SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Criminal Justice Committee

BILL:	SB 1130
INTRODUCER:	Senator Villalobos
SUBJECT:	Sentencing in Capital Cases
DATE:	January 6, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 1130 requires a unanimous jury advisory sentence of death. Currently, a jury recommendation may be based upon a simple majority vote. The bill does not effect the trial judge's ultimate authority to impose the actual sentence (death or life imprisonment) nor the weight the jury's recommendation must be given by the trial judge in making the sentencing decision.

This bill substantially amends sections 921.141 and 921.142, Florida Statutes.

II. Present Situation:

The Furman Decision – Historical Perspective

In *Furman v. Georgia* the U.S. Supreme Court found that then-existing death penalty statutes constituted cruel and unusual punishment under the Eighth Amendment. (*Furman v. Georgia*, 408 U.S. 238 (1972). Since that landmark decision, the Florida Legislature enacted a new capital sentencing scheme in 1972, which provides for a separate sentencing hearing after conviction or adjudication of guilt of a capital offense. The jury acts in an advisory capacity to the judge, who is the ultimate sentencing authority. Evidence is introduced regarding the defendant's character and the nature of the crime. The jury considers statutory aggravating and mitigating factors and advises the judge whether the sentence should be the death penalty or life imprisonment. The judge independently weighs the aggravating and mitigating factors and, considering the jury's recommendation as well, determines the sentence. The judgment of conviction and sentence of death is subject to automatic review by the Supreme Court of Florida. Section 921.141. F.S.

Proportionality Review

In the *State v. Dixon* opinion, upholding the death penalty sentencing procedures enacted by the Legislature in response to *Furman*, the Florida Supreme Court indicated that automatic appellate review in death cases, and comparison with other cases in which the death penalty was handed down, could serve to control and channel the discretion in sentencing the *Furman* court struck down. *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

The Florida Supreme Court gleaned two points from the *Furman* decision: 1) the opinion did not abolish capital punishment; and 2) "the mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*; it was rather the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman*." (*Id*.at 6) "If the judicial discretion possible and necessary under Fla. Stat. s. 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia* has been met." (*Id*.at 7)

Proportionality review is the comparison of one case in which the defendant was sentenced to death with other death cases. The Florida Supreme Court engages in proportionality review in all death penalty cases. The origin of proportionality review is found in the *Dixon* case.

The *Dixon* court found that the Florida Legislature had provided a death penalty sentencing system whereby aggravating and mitigating factors are defined, and the weighing process is left to the carefully scrutinized judgment of jurors and judges. (*Id*. at 7)

The court explained the five steps between conviction of a defendant in a capital case and imposition of the death penalty:

- The question of punishment is reserved for a post-conviction hearing – relevant evidence, which may not have been heard during the guilt phase, can be heard as to the issue of punishment.
- The jury must make a recommendation (unless waived by the defendant), as a separate and distinct issue from the question of guilt. The question before the jury in the penalty phase is "whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." (*Id*. at 8)
- The trial judge decides the sentence – guided by, but not bound by, the jury's recommendation. In the court's view, this was intended as a safeguard against the inflamed emotions of jurors – the appropriate sentence is "viewed in the light of judicial experience." The court must weigh the aggravating and mitigating factors, as the jury did, in handing down the sentence.
- The reasons for the sentence must be set forth in writing by the judge. Although the statute did not require it, in its opinion, the court required that life sentences be set out in writing as well as sentences of death, "to provide the opportunity for meaningful review." (*Id*. at 8)
- Automatic review of the conviction and death sentence by the Florida Supreme Court was viewed by the *Dixon* court as "evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." (*Id*. at 8)

The court opined that the "most important safeguard" in the sentencing scheme is the aggravating and mitigating circumstances which "must be determinative of the sentence imposed." (*Id*.at 8) When one or more of the aggravating factors is found (beyond a reasonable doubt), death is presumed to be the appropriate sentence, unless the aggravating factor is overcome by one or more mitigating factors.

