

STORAGE NAME: h3505a.cp

DATE: February 19, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HJR 3505

RELATING TO: Death Penalty/Execution Method

SPONSOR(S): Reps. Crist & Feeney

COMPANION BILL(S): SB 964 (Identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The proposed amendment would ensure that the Florida Supreme Court does not rule the death penalty unconstitutional unless the death penalty also violates the United States Constitution. The resolution requires that the prohibition against cruel **or** unusual punishment be construed in conformity with the 8th Amendment to the United States Constitution which prohibits cruel **and** unusual punishments. The resolution further requires that the Florida Supreme Court defer to the decisions of the United States Supreme Court when interpreting the 8th Amendment to the United States Constitution.

The resolution also provides that if a method of execution is declared invalid, then the sentence may not be reduced, and the sentence shall remain in force until there is an execution by a valid method.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

- Florida's **death-penalty** statute s. 775.082(1), states:
 - (1) A person who has been convicted of a capital felony shall be punished by death... .
- Florida's **method-of-execution** statute, s. 922.10, states:
 - A death sentence shall be executed by electrocution. ...
- Article I, section 17 of the **Florida Constitution** provides that "cruel or unusual" punishment is forbidden.
- The Eighth Amendment to the **United States Constitution** provides that "cruel and unusual" punishments may not be inflicted.

Currently, the only method of execution available in Florida is the electric chair. Florida began using the electric chair in 1924 when it was thought to be a more humane method than execution by hanging which occasionally resulted in slow suffocation when improperly performed. The electric chair has recently come under attack as being inhumane when two executions resulted in unnecessary burns to the body of the condemned. Nonetheless, the Florida Supreme Court recently held that the electric chair does not violate constitutional protections against cruel or unusual punishment in Jones v. Butterworth, 22 Fla. L. Weekly S659a (Fla. October 20, 1997).

In Jones, the majority did not distinguish the clause in the Florida Constitution prohibiting cruel or unusual punishment as requiring a different analysis than the cruel and unusual clause in the federal constitution. The majority emphatically held that the electric chair, in its present condition, is not cruel or unusual:

There was substantial evidence presented in this case that executions in Florida are conducted without any pain whatsoever, and this record is entirely devoid of evidence suggesting deliberate indifference to a prisoner's well-being on the part of state officials.

The Florida Supreme Court's four to three decision in Jones implied that their decision to uphold the constitutionality of the electric chair is subject to change in the future. One of the votes for the majority, Justice Grimes, is leaving the bench this year. Another justice in the majority, Justice Harding, strongly encouraged the legislature to give inmates an option of lethal injection or electrocution. Justice Harding mentioned the possibility of a "constitutional train wreck" with all the people on Death Row having their sentences commuted to life unless an alternative to electrocution is passed by the legislature. Furman v. Georgia, 408 U.S. 238 (1972); Anderson v. State, 267 So. 2d 8 (Fla. 1972). Justice Overton, who was also with the majority, concurred with Justice

Harding's concerns. Five of the seven Justices encouraged the legislature to adopt legislation which would give an inmate the option to choose lethal injection.

Authority for "constitutional train wreck"

Justice Harding in his concurring opinion in the recent Jones case wrote that a new statute providing for a death sentence to be executed either by electrocution or by lethal injection "would avert a possible 'constitutional train wreck.'" Justice Harding attempted to demonstrate the real possibility of death sentences being commuted to life by referring to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) which held that the manner in which the death penalty was being imposed constituted cruel and unusual punishment. Justice Harding noted that before 1972 the United States Supreme Court had consistently held that the death penalty was not cruel and unusual, thus implying that like the federal court, the Florida Supreme Court could suddenly change its position.

The Florida Supreme Court was forced to commute death sentences to life after Furman, because the United States Supreme Court had held that the manner in which judges and juries decided whether to impose the death penalty was without standards and the arbitrary manner in which the death penalty was decided upon violated the Cruel and Unusual Clause in the federal constitution. After the Furman decision, the states rectified their death-penalty statutes to ensure that certain standards or guidelines were met. The United States Supreme Court subsequently upheld the new death penalty statutes. Gregg v. Georgia, 428 U.S. 153 (1976).

