SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 3, 1998 Revised: _____ _____ _____ _____

Subject: Death Penalty/Execution Method

	Analyst	Staff Director	Reference	Action
1.	Erickson	Miller	CJ	Favorable/CS
2.			WM	Withdrawn
3.			RC	Withdrawn
4.				
5.				

I. Summary:

Committee Substitute for Senate Joint Resolution 964 proposes an amendment to Article I, Section 17, of the Florida Constitution. Section 17 prohibits, among other things, "cruel or unusual" punishment. The proposed amendment authorizes the death penalty as a punishment for capital crimes designated by the Legislature and provides that the death penalty is not limited or restrained by the Florida Constitution, provides that the prohibitions against cruel or unusual punishment (in the current Section 17) and cruel and unusual punishment (as the prohibition reads in the proposed amendment of Section 17) shall be construed in conformity with U.S. Supreme Court decisions interpreting the prohibition against cruel and unusual punishment in the Eighth Amendment to the U.S. Constitution, provides that any method of execution shall be allowed unless specifically prohibited by the U.S. Supreme Court, provides that methods of execution may be designated by the Legislature and a change in any method of execution may be applied retroactively, prohibits the reduction of a death sentence on the basis that a method of execution is invalid, provides that a death sentence shall remain in force until the sentence can be lawfully executed by a valid method of execution, and provides for retroactive application of Section 17.

The proposed amendment, if approved by a three-fifths vote of each house of the Legislature, would be submitted to the Florida electorate at the general election held on November, 1998.

The constitutional amendment proposed in this joint resolution substantially amends Article I, Section 17, of the Florida Constitution.

II. Present Situation:

Article I, Section 17, of the Florida Constitution provides that "[e]xcessive fines, *cruel **or** unusual punishment*, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden." (Emphasis added).

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel **and** unusual punishments* inflicted." (Emphasis added).

To date, the Florida Supreme Court has not declared that the use of the disjunctive "or" ("cruel or unusual" punishment) in Section 17, rather than the use of the conjunctive "and" ("cruel and unusual" punishment) in the Eighth Amendment means that a punishment could be found unconstitutional under Section 17 (but not under the Eighth Amendment) by virtue of the state court finding that the punishment is cruel but not unusual, or unusual but not cruel. However, this interpretation of Section 17 has been suggested by Justices Shaw and Anstead in their separate dissenting opinions in *Jones v. State*, 11 Fla. L. Weekly S659 (Fla., Oct. 20, 1997) (Shaw, J., and Anstead, J., dissenting).

The *Jones* opinion is the most recent opinion of the Florida Supreme Court regarding the electric chair. By a vote of 4 to 3, a majority of the Justices held that electrocution in Florida's electric chair is not a cruel or unusual punishment. The analysis employed in the *Jones* case is substantially similar to the Eighth Amendment analysis employed by the Ninth Federal Circuit Court of Appeals in *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), *cert. denied and reh. denied*, 511 U.S. 1118, 1119 (1994).

Article XI, Section 1, of the Florida Constitution provides that an "[a]mendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member shall be entered on the journal of each house."

III. Effect of Proposed Changes:

Committee Substitute for Senate Joint Resolution 964 proposes an amendment to Article 1, Section 17, of the Florida Constitution.

The features of the proposed amendment are:

- Authorizes the death penalty as a punishment for capital crimes designated by the Legislature and provides that the death penalty is not limited or restrained by the Florida Constitution.

- Provides that the prohibitions against cruel or unusual punishment (in the current Section 17) and cruel and unusual punishment (as the prohibition reads in the proposed

amendment of Section 17) shall be construed in conformity with U.S. Supreme Court decisions interpreting the prohibition against cruel and unusual punishment in the Eighth Amendment to the U.S. Constitution.

- Provides that any method of execution shall be allowed unless specifically prohibited by the U.S. Supreme Court.

- Provides that methods of execution may be designated by the Legislature and a change in any method of execution may be applied retroactively.

- Prohibits the reduction of a death sentence on the basis that a method of execution is invalid.

- Provides that, in any case in which a method of execution is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method.

- Provides that Section 17 (as amended) shall apply retroactively.

The proposed amendment, if approved by a three-fifths vote of each house of the Legislature, would be submitted to the Florida electorate for approval or rejection at the general election held in November 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The approach taken by the proposed amendment is similar to that taken in Article I, Section 12, of the Florida Constitution, as that section pertains to searches and seizures. In 1982, Section 12 was amended to provide that the “right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against unreasonable interception of private communications by any means” is to “be construed in

conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In *Bernie v. State*, 524 So.2d 988, 990-91 (Fla. 1988), the Florida Supreme Court described the effect of this amendment as follows:

> Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution," [*State v.*] *Lavazzolli*, 434 So.2d [321, 323 (Fla. 1983)]. With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.