The court stated: "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. *Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case*. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia, Supra,* can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." (*Id*. at 10, emphasis added)

In *Proffitt v. Florida*, 428 U.S. 242 (1976), the U.S. Supreme Court seemed to rely on the Florida Supreme Court's promise to give each death case a meaningful review, including proportionality review, when the *Proffitt* court upheld Florida's new death penalty sentencing structure. The court stated: "[T]he Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases….In fact, it is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences (citations omitted)." (*Id*. at 258, 259)

In his article "The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida," *11 St. Thomas L. Rev. 207* (1999), Ken Driggs makes the following observations: "Jury death recommendations on close votes are more likely to see their death sentences reduced to life by the Florida Supreme Court. The court has often reduced death sentences to life where they were imposed on a 7-5 jury recommendation. Death sentences are more commonly imposed on an 8-4 jury recommendation. A 9-3 jury death recommendation still represents a significant sentiment for life and often comes to the Florida Supreme Court on proportionality review. Not surprisingly, when a jury recommends death by a 10-2, 11-1, or 12-0 vote the sentence is very likely to withstand proportionality review." (*Id*. at 267-270.)

The Jury's Role in Capital Cases in Florida – A "Hybrid" System

Florida has what is commonly called a "hybrid" system for sentencing in capital cases. That is, the jury acts in an advisory capacity to the sentencing judge and the judge has the ability to "override" the jury's recommendation of life or death. Other schemes are either "pure" judge sentencing (by the trial judge or a panel of judges) or "pure" jury sentencing.

In Florida, the jury in a capital case makes a sentencing recommendation – death or life imprisonment – unless the jury is waived. This recommendation is by majority vote, and is based on the weighing of aggravating and mitigating factors, as well as argument presented during the penalty phase of the trial.

The judge must then decide the appropriate sentence, independently weighing the jury's recommendation along with the aggravating and mitigating factors. The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in a meaningful review. The judge may sentence a defendant in a different manner than the jury recommends – this is known as an "override."

The Florida Supreme Court must review all cases in which the death penalty has been imposed. *Article V, section (3),(b)(1), Florida Constitution.* The Court scrutinizes overrides very carefully. The recommendation of the jury must be given great weight in the trial judge's decision-making process on the sentence handed down.

What is referred to as the Tedder "Great Weight" Standard was announced by the Florida Supreme Court in *Tedder v. State*, 322 So.2d 908 (Fla. 1975). In that case, the Court determined that "[a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." (*Id*. at 910). The same consideration by the sentencing judge is expected of a death recommendation as a life recommendation. *Grossman v. State*, 525 So.2d 833, 839, n.1 (Fla. 1988).

It has been reported that the Supreme Court of Florida has vacated "roughly three-fourths of death sentences imposed in the face of contrary jury recommendations." (Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes, James R. Acker and Charles S. Lanier, *31 Crim Law Bull 19, at 22* (1995)).

Jury Votes in Florida Death Penalty Cases, 1990-1999

The Clerk of the Supreme Court of Florida has compiled data from direct appeals in capital cases disposed of by the Court during the years 1990 through 1999 which reflects the breakdown of the jury votes in those cases. This data is reported as follows:

Jury Recommendations for Death Sentence

Jury Vote	Number of Sentences	Percentage
12-0	77	15.9%
11-1	59	12.2%
10-2	59	12.2%
9-3	69	14.3%
8-4	72	14.9%
7-5	64	13.2%
6-6	2	0.4%
5-7	1	0.2%
4-8	1	0.2%
vote unknown,	30	6.2%

life rec.		
jury rec. waived by defendant	19	3.9%
death sentence imposed by judge on remand	18	3.7%
vote not recorded or not available	13	2.7%
TOTAL	484	100%

Clerk of the Supreme Court of Florida, correspondence dated November 9, 2000.

The Clerk cautions that the votes could only be determined by doing a manual count from data that was not stored in a computer database. Although the Clerk indicates that there were some "judgment calls" made with regard to how to record the votes, they were minimal and, in the Clerk's opinion, not statistically significant. The total number of jury votes and corresponding sentences (484) exceeds the total number of initial, resentence and retrial cases disposed of by the Court during that time period (467). This reflects multiple death sentences in several cases, with different jury votes on different counts.