If the Florida Supreme Court decides to strike down use of the electric chair, that decision would only invalidate the method of execution, not the imposition of the death penalty itself. However, Justice Harding in the Jones case has pointed out that Florida statutes only provide for one method of execution and that if that method is removed, then the Court's only alternative may be to impose life sentences on all the inmates currently on Death Row. The Court would not necessarily have to come to the conclusion that sentences would have to be commuted. It is not settled that the method of execution must be specified by statute in order for the Governor to execute a lawfully imposed death sentence. Alternatively, the court could acknowledge that the penalty of death remains intact, and stay the execution until the Legislature passed a new law regulating the method of execution.

Governor's Response

In response to the opinion in Jones the Governor has delayed two executions and reset them for the week of March 23, 1998, to "allow the Legislature an opportunity to consider the Court's recommendation." In a letter to the Speaker of the House, the Governor urged the legislature "to act swiftly in adopting an alternative method of execution."

B. EFFECT OF PROPOSED CHANGES:

The resolution calls for an amendment to Article I, Section 17 of the Florida Constitution to prohibit the Florida Supreme Court from ruling that the death penalty itself violates the Florida Constitution.

The proposed amendment would ensure that the cruel or unusual provision in Article I, Section 17 could not be a basis for the Florida Supreme Court to rule the death penalty unconstitutional unless the death penalty also violates the United States Constitution. The resolution requires that the prohibition against cruel **or** unusual punishment be construed in conformity with the 8th Amendment to the United States Constitution which prohibits cruel **and** unusual punishments. The resolution further requires that the Florida Supreme Court defer to the decisions of the United States Supreme Court when interpreting the 8th Amendment to the United States Constitution.

The resolution also provides that if a method of execution is declared invalid, then the sentence may not be reduced, and the sentence shall remain in force until there is an execution by a valid method.

The resolution applies to cases for people already on death row as well as for crimes committed after the adoption of the amendment.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION RESEARCH:

This section need be completed only in the discretion of the Committee.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because the proposed amendment concerns the criminal law, it is exempt from the requirements of Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The proposed amendment does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The proposed amendment does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

The Crime and Punishment Committee on February 3, 1998 favorably passed out of the committee CS/HB 3303 which provides that if electrocution is declared to be an invalid method of execution then the method of execution is to be by lethal injection. If electrocution is not declared invalid then electrocution will remain the method of execution in Florida.

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This resolution will prevent the Florida Supreme Court from ruling that electrocution, or even the death penalty itself, violates the cruel or unusual provision in the state constitution. Other clauses in the state constitution, such as the due process clause, could not be used to completely abolish the death penalty for violating the state constitution since the proposed amendment explicitly states that "the death penalty is an authorized punishment for capital crimes." However, state constitutional provisions such as due process could still be used to prohibit executions if the court determines that the procedures with which the penalty is executed are arbitrarily and unequally imposed.

A similar amendment was adopted in 1982 which requires the Florida Supreme Court to interpret Article I, Section 12, which relates to improper searches and seizures, in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court. The 1982 amendment was adopted because the Florida Supreme Court was interpreting the state prohibition against improper search and seizure more broadly than the United States Supreme Court was interpreting the similar provision in the United States Constitution. In fact, the Florida Supreme Court adopted the exclusionary rule to prohibit the use of illegally obtained evidence long before the United States Supreme Court arrived at the same conclusion. Thurman v. State, 156 So. 484 (Fla. 1934); Mapp v. Ohio, 367 U.S. 643 (1961). As a result of the Florida Supreme Court's broader interpretation, more cases had to be dismissed because evidence such as illegal drugs was being suppressed, even though the evidence would have been allowed under federal law.

The 1983 amendment to Article 1, Section 12 was not applied to cases that occurred before the amendment was adopted because the amendment did not specify that it was retroactive. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). House resolution 3503 expressly states that it "shall apply retroactively."

The Florida Supreme Court has also held that the court is required to follow past and future United States Supreme Court decisions interpreting unlawful searches and seizures. Rolling v. State, 695 So.2d 278 (Fla. 1997). Therefore, decisions made in the distant past by the United States Supreme Court upholding a method of execution or the death penalty would be binding until the United States Supreme Court rules differently.

House Resolution 3505 requires that any method of execution be allowed, unless prohibited by the United States Constitution. Any court may determine that a method of execution violates the United States Constitution including state courts, but the decision would eventually be subject to review by the United States Supreme Court. Soca v. State, 673 So.2d 24 (Fla. 1996).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

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VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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