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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY (HCC)
ANALYSIS

BILL #: HB 951 **(PCB CPCS 01-02)**

RELATING TO: Excessive Punishment

SPONSOR(S): Committee on Crime Prevention, Corrections & Safety, and Representative Bilirakis

TIED BILL(S):

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

(1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 7 NAYS 1
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I. SUMMARY:

House Bill 951 is a joint resolution which proposes the exact same amendment to Section 17, of Article I of the State Constitution which was proposed in HJR 3505 in 1998. In the 1998 general election, it appeared on the ballot as "Amendment 2" and was passed by nearly 73 percent of the voters (receiving over 2.6 million "yes" votes). Twenty-two months after the election, the amendment was struck down by the Florida Supreme Court in a ruling in which four of the seven justices concluded that the ballot summary was "clearly and conclusively" inaccurate.

This joint resolution makes a specific provision within Article 1, Section 17 of the State Constitution that the death penalty is an authorized punishment for capital crimes designated by the Legislature.

It also changes the state prohibition against "cruel **or** unusual" punishment to a prohibition against "cruel **and** unusual" punishment. This change would eliminate the present textual basis to conclude that the state standard must be somehow different from the federal standard.

The proposed constitutional amendment would also 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 Eighth 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 Eighth 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 ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Article I, Section 17 of the Florida Constitution provides:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

While the State Constitution prohibits "cruel **or** unusual" punishment, the Eighth Amendment to the Federal Constitution prohibits "cruel **and** unusual" punishments.

In 1998, the Legislature passed HJR 3505 which proposed amending Article 1, Section 17 of the State Constitution as follows:

> SECTION 17. Excessive punishments.-Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

(Words ~~stricken~~ are deletions, words underlined are additions)

The proposal appeared on the ballot as "Amendment 2" in the 1998 general election. It was passed by nearly 73 percent of the voters (over 2.6 million "yes" votes)[1]. The ballot title and summary for Amendment 2 provided:

[1] Source: Florida Department of State, Division of Elections.

BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT

BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to the United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

Armstrong v. Harris

Twenty-two months after the 1998 general election, the Florida Supreme Court, in a 4-3 decision, held that the ballot title and summary of the proposed amendment "clearly and conclusively" failed to meet an "implicit" requirement in Section 5 of Article XI of the Florida Constitution that proposed constitutional amendments "be accurately represented on the ballot." Armstrong v. Harris, Slip Opinion No. SC95223 (Fla. September 7, 2000). The Court believed its case precedent supported judicial review of the accuracy of ballot titles and summaries, including those proposed by the Legislature. The Court also held that the ballot title and summary had mislead the voters in violation of s. 101.61, F.S., which requires that "the substance of [a proposed constitutional amendment] . . . be printed in clear and unambiguous language." The Court described the inaccuracies of the ballot title and summary as follows:

> Amendment No. 2 fails under article XI, section 5, for several reasons. First, the amendment "flies under false colors." Citizens may well have voted in favor of the amendment based on the false premise that the amendment will promote the basic rights of Florida citizens. Under such circumstances, the true merits of the amendment will have been overlooked or misconstrued. Second the proposed amendment "hides the ball" from the voter. The ballot title and summary give no hint of the **radical** change in state constitutional law that the text actually foments. (Emphasis added)
> *Id*. at page 30.

According to the Court, the amendment "flew under false colors" because the ballot title and second sentence of the summary failed to apprise the voters of what the Court identified as the main point and effect of the amendment - i.e., to effectively nullify the state constitutional prohibition against "cruel or unusual punishments." *See*, Armstrong, *supra* at page 21 and 23. The Court stated:

> Under such a scenario , the organic law governing either cruel or unusual punishments in Florida would consist of a floor (i.e. the federal constitution) and nothing more. *Id*. at 21.

The Court concluded that from the ballot summary description of the change, "a citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state Constitutional rights when in fact the citizen was doing the exact opposite- i.e., he or she was voting to nullify those rights." Armstrong at 22.

According to the Court, the ballot summary "hid the ball" because it did not inform the voters that the main effect of the amendment -- nullifying the "cruel or unusual" punishment clause -- "far outstrips the stated purpose (i.e., to 'preserve' the death penalty)" because this clause

"applies to all criminal punishments, not just the death penalty." *Id*. at page 23. Further, the Court stated that "[t]he voter is not even told on the ballot that the word "or" in the Cruel or Unusual Punishment Clause will be changed to "and" --a **significant** change by itself." *Id*. (footnote omitted- emphasis added).

As noted above, the Court described Amendment 2's change from a prohibition against "cruel or unusual" punishment to a prohibition against "cruel and unusual" punishment as both "radical" and "significant." The authority relied upon by the majority to explain this distinction were two footnotes; one of which, was a footnote to the previous footnote. The referenced footnotes in these cases offer little by way distinguishing "cruel **or** unusual" punishment from "cruel **and** unusual" punishment except to essentially state the obvious conclusion that "the word 'or' indicates that alternatives were intended." *See*, Armstrong, *supra*, at 20, n.26 *citing* e.g., Allen v. State, 636 So.2d 494, 497 n.5 (Fla. 1994) and Tillman v. State, 591 So.2d 167, 169 n.7 (Fla. 1991).

However, Chief Justice Wells noted in his dissenting opinion:

> Also, respondent is correct that it has never been determined that there is a material difference between the phrases "cruel or unusual" and "cruel and unusual" for purposes of the application of capital punishment. Armstrong, *supra*, at 54 (Wells dissenting).

The correctness of this observation by Chief Justice Wells, is evidenced by Justice Anstead's dissenting opinion in a challenge made against the constitutionality of the electric chair which took place several months **after** Amendment 2 had passed.

> An obvious failing of the majority opinion is its apparent unwillingness to directly confront and explain the Florida Constitution's prohibition of cruel or unusual punishments and the ban of cruel and unusual punishments in the U.S. Constitution. Provenzano v. Moore, 744 So.2d 413, 445 (Fla. 1999)(Anstead dissenting).

The "majority opinion" Justice Anstead is referring to is Provenzano v. Moore, 744 So.2d 413 (Fla. 1999). Provenzano was a case in which the Florida Supreme Court reasserted the application of United States Supreme Court precedent utilizing the federal "cruel **and** usual" analysis to determine that Florida's electric chair does not constitute "cruel **or** unusual" punishment. *See*, Provenzano, *supra* at 415.

With respect to noncapital cases, there has been no noncapital case where the application of the two standards has been held to require different results when applied to a particular set of circumstances. An example of a noncapital case is Hale v. State, 630 So.2d 521 (Fla. 1993). In Hale, the Florida Supreme Court was reviewing a case involving two concurrent 25 year maximum prison sentences, containing two concurrent ten year minimum mandatory prison sentences, which arose from the sale of "a small piece of crack cocaine to a confidential informant." Hale argued that the Florida constitution guaranteed judicial review of the proportionality of his sentence to determine if it was cruel **or** unusual punishment. In his petition, Hale abandoned his cruel **and** unusual argument and relied exclusively on the state prohibition against cruel **or** unusual punishment, asserting that the state provision is broader than the federal provision.

The Court determined that it was not necessary to "delineate the precise contours of the Florida guarantee against cruel **or** unusual punishment." Moreover, this determination was

made with the Court's acknowledgment that the proportional review provided by the federal cruel **and** unusual clause was a minimum standard.

Florida's Methods of Execution

Section. 922.105, F.S. is the current provision governing Florida's methods of execution. It provides in part:

> (1) A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution. . . .
>
> . . .
>
> (3) If electrocution or lethal injection is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution.

As it stands now, Florida has two valid methods of execution.[2] When electrocution was the primary method of execution in Florida, it was routinely challenged as cruel or unusual punishment. *See*, Provenzano, *supra*. a 417, (Harding concurring).

In the year 2000, two challenges were made to Florida's lethal injection execution method based on claims alleging deficiencies in the procedures for administering a lethal injection. Both of these challenges were unsuccessful. *See*, Sims v. State, 754 So.2d 657 (Fla. 2000); Provenzano v. State, 761 So.2d 1097 (Fla. 2000).

C. EFFECT OF PROPOSED CHANGES:

This resolution makes a specific provision within Article 1, Section 17 of the State Constitution that the death penalty is an authorized punishment for capital crimes designated by the Legislature.

It also changes the state prohibition against "cruel **or** unusual" punishment to a prohibition against "cruel **and** unusual" punishment. This change would eliminate the present textual basis to conclude that alternatives were intended, and that as a result, the state standard must be somehow different from the federal standard.

The proposed constitutional amendment would also 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 Eighth 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 Eighth 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.

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[2] In January 2000, Florida avoided a constitutional challenge to the electric chair in Bryan v. Moore, ---U.S.---, 120 S.Ct 394, 145 L.Ed. 2d 306 (1999), *cert dismissed*, ---U.S.---, 120 S.Ct. 1003, 145 L.Ed 2d 927 (2000), when as a result of a special session, Florida changed its primary method of execution from electrocution to lethal injection as provided in s. 922.105, F.S. The United States Supreme Court had granted certiorari in October of 1999 to hear the challenge, but subsequent to the change in Florida law, dismissed its previous order agreeing to hear the case.

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

D. SECTION-BY-SECTION ANALYSIS:

See Effect of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

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:

A. CONSTITUTIONAL ISSUES:

This resolution will prevent the Florida Supreme Court from declaring that the death penalty itself violates the Florida Constitution. In addition, other clauses in the State Constitution could not be used to 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. . . "

Although, prior to Armstrong, *supra*, no majority opinion of the Florida Supreme Court has neither elaborated on, nor "delineated the contours" of, any material difference between the state cruel **or** unusual clause, and the federal cruel **and** unusual clause, the fact that the present majority of the Court describes this distinction as both "radical" and "substantial" leaves uncertainty as to what material significance, if any, would be attached to this distinction now or in the near future.

