by the defendant by one act, or pursuant to one scheme, or course of conduct.

(ix) The crime was committed during the commission of burglary in any degree, kidnapping, or trafficking in persons.

(b) Mitigating circumstances:

(i) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

(ii) The crime was committed while the defendant was under the influence of mental or emotional disturbance.

(iii) The defendant was an accomplice in the crime committed by another person and his participation was relatively minor.

(iv) The defendant acted under duress or under the domination of another person.

(v) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(vi) The age or mentality of the defendant at the time of the crime.

(vii) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances, which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases, the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

~~Where~~ When a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. ~~Where~~ When a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in this subsection ~~(D)(4)~~. Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to life imprisonment. No person sentenced to life imprisonment ~~under~~ pursuant to this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for ~~such~~ the death penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant upon conviction or adjudication of guilt of a defendant pursuant to this section, the trial judge shall dismiss ~~such~~ the jury and shall sentence the defendant to life imprisonment, as provided in this subsection ~~(D)(4)~~.

(3) Notwithstanding the provisions of Section 14‑7‑1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(4) In a criminal action pursuant to this section, which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless ~~such~~ those beliefs or attitudes would render him unable to return a verdict according to law.

~~(E)~~(F)(1) In all cases in which an individual is sentenced to death pursuant to this section, the trial judge ~~shall~~, before the dismissal of the jury, shall verbally instruct the jury concerning the discussion of its verdict. A standard written instruction ~~shall~~ must be promulgated by the Supreme Court for use in capital cases brought pursuant to this section.

(2) The verbal instruction ~~shall~~ must include:

(a) the right of the juror to refuse to discuss the verdict;

(b) the right of the juror to discuss the verdict to the extent that the juror so chooses;

(c) the right of the juror to terminate any discussion pertaining to the verdict at any time the juror so chooses;

(d) the right of the juror to report any person who continues to pursue a discussion of the verdict or who continues to harass the juror after the juror has refused to discuss the verdict or communicated a desire to terminate discussion of the verdict; and

(e) the name, address, and phone number of the person or persons to whom the juror should report any harassment concerning the refusal to discuss the verdict or the juror’s decision to terminate discussion of the verdict.

(3) In addition to the verbal instruction of the trial judge, each juror, upon dismissal from jury service, shall receive a copy of the written jury instruction ~~set forth~~ as provided in ~~subsection~~ item (1).

~~(F)~~(G)(1) Whenever the death penalty is imposed pursuant to this section, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(2) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(3) With regard to the sentence, the court shall determine whether the:

(a) ~~Whether the~~ sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(b) ~~Whether the~~ evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in subsection ~~(D)~~(E)(2)(a); and

(c) ~~Whether the~~ sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, ~~shall be~~ is authorized to:

(a) affirm the sentence of death; or

(b) set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as ~~hereinafter~~ provided for, ~~shall~~ must be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined ~~under~~ in subsection ~~(D)~~(E)(1), the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for ~~such~~ this purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation, or aggravation of the punishment in addition to any evidence admitted in the defendant’s first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(6) The sentence review ~~shall be~~ is in addition to direct appeal, if taken, and the review and appeal ~~shall~~ must be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

~~(G)~~(H)(1) Whenever the solicitor seeks the death penalty pursuant to this section, he shall notify the defense attorney of his intention to seek ~~such~~ the death penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney ~~shall~~ must be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(2)(a) Whenever any person is charged with first degree criminal sexual conduct with a minor who is less than eleven years and the death penalty is sought, the court, upon determining that ~~such~~ the person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend ~~such~~ the person in the trial of the action. One of the attorneys so appointed shall have at least five years’ experience as a licensed attorney and at least three years’ experience in the actual trial of felony cases, and only one of the attorneys so appointed ~~shall~~ may be the public defender or a member of his staff. In all cases ~~where~~ when no conflict exists, the public defender or member of his staff ~~shall~~ must be appointed if qualified. If a conflict exists, the court then shall ~~then~~ turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

(b) Notwithstanding ~~any other~~ another provision of law, the court shall order payment of all fees and costs from funds available to the Office of Indigent Defense for the defense of the indigent. Any attorney appointed ~~shall~~ must be compensated at a rate not to exceed fifty dollars per hour for time expended out of court and seventy‑five dollars per hour for time expended in court. Compensation ~~shall~~ may not exceed twenty‑five thousand dollars and ~~shall~~ must be paid from funds available to the Office of Indigent Defense for the defense of indigent represented by court‑appointed, private counsel.

(3)(a) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant’s attorneys to obtain ~~such~~ services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed twenty thousand dollars as the court ~~shall deem~~ deems appropriate. Payment of ~~such~~ these fees and expenses may be ordered in cases where the defendant is an indigent represented by either court‑appointed, private counsel, or the public defender.

(b) Court‑appointed counsel seeking payment for fees and expenses shall request these payments from the Office of Indigent Defense within thirty days after the completion of the case. For the purposes of this statute, exhaustion of the funds shall occur if the funds administered by the Office of Indigent Defense and reserved for death penalty fees and expenses have been reduced to zero. If either the Death Penalty Trial Fund or the Conflict Fund has been exhausted in a month and the other fund contains money not scheduled to be disbursed in that month, then the Indigent Defense Commission must transfer a sufficient amount from the fund with the positive fund balance to the fund with no balance and pay the obligation to the extent possible.

(4) Payment in excess of the hourly rates and limit in ~~subsection~~ item (2) or (3) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred. Upon a finding that timely procurement of ~~such~~ services cannot await prior authorization, the court may authorize the provision of and payment for ~~such~~ services nunc pro tunc.

(5) After completion of the trial, the court shall conduct a hearing to review and validate the fees, costs, and other expenditures on behalf of the defendant.

(6) The Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases brought pursuant to this section.

(7) The Office of Indigent Defense shall maintain a list of death penalty qualified attorneys who have applied for and received certification by the Supreme Court as provided for ~~herein~~ in this subsection. In the event the court‑appointed counsel notifies the chief administrative judge in writing that he or she does not wish to provide representation in a death penalty case, the chief administrative judge shall advise the Office of Indigent Defense which shall forward a name or names to the chief administrative judge for consideration. The appointment power is vested in the chief administrative judge. The Office of Indigent Defense shall establish guidelines as are necessary to ensure that attorneys’ names are presented to the judges on a fair and equitable basis, taking into account geography and previous assignments from the list. Efforts ~~shall~~ must be made to present an attorney from the area or region where the action is initiated.

(8) The payment schedule ~~set forth herein~~ provided in this subsection, as amended by Act 164 of 1993, shall apply to any case for which trial occurs on or after July 1, 1993.

(9) Notwithstanding another provision of law, only attorneys who are licensed to practice in this State and residents of this State may be appointed by the court and compensated with funds appropriated to the Death Penalty Trial Fund in the Office of Indigent Defense. This ~~proviso~~ item shall not pertain to any case in which counsel has been appointed on the effective date of this act.

(10) The judicial department biennially shall develop and make available to the public a list of standard fees and expenses associated with the defense of an indigent person in a death penalty case.

~~(H)~~(I) Notwithstanding ~~any other~~ another provision of law, in any trial pursuant to this section ~~where~~ when the maximum penalty is death or in a separate sentencing proceeding following ~~such~~ the trial, the defendant and his counsel shall have the right to make the last argument.”

SECTION 2. Section 16‑15‑140 of the 1976 Code is repealed.

SECTION 3. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 4. This act takes effect upon approval by the Governor.

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