The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	SB 148
INTRODUCER:	Senators Altman and Soto
SUBJECT:	Sentencing in Capital Felonies
DATE:	March 7, 2013
REVISED:	

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

I. Summary:

SB 148 makes four changes in the death sentencing law in Florida. The bill requires that:

- If the jury is going to recommend the death penalty, the jury must first find that sufficient aggravating circumstances exist that are not outweighed by mitigating evidence.
- The jury must agree by a unanimous vote on any aggravators which support the jury's death recommendation.
- The jury vote on the aggravating circumstances must be recorded on a special verdict form.
- The jury must also agree unanimously to recommend the death penalty. Currently a jury must agree by a simple majority to recommend a death sentence.

This bill substantially amends sections 921.141 and 921.142 of the Florida Statutes.

II. Present Situation:

Florida's Capital Sentencing Law

In Florida, after a guilty verdict in a capital case, the jury issues a sentencing recommendation – death or life imprisonment – unless the jury is waived.[1] During the sentencing phase the jury

[1] With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them-facts in addition to those necessary to prove the commission of the crime-whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty. *State v. Dixon*, 283 So.2d 1(Fla. 1973).

hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating circumstances.[2] The aggravating factors must be established beyond a reasonable doubt.[3] The fact-finder must only be convinced by the greater weight of the evidence (a lower standard of proof than beyond a reasonable doubt) as to the existence of mitigating factors.[4]

If the jury finds one or more aggravating circumstances and determines that these circumstances are sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances. Based upon these considerations, the jury must recommend whether the defendant should be sentenced to life imprisonment or death.[5] However, even if the aggravating circumstances are found to outweigh the mitigating circumstances, the jury is never required to return a recommendation for death and must be so instructed.[6]

A simple majority of the jury is necessary for recommendation of the death penalty. It is not necessary for the jury to list on the verdict the aggravating and mitigating circumstances it finds or to disclose the number of jurors making such findings.[7]

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[2] "An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim." Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.

[3] "An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven." **…** "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole." *Id*.

[4] "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed." *Id*.

[5] "The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor." *Id.*

[6] "The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death." *Id*.

[7] "If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be:

A majority of the jury by a vote of _____, to _____ advise and recommend to the court that it impose the death penalty upon (defendant).

The aggravating and mitigating circumstances and the method by which they must be determined to apply for sentencing are set forth in s. 921.141, F.S., as follows:

> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.
> (5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary;

On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:
The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole." *Id*.

kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
(l) The victim of the capital felony was a person less than 12 years of age.
(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.
(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.
(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.
(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

> (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.[8]

After receiving the jury's recommendation the judge must then decide the appropriate sentence.[9] The judge weighs the jury's recommendation and conducts his or her own analysis of the aggravating and mitigating factors. The recommendation of the jury must be given great weight in the judge's decision-making process on the sentence handed down.[10] The judge may sentence a defendant in a different manner than the jury recommends – this is known as an "override."

The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in a meaningful review.[11] The judgment of conviction and sentence of death is subject to automatic review by the Supreme Court of Florida.[12]

The Florida Supreme Court engages in proportionality review in all cases in which the death penalty is handed down. Proportionality review is the comparison of one case in which the defendant was sentenced to death with other similar death cases.

When the U.S. Supreme Court upheld Florida's current death penalty sentencing law in 1976, the court seemed to rely quite heavily on the Florida Supreme Court's promise to give each death case a meaningful review.[13] The *Proffitt* 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).[14]

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[8] Aggravating and mitigating circumstances appear in s. 921.142, F.S. which applies to Capital Drug Trafficking Felonies. Section 921.142, F.S., is also amended by this bill.

[9] "The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to which punishment should be imposed upon the defendant." Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.

[10] 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."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).

[11] *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

[12] s. 921.141. F.S.

[13] *Proffitt v. Florida*, 428 U.S. 242 (1976). It is important to note that *Proffitt* was decided on 8th and 14th Amendment grounds (cruel or unusual punishment and due process), not on 6th Amendment (right to a jury trial) grounds. (For an extensive discussion of the history of Florida's death penalty see: Eaton, Stetson Law Review Fall 2004, 34 Stet.L.R. 9).

[14] *Id*., 258-259.

