

# Two issues with new death penalty rules

**G**ov. Ron DeSantis and the Legislature have conspired to separate Florida from all other states by expanding the death penalty in two unwarranted ways. In doing so, they are divorcing Florida from the unambiguous, binding holdings of the U.S. Supreme Court, decisions that apply to all participants in the criminal justice system. This latest estrangement between the state and the state of the law is one that Floridians must worry about regardless of political affiliation.

The language in the recently passed bills show that the legislators and the state's chief executive know what they've done isn't permitted under constitutional law. Their aim is to jettison inconvenient Supreme Court decisions spanning nearly a



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half century. The court has methodically narrowed the scope of the death penalty in order to preserve its constitutionality. That rationale is apparent to anyone who cares to read the case opinions. Evidently, DeSantis didn't do so.

Now two new Florida death penalty laws — one making child sexual assault eligible for the death penalty and one eliminating the juror unanimity requirement for imposing the death penalty — reject the overwhelming national movement away from the death penalty. Only 27 states have the death penalty in some form and at least three of those have imposed moratoriums on executions. The number of annual executions nationally has fallen from almost a hundred in 1998 to 18 in 2022. With numerous states eliminating the death penalty (Washington in 2018; New Hampshire in 2019; Colorado in 2020; Virginia in 2021) and capital cases in long-term decline, Florida stands alone in its expansion.

Despite the governor and others proclaiming the new laws constitute real justice, the changes in death penalty eligibility and process actually will put

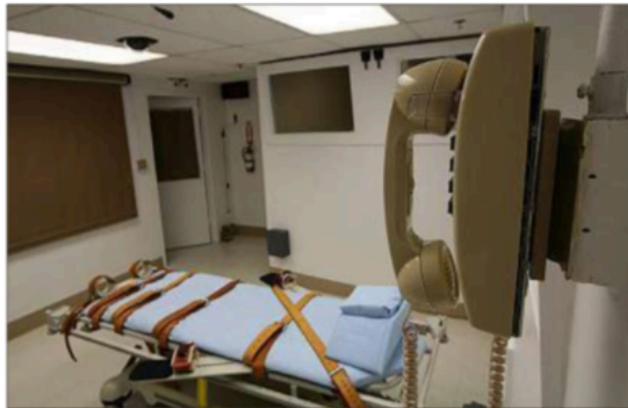
capital cases at unnecessary risk. State attorneys who pursue death penalty prosecutions relying on one or both of the new laws will bear the burden of extensive litigation and almost certain retrials.

Any capital case where a death penalty is imposed with a less than unanimous jury vote as to punishment would be subject to reversal. Child victims will not receive justice if they are forced to relive and repeat the horrors inflicted upon them when convictions/sentences are vacated.

Paradoxically, by using an unconstitutional law regarding the death penalty for child molesters and obtaining death absent jury unanimity, it may make it less certain the offender will be punished with any finality. While there might be an injunction imposed by a federal court temporarily halting the laws, that's not a certainty at this juncture.

Importantly, if a prosecutor decides not to rely on the unconstitutional provisions and declines to seek the death penalty, it is no statement whatsoever lessening the grievous, horrific nature of the sexually abusing a child. Having a valid process and criteria for death penalty cases is distinct from any value judgment about a crime.

Further, given the governor's politically motivated removal of twice-elected State Attorney Andrew Warren in Hillsborough County, what will happen if — as should be the situation — state attorneys decline to enforce the new state law by not seeking the death penalty



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**The execution chamber at Florida State Prison in Starke.**

for an alleged sexual assault on a child under 12 even when statutory aggravators exist. The governor, state legislators and the statute's language all recognize that the expansion of the death penalty to include child sexual assault crimes expressly contradicts binding U.S. Supreme Court decisions limiting the death penalty to only certain homicides. Those decisions by the Supreme Court are all based on the U.S. Constitution which applies to and governs the actions of Florida's state attorneys.

Florida's aggressive, unvarnished expansion of the death penalty only confirms the fundamental democratic (the system, not the party) fear that it is only a matter of when, not if, government executives start ignoring Supreme Court rulings. The next generation authoritarian won't propose or enact legislation with the intent of litigation and judicial review, they will reject judicial decisions they find inconvenient by not accepting the decisions' application to them. In essence, the new brand of despots won't hide behind the façade of respecting the rule of law. The rules will be whatever pleases them in the moment.

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