The Supreme Court Workload Study Commission discussed the death penalty caseload of the Court on October 24, 2001. Part of the discussion centered around the possibility of decreasing the Court's death penalty workload if statutory changes were implemented to require a supermajority vote of the jury, rather than the simple majority required under current law. Spokespeople for the Attorney General and the Florida Prosecuting Attorney's Association disagreed that such a modification would have an effect on the death penalty workload. In their opinions, juries who believed the death penalty was the appropriate sentence in a case would reach the required vote (supermajority, in the context of the discussion) in order to issue that verdict. *Minutes of the October 24, 2001 Meeting,* Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission,* page 11.

Ring v. Arizona

On June 24, 2002, the United States Supreme Court handed down its decision in Ring v. Arizona, a death penalty case that has had a ripple effect all over the country. In a 7-2 decision, the Court ruled that juries rather than judges acting alone must make crucial factual determinations that subject a convicted murderer to the death penalty. The decision was clear as to its application to the Arizona death penalty sentencing scheme wherein the judge, without any input whatsoever from the jury beyond the verdict of guilty on the murder charge, made the sentencing decision. The Court found that the Arizona sentencing scheme violated the defendant's 6th Amendment right to a jury trial. Ring v. Arizona, 536 U.S. 584 (2002).

The Court was not clear about whether Florida's "hybrid" sentencing scheme was effected by the Ring decision. Florida, Alabama, Delaware, and Indiana provided for a recommendation of death or life from the jury, but the judge made the ultimate decision after considering the jury recommendation.

The Florida Supreme Court has not decided the overall applicability of Ring to our death penalty sentencing scheme, other than to clearly state in Johnson v. State that Ring does not apply retroactively in Florida. This is an important ruling which should give the Legislature some assurance that in statutorily implementing any changes suggested by the Court, based on Ring, the Death Row inmates whose convictions are final at the time of the statutory changes should not have valid postconviction claims because the Ring – based changes were made.

State v. Steele

The Florida Supreme Court issued a ruling on October 12, 2005, that had a clear message for the Legislature: "Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations." State v. Steele, No. SC04-802 (Fla. 2005) [Justice Cantero, writing for the majority; Wells, Lewis, Quince and Bell, JJ., concurring; C.J. Pariente wrote separately to concur in part and dissent in part, Anstead, J. concurring. Both Justices in the minority concurred with Justice Cantero's suggestions to the Legislature.]

The Steele case is a product of the post-Ring efforts by a trial court, in a death case, to comply with Ring. The trial judge imposed two requirements to address concerns with the sentencing scheme in death cases, which were unresolved by the Florida courts at the time of the trial.

The trial court required: 1) the State to provide advance notice of the aggravating factors upon which it would rely at the penalty phase, and 2) an interrogatory verdict form at the penalty phase. The court required the jurors to specify each aggravator found and the vote for that aggravator. A majority vote was required to find an aggravator proven.

As to those two issues, the Florida Supreme Court held that:

1. Notice of Aggravating Factors: Because of the expansion of the statutory aggravators (8 additional in the last several years), and because there is no express prohibition on requiring Notice, the trial court did not violate an established principle of law. Further, Notice does not constitute a miscarriage of justice, nor is the Notice requirement inequitable.

2. Special Verdict on Aggravators: *Ring* does not require it; our current sentencing statute only requires a majority of the jury to agree that an aggravator has been proven – not necessarily the same one; therefore the trial court's requirement constituted a departure from the essential requirements of law.

In an unusual act, the Court reached beyond the analysis and holding in the case before it, to include a section in the opinion entitled "The Need for Legislative Action." It is here, and in Justice Wells' concurring opinion, that the Court indicates concerns about the possible implications of *Ring* in Florida.

Post-*Ring*, the other three states that had systems akin to Florida's "hybrid" system for sentencing in death penalty cases, have modified their sentencing schemes. Alabama and Indiana have judicially required a unanimous jury finding of aggravators and Indiana moved away from

the hybrid system completely by statutorily giving the sentencing responsibility to the jury. Delaware has amended its statute to require jury unanimity on at least one aggravating circumstance.