To date, Florida's capital sentencing scheme has withstood challenges based on the 8th, 14th and 6th Amendments.[15]

Other States

Currently 33 states in the U.S. have a death penalty statute. In those states in which the jury has sole discretion in capital sentencing, the decision to sentence the defendant to death must be unanimous. Florida and Alabama are the only states that do not require a unanimous vote of the jury in order to impose the death penalty.

In Alabama, a 10-2 vote is sufficient for the jury to recommend a death sentence. The jury provides an advisory verdict that is not binding on the court. If the jury cannot reach an advisory verdict recommending a sentence, or for other manifest necessity, the court can declare a mistrial and another sentencing hearing can be conducted before another jury. The parties and the court can agree to waive the advisory verdict after one or more mistrials and the court will determine the sentence without a jury recommendation.[16]

State v. Steele

Although the U.S. Supreme Court issued rulings in two death penalty cases that indicated that aggravating factors operate as the "functional equivalent of an element of a greater offense,"[17] and therefore must be decided by a jury, the Florida Supreme Court has not yet held that those decisions apply within the context of Florida's death penalty sentencing scheme.[18]

In *Steele*, Justice Cantero wrote for the majority:

> Even if *Ring* did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of "an element of a greater offense." *Id.* That finding would be that at least one aggravator exists-not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death. Our interpretation of *Ring* is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250–51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In requiring the jury to consider by majority vote each particular

[15] Cruel or unusual punishment, due process and right to jury trial. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989).
[16] Ala. Code § 13A-5-44-53.
[17] See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (ruling that aggravating circumstances must be determined by the jury and established beyond a reasonable doubt; quoting *Apprendi v. New Jersey*, 530 U.S. 466 (2000)
[18] *State v. Steele*, 921 So.2d 538 (Fla. 2005).

> aggravator submitted rather than merely specifying whether one or more aggravators exist, the trial court in this case imposed a greater burden than the one the Supreme Court imposed in reviewing Arizona's judge-only capital sentencing scheme in *Ring.*[19]

The *Steele* opinion contained "suggestions" from the court 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."[20]

The court set forth the death penalty sentencing requirements of the other 37 states (at the time of the opinion) and concluded that "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."[21] Finally, Justice Cantero wrote: "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."[22]

Florida-Specific Statistical Information

Table 1 shows that under current law and practice only 20 percent of death cases over the last twelve years had unanimous jury verdicts. Based on this analysis it is impossible to predict with any degree of accuracy whether requiring a unanimous jury recommendation would result in a marked decline in death cases. It would appear from the current practice that a decline is likely if this bill becomes law, but the degree of the decline is uncertain.

TABLE 1

Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court [i] (N=296)																
Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	%[ii]	Cum %
7-5	6	1	4	4	0	3	0	2	4	1	3	2	2	32	11%	11%
8-4	4	6	2	6	2	0	3	0	**2**	9	2	1	5	42	14%	25%
9-3	4	4	3	6	2	2	11	3	5	6	6	9	5	66	22%	47%
10-2	3	12	4	3	3	3	2	2	2	5	11	1	3	54	18%	66%
11-1	2	8	5	5	3	1	1	2	1	5	5	1	3	42	14%	80%
12-0	9	6	8	4	2	3	6	7	6	0	1	6	2	60	20%	100%
Subtotal	28	37	26	28	12	12	23	16	20	26	28	20	20	296	100%	
Other[iii]	3	1	2	3	4	2	0	0	1	4	3	1	0	24		
TOTAL	31	38	28	31	16	14	23	16	21	30	31	21	20	320		

Table 2 analyzes the degree to which a unanimous jury vote results in the case being more likely be to affirmed by the Florida Supreme Court on direct appeal. Sixty-three percent of the 12-0 cases were affirmed by the court compared to 53 percent of the 7-5 cases. It appears then that a unanimous jury vote is not as strongly correlated with an affirmed sentence as perhaps logically predicted.

[19] *Id*.
[20] *Id*. at 548.
[21] *Id*.
[22] *Id*. at 549.