Similarly, the proposed amendment would require state courts that are determining whether a punishment is "cruel or unusual" (in the current Section 17) or "cruel and unusual" (as the prohibition reads in the proposed amendment of Section 17) to follow the U.S. Supreme Court's interpretation of the prohibition against cruel and unusual punishment in the Eighth Amendment to the U.S. Constitution. However, staff notes that in construing the 1982 amendment to Article I, Section 12, of the Florida Constitution, the Florida Supreme Court has stated that "when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we are free to look to our own precedent for guidance." *Rolling v. State*, 695 So.2d 278, 297, n. 10 (Fla. 1997). *See Soca v. State*, 673 So.2d 24 (Fla. 1996). In construing Section 12, "[t]he language of article I, section 12, clearly indicates an intention to apply all United States Supreme Court decisions regardless of when they are rendered." *Bernie*, 524 So.2d at 989.

The proposed amendment appears to preclude the Florida Supreme Court from adopting the suggestion of Justices Shaw and Anstead to construe the use of the disjunctive "or" ("cruel or unusual" punishment) in the current Section 17 to mean that a punishment can be found to be cruel but not unusual, or unusual but not cruel. Since the proposed amendment requires that the Florida courts, in construing Section 17, follow the Eighth Amendment, as interpreted by the U.S. Supreme Court, an interpretation of Section 17 consistent with that suggested by Justices Shaw and Anstead would be impermissible.

As it relates to constitutional review of methods of execution, the state courts do not interpret the United States Supreme Court's case law; the courts simply determine if there is a specific holding from the U.S. Supreme Court regarding the method of execution. Unless the U.S. Supreme Court specifically holds a method of execution invalid, the method is valid. The reason for this provision appears to be that there is no universal consensus among the

state and federal courts as to what Eighth Amendment analysis the U.S. Supreme Court intended to apply. The Florida Supreme Court in *Jones, supra,* essentially applied the narrow Eighth Amendment analysis applied by the Ninth Federal Circuit in *Campbell, supra,* which rejects other Eighth Amendment analyses or tests the U.S. Supreme Court has applied in matters other than methods of execution. However, the dissent in *Campbell* would have applied a much broader construction to include such tests as the "evolving standards of decency" test, arguing that the test was meant to apply regardless of the fact that the cases in which it was applied did not concern methods of execution. Chief Justice Kogan essentially advanced this argument in his dissent in the *Jones* case. The proposed amendment would prohibit the Florida Supreme Court from applying this test to electrocution.

While the proposed amendment does not expressly purport to amend any other section, it would amend by implication other sections of the Florida Constitution. For example, a capital defendant could not charge that the state constitution is violated because death sentence proceedings are allegedly arbitrary and capricious, since the proposed amendment provides that the death penalty is not restrained or limited by Florida's Constitution. "[A] Constitution may be amended by implication in the adoption of amendments that by fair intendment and meaning and in effect accomplish such a result." *Board of Public Instruction of Polk County v. Board of Com'rs of Polk County*, 58 Fla. 391, 50 So. 574, 575 (1909). "Where an amendment is the last expression of the will and intent of the lawmaking power, duly exercised, such amendment is controlling, and prior provisions, inconsistent or repugnant to the amendment, are modified or superseded to the extent of inconsistency or repugnancy." *Id*.

In providing for retroactive application of Section 17, the proposed amendment is addressing an issue regarding the 1982 amendment of Article I, Section 12, of the Florida Constitution. The 1982 amendment did not specifically provide for retroactive application of the 1982 amendment. The Florida Supreme Court held that the amendment unquestionably altered substantive rights under the law prior to the amendment, and absent manifest intent to give the amendment retroactive application, the amendment had to be construed as having only prospective application. *State v. Lavazolli,* 434 So.2d 321 (Fla. 1983).

Most of the provisions of the proposed amendment are self-executing, though the Legislature would have to determine the specific method of execution. While the provision authorizing the death penalty appears to preclude the Legislature, if it so chose, from abolishing the death penalty, the Legislature could enact laws that would effectively nullify the effect of this provision, such as eliminating capital crimes.

The ballot summary does not exceed the statutory limit of 75 words, and the ballot title does not exceed the statutory limit of 15 words. s. 101.161(1), F.S.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Staff anticipates that the Office of the Attorney General will experience some temporary workload increase in defending the amendment against any challenges to its constitutionality. The fiscal impact of this workload increase cannot be ascertained at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.