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 Fourth 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. As a result of the Florida Supreme Court's broader interpretation, more cases had to be dismissed because evidence 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 Bill 951, however, 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.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

Changes to Ballot Summary Requirements

Section 101.161 F.S., requires that the substance of a proposed amendment to the Florida Constitution shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the amendment. At the time HJR 3505 was placed on the ballot in 1998, this requirement applied to amendments proposed by the Legislature through joint resolution. Subsequently, in Ch. 2000-361, Laws of Florida, the Legislature exempted amendments and ballot language proposed by joint resolution from this word limitation. Consequently, there is no statutory provision precluding a ballot summary of any length on an amendment proposed by joint resolution, and the Legislature could include the whole text of the proposed amendment in the ballot summary.

Brennan v. State – Execution of persons 16 years of age at the time of the crime

Brennan v. State, 754 So.2d 1 (Fla. 1999) was a first degree murder case in which the defendant, who was eight days shy of 17 years of age at the time of the crime, had been sentenced to death. To put the discussion of the Brennan case in context, the following description is provided to describe the facts under which a jury recommended, and the trial judge imposed, a death sentence on the defendant. The evidence established that Brennan and the Co-defendant, Nelson (age eighteen) wanted to leave Cape Coral and travel to Fort Lauderdale. Brennan and Nelson devised a plan in advance to lure the victim, under false pretenses, into a remote area of Cape Coral to kill the victim, Tommy Owens, and steal his car. On March 10, 1995, according to the plan, Brennan and Nelson drove to a remote area with the victim. Once there, in order to entice the victim out of the car, Brennan took a razor knife and cut the rear bumper of the car. He then told Owens about the damage to lure him out of his car. When the victim stepped out to look at the damage, Nelson hit Owens with a metal baseball bat. The victim ran away but was chased down by Nelson with Brennan not far behind. The victim, injured and in pain, pleaded for his life and offered them his car and money, if they would stop beating him, but Brennan and Nelson decided that Owens should die. Brennan and Nelson continued beating the victim. The victim eventually fell to the ground. Brennan took his razor knife (box cutter) and repeatedly slashed and cut the victim's throat. Even after all this, Owens was still breathing, and was again struck by Nelson with the baseball bat. The victim sustained multiple blows to the head. He was conscious and aware of his impending demise before his throat was cut. Brennan tied the victim's hands behind his back and, together with Nelson, dragged the victim along the ground into the brush where he was again beaten by both Brennan and Nelson with the baseball bat. They covered the victim with a piece of plywood and left him to die, still gasping and gurgling for breath. The trial judge found that Brennan's actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic, or a fit of rage. The judge found that the death of the victim was the result of a careful plan made well in advance of the crime. The trial judge described this murder as a "malevolent, unmerciful and ruthless murder involving prolonged torture and unmitigated cruelty."

On direct appeal of the judgment and sentence, the Florida Supreme Court ruled that "the imposition of a death sentence on Brennan, for a crime committed when he was sixteen years of age, constitutes cruel **or** unusual punishment in violation of article I, section 17 of the Florida Constitution. Although the Court in Brennan rested its ruling on the State Constitutional prohibition against cruel **or** unusual punishment, they also clearly indicated that if the Federal Constitutional prohibition against cruel **and** unusual punishment had been applied (which is the standard that would be applied if the proposed amendment passed) they would have reached the same result. The Court stated:

> However, there is an important aspect of the Stanford opinion that further supports our determination that **the imposition of the death penalty in this case would be unconstitutional under both the Florida and United States Constitutions.** Brennan, *supra* at 16.

The Stanford opinion is a U.S. Supreme Court opinion which held that it is not per se cruel and unusual punishment to execute a person 16 or 17 years of age at the time of the crime. The Florida Supreme Court distinguished the Stanford case from the Brennan case based on statutory differences between Florida's statutory scheme and the ones at issue in Stanford. With respect to these differences, the Florida Supreme Court stated in Brennan:

> The Legislature's failure to impose a minimum age, the legislative mandate that a child of any age indicted for a capital crime shall be subject to the death penalty, and the failure to set up a system through our juvenile transfer statutes that "ensure[s] individualized consideration of the maturity and moral responsibility" render our statutory scheme

> suspect under the federal constitution and the reasoning of Stanford as it applies to sixteen-year-old offenders. (citation omitted) This also distinguishes our statutory scheme from the Virginia statute recently upheld as constitutional by the Virginia Supreme Court. (citation omitted)
> . . .
>
> If given literal effect, our statutory scheme would unconstitutionally authorize the imposition of the death penalty on a child of any age.

Since the issuance of the Brennan opinion, nothing has changed with respect to Florida's statutory scheme that would provide any basis for concluding that the Florida Supreme Court would uphold a death sentence imposed on a person who was 16 years of age at the time of the crime, regardless of whether the standard applied was *cruel **or** unusual* punishment, or *cruel **and** unusual* punishment.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:	Staff Director:
David De La Paz	David De La Paz