Significantly, as Justice Cantero explains in *Steele*: "Florida is now the only state in the country that allows a jury to decide that aggravators exist **and** to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, **at least**, a unanimous jury finding of aggravators. Of these, 24 states require by statute **both** that the jury unanimously agree on the existence of aggravators **and** that it unanimously recommend the death penalty. Three states require by statute unanimity only as to the jury's finding of aggravators. Seven more states have judicially imposed a requirement **at least** that the aggravators be determined unanimously. Of these seven states, five … require that **both** the aggravators **and** the recommendation of death be unanimous. … Although Missouri law is less clear, it appears that a jury at least must unanimously find the aggravators. … That leaves Utah and Virginia. In those states, the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty. … Finally, the federal government, when imposing the death penalty, also requires a unanimous jury." *Id.*

A careful reading of the majority opinion seems to indicate that the Court is suggesting the Legislature consider revising our sentencing scheme to require a unanimous jury recommendation of death, but not necessarily unanimity on any one aggravator. This appears to be so for several reasons:

- To require unanimity on any one aggravator, or even a majority vote on each aggravator would be an unnecessary expansion of *Ring*.
- A unanimous recommendation of death implies the finding of at least one aggravator (not out-weighed by a mitigator) by each juror.
- Setting forth the jury vote on particular aggravators may sway the sentencing judge's *independent analysis and weighing of the aggravators and mitigators*, a factor in avoiding the arbitrary and capricious application of the death penalty.
- The emphasis placed by Justice Cantero in the observation that Florida is the only state to allow a jury to decide aggravators **and** a death recommendation by a simple majority (seeming to indicate by the emphasis that allowing **both** to be found by a majority is problematic).
- Likewise, in the closing paragraph of the section of the opinion suggesting Legislative action, the statement: "The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote **both** whether aggravators exist and whether to recommend the death penalty." *Id.*

Recent Precedent for Implementing Suggested Statutory Changes Made by the Judiciary in Death Penalty Cases

On October 29, 1997, the Florida Supreme Court in *Jones v. State*, 701 So.2d 76 (Fla. 1997) upheld Florida's use of the electric chair. However, a majority of the Justices urged the Legislature to allow lethal injection. In a concurring opinion, Chief Justice Harding suggested that such a step "would avert a possible constitutional 'train wreck' if this or any other court should ever determine that electrocution is unconstitutional." *Id.*

During the 1998 Regular Legislative Session, the Legislature passed legislation providing for executions by means of lethal injection only if electrocution was held to be unconstitutional. *See* ch. 98-4, L.O.F.

The Legislature also passed legislation proposing an amendment to Art. I, Sec. 17, Fla. Const., which prohibited "cruel or unusual punishment." This joint resolution became Revision 2 on the ballot. Revision 2 passed during the November 1998 general election. The amendment provides, in part, state constitutional authorization for any method of execution designated by the Legislature and not declared unconstitutional.

On July 8, 1999, Alan Lee Davis was executed. Witnesses at the execution observed a line of blood descending from the area around the defendant's nose and the mouth strap and pooling on Davis' shirt. The medical examiner concluded at a subsequent autopsy that the cause of the blood was a nose bleed.

On September 24, 1999, the Florida Supreme Court in *Provenzano v. Moore*, 24 Fla. L. Weekly S314 (Fla. 1999) held that Florida's electric chair is not cruel or unusual punishment.

On October 26, 1999, the U.S. Supreme Court granted certiorari in *Bryan v. Moore*, Case No. 99-6723, a case in which the constitutionality of Florida's electric chair was again at issue.

On December 7, 1999, the Governor announced a Special Session from January 5, 2000 to January 7, 2000. The Governor's Proclamation identified the call as being for the purpose of considering "legislation authorizing that death sentences be carried out by lethal injection or electrocution," among other matters.

The Legislature ultimately passed a bill that provided for lethal injection as the method of execution, unless the condemned elects to be executed by electrocution. This was done at the behest, or suggestion, of the Court, *to avoid a potential constitutional problem* with the death penalty in Florida.

III. Effect of Proposed Changes:

Senate Bill 1130 amends ss. 921.141 and 941.142, F.S., for death-eligible offenses committed on or after October 1, 2006, so that if the jury decides to advise the sentencing court that its recommendation is death, that decision must be by a unanimous vote.

The bill does not effect the sentencing judge's statutory authority to "override" the jury's recommendation nor does it alter the standard of review the court must give the aggravators and mitigators in the case.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.