TABLE 2

Distribution of Jury Votes in Death Cases Disposed by the Florida Supreme Court on Direct Appeal from Calendar Year 2000 to 2012[iv] (N=296)					
Original Jury Vote For Death	TOTAL	Death Sentence Affirmed	Percent Affirmed	Death Sentence Not Affirmed[v]	Percent Not Affirmed
7 to 5	32	17	53%	15	47%
8 to 4	42	31	74%	11	26%
9 to 3	66	48	73%	18	27%
10 to 2	54	39	72%	15	28%
11 to 1	42	37	88%	5	12%
12 to 0	60	38	63%	22	37%
TOTAL	296	210	71%	86	29%

In summary, both Tables 1 and 2 illustrate the wide variability in voting practices in these complex and emotionally charged death cases. Given this wide variability, it is difficult to predict the impact on future death cases and voting practices if SB 148 passes and becomes law.

Workload Study Commission

The Supreme Court Workload Study Commission was created as part of Chapter 2000-237, Laws of Florida. The task of the Commission was to "develop recommendations for addressing workload issues, including, but not limited to, the need for additional justices on the supreme court." The discussion and testimony heard by the Commission included statistics and anecdotal evidence related to the death penalty caseload of the court.

Two recommendations of the Commission were related to the death penalty sentencing law. One of those recommendations was that the Legislature further study the potential to reduce the supreme court's workload by requiring a super majority vote of the jury (of no less than 9 to 3) before a trial judge could impose the death penalty. [23]

The Commission heard testimony that advocated requiring either a supermajority or unanimous jury recommendation in favor of the death penalty before the trial judge could impose the death penalty. Those witnesses argued that if the number of death sentences were reduced, the Court's workload would be appreciably reduced. The Chief Justice said that requiring a supermajority jury verdict for imposition of the death penalty would appreciably reduce his workload as much as 30-40 percent. [24]

The Commission heard testimony from representatives of the Attorney General's Office and the Florida Prosecuting Attorney's Association who were of the opinion that juries who believed the death penalty was the appropriate sentence in a case would reach the required vote - even a

[23] Minutes of the October 24, 2001 Meeting, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, page 11.
[24] Minutes of the October 24, 2001 Meeting, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, page 11.

supermajority vote - in order to issue that verdict, therefore the number of death penalty cases would not decrease if the statute were modified.[25]

Recognizing that there are other policy issues involved, the Commission declined to recommend that the Legislature approve a supermajority vote. However, the Commission approved a finding that requiring a supermajority vote of the jury before a trial judge could impose the death penalty would reduce the workload of the court.

America Bar Association Report

In September of 2006, the American Bar Association (ABA) issued a report entitled " Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report." The authors of the report acknowledged that the Florida Supreme Court has consistently rejected the claims under the U.S. Supreme Court's decision in *Ring v. Arizona* that the jury must make a unanimous advisory sentence.[26] Despite this recognition and Florida's practice of not requiring unanimity, the ABA report asserts that by not requiring a unanimous recommendation meaningful jury deliberation is lessened.[27] The ABA report cites to a survey of Florida capital jurors who were not required to reach a unanimous vote to recommend a death sentence.[28] The ABA report argues that these jurors were less likely to take longer than 3 hours to reach a sentencing decision and less likely to demonstrate emotional commitment to the punishment decision.[29]

Multi-State Studies of Capital Case Juries

The chief criticisms of pure jury-driven sentencing comes from the belief that juries may be confused by the court's instructions, may act out of passion rather than reason, or may not understand or accept their role in the sentencing structure. These issues were studied by The Capital Jury Project (CJP) a multi-state research effort, funded by the National Science Foundation.

In 1990, the CJP researchers began interviewing jurors who had served in capital cases. Analysis of the data began appearing as early as 1993, with the latest article being published in June, 2001. According to the Cornell Death Penalty Project, the CJP researcher interviewed 1,115 jurors who sat on 340 capital trials in fourteen different states.[30]

[25] Minutes of the January 29, 2001 Meeting, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, pages 11-12.
[26] " Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report", American Bar Association, Death Penalty Moratorium Implementation Project (2006), pg. 287.
[27] *Id*. pg. 303.
[28] *Id*.
[29] *Id*. pg. 304.
[30] Cornell Death Penalty Project, Cornell Law School, www.lawschool.cornell.edu/lawlibrary/death/cjp.htm.

