HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HR 1627 Unanimity of Jury Recommendations in Death Penalty Cases
SPONSOR(S): Kyle
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Kramer	Kramer
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Currently, in a case where a defendant has been convicted of a capital felony, after the penalty phase is conducted, the jury considers statutory aggravating and mitigating factors and recommends to the judge a sentence of death or life imprisonment. The jury's recommendation of death requires a majority vote of the twelve jurors.

In an opinion released in October 2005, the Florida Supreme Court recommended that the Legislature amend the death penalty statute to require unanimity in the jury's recommendations.

This House resolution contains a number of "whereas" clauses and provides that the "House of Representatives believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases."

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any House principles.

B. EFFECT OF PROPOSED CHANGES:

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)

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.

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, life rec.	30	6.2%
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.

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 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 that *Ring* does not apply retroactively in Florida.

State v. Steele

The Florida Supreme Court issued a ruling on October 12, 2005, in which the court stated: "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 trial 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; Florida's 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.

The Court then reached beyond the analysis and holding in the case before it, and included a section in the opinion entitled “The Need for Legislative Action.” The court stated:

> 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.*

The court stated that “many courts and scholars have recognized the value of unanimous verdicts.” The court concludes its discussion as follows:

> 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. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

The opinion did not specifically indicate what constitutional deficiency may arise to cast Florida’s death penalty statute into jeopardy.

Attorney General’s Letter

In a letter written to the Speaker of the House of Representatives following the *Steele* decision, the Attorney General recommended that the Legislature not change its death penalty sentencing scheme. The Attorney General noted that the jury recommendations in several well-known murder cases were not unanimous including Theodore Bundy (10-2 recommendation), Aileen Wuornos (10-2 recommendation) and Joe Nixon (10-2 recommendation).

House Resolution

This House resolution contains the following wheras clauses:

> WHEREAS, the Florida Supreme Court in its opinion in the case of State of Florida v. Alfredie Steele, SC04-802, issued October 12, 2005, suggested 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" in death penalty cases, and
>
> WHEREAS, the Florida Supreme Court quoted the view of the Supreme Court of Connecticut, which stated in part "[t]he requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision," and
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> WHEREAS, the House of Representatives notes that the State of Connecticut has executed only one person since 1976 and that person was a volunteer, and
>
> WHEREAS, the House of Representatives finds that no majority opinion of the United States Supreme Court has suggested that unanimous agreement of a twelve-member jury was required, recommended, or advisable for the determination of whether a death sentence is an appropriate punishment for the commission of a capital crime, and
>
> WHEREAS, the United States Supreme Court has upheld Florida's existing death penalty statute as constitutional in Proffitt v. Florida, 428 U.S. 242 (1976), and the statute has

been repeatedly upheld by state and federal appellate courts against constitutional attacks for the past 29 years, and

WHEREAS, the Florida Supreme Court acknowledges that the question of whether Florida's death penalty should require unanimous agreement of the jury before it can be imposed is a matter of public policy for the Legislature to determine, and

WHEREAS, the House of Representatives finds that a requirement of unanimity among twelve jurors is not the proper mechanism to determine whether a death sentence is an appropriate sentence in individual cases because a requirement of unanimity vests with a single juror the ability to override the reasoned judgment of all other jurors weighing and considering the same facts and circumstances, and

WHEREAS, the House of Representatives finds that some of Florida's most notorious and heinous murderers, including Theodore Bundy and Aileen Wuornos, were sentenced to death and executed when the jury recommendation of death was less than unanimous and that these death sentences were just and appropriate despite the lack of unanimity, NOW, THEREFORE

HR 1627 provides that the "House of Representatives believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases.[1]"

C. SECTION DIRECTORY:

A House resolution is not divided into sections.

II. 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:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES