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 664
INTRODUCER:	Senator Altman
SUBJECT:	Sentencing in Capital Felonies
DATE:	March 9, 2015
REVISED:	03/13/15

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.			JU	
3.			AP	

I. Summary:

SB 664 requires the sentencing jury to render a recommendation for the death penalty by a unanimous vote rather than a simple majority vote. It requires the jury to certify in writing that the vote for death was unanimous.

The bill effects sentencing proceedings in death penalty cases commencing on or after July 1, 2015. The new procedures created by this bill will apply to capital crimes committed both before and after July 1, 2015.

The bill requires that in order to recommend the