Juror Responsibility:
One article based on the data gathered by the Capital Jury Project examined juror responsibility.[31]

There are many ways in which a juror may shift sentencing responsibility, given all the "actors" in a capital case. This shifting of responsibility, according to some critics, leads to a capital sentencing law which makes death sentences unreliable and too easy to impose.[32]

In attempting to examine whether capital sentencing jurors assume responsibility for the sentences they impose, the authors utilized data from interviews of 153 South Carolina jurors. It was found that most jurors accept responsibility for their capital sentencing decision (59%), as far as their role in the system is concerned, although a significant minority do not. The study found that the "average juror understands and accepts the key role he plays in determining the defendant's sentencing; does not view the law as forcing him to reach a particular sentence; does not view a death decision as something that the courts will likely reverse; and finds his service on a capital jury emotionally upsetting. On the other hand, he does not think it very likely that any death sentence he imposes will actually ever be carried out."[33]

Juror Confusion:
One criticism of the capital jury's involvement in sentencing is that the jury may not fully understand the mechanics of deciding between the death penalty and life imprisonment. One example of this potential for juror confusion is explored in the article *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases* which examines the Virginia case of Lonnie Weeks.[34] In that case, the jury was instructed in the law, but had a question about the instructions with regard to whether the jury was *required* to impose the death penalty under certain circumstances.[35] In answering the jury's question, the trial court simply referred the jury's attention back to the specific instruction about which it had the question.[36]

In a 5-4 decision, the U.S. Supreme Court held that the *Weeks* jury was adequately instructed, and affirmed the conviction. The Court stated: "At best, petitioner has demonstrated only that there exists a slight possibility that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation….".[37]

In the *Correcting Deadly Confusion* study which was based on the facts of the *Weeks* case, a mock jury of 154 people was used to test jury confusion with regard to the instructions given in the Weeks trial. The study modified one variable in the jury instruction. The study showed that

[31] *Jury Responsibility in Capital Sentencing: An Empirical Study*, by Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells (44 Buff.L.Rev. 339).
[32] *Id*. pg. 340.
[33] *Id.* pg. 368
[34] Stephen P. Garvey, Sheri Lynn Johnson and Paul Marcus, 85 Cornell Law Review 627 (2000).
[35] *Id*.
[36] *Id*.
[37] *Weeks v. Angelone*, 528 U.S. 225, 236 (2000).

jurors who understood the instruction were more likely to vote for life compared to jurors who misunderstood it.[38]

"Among jurors who understood that death was not required even if heinousness is proven, sixty-three percent voted for a life sentence, whereas the corresponding figure among those who believed death was required dropped to fifty-two percent. The results were similar for future dangerousness: sixty-two percent of the jurors who understood the rule voted for life, compared to fifty-three percent who did not."[39]

III. Effect of Proposed Changes:

The bill changes the capital case sentencing law in four ways.

First, rather than having the sentencing jury be able to render a recommendation for the death penalty by a simple majority vote, the bill requires a unanimous recommendation.

The bill also requires that the jury be provided with a special verdict form "for each aggravating circumstance found."

The jury must unanimously vote for each aggravating circumstance it uses in support of a recommended sentence of death.

Finally, the jury must find that "sufficient aggravating circumstances exist which outweigh any mitigating circumstances found to exist." This is the opposite of current law that requires sufficient mitigators outweigh any aggravators found to exist.

Other Potential Implications:

Although the new sentencing provisions are effective for offenses committed on or after October 1, 2013, it cannot be ruled out that persons sentenced to death prior to the effective date will nonetheless raise the issue of the application of the provisions to their cases. This could result in a substantial number of appeals, and whether they are factually, facially, invalid claims, the appeals must be answered by the Attorney General.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[38] *Id*.
[39] *Id*.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be a fiscal impact to the Attorney General's Office and the court system that is a result of the potential appellate practice resulting from this bill. According to historical Supreme Court documents, legislation requiring a unanimous jury vote may have a notable workload reduction to the Supreme Court.[40]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[i] Thirteen years of data compiled by the Supreme Court Clerk's Office.
[ii] Calculated percentage excludes the "other" category.
[iii] Includes: waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.
[iv] Source document: Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2000 to 2012
[v] Includes: reversal and remand for trial, reduced to life, dismissal, deceased defendant, and acquittal.

[40] Minutes of the October 24, 2001 Meeting, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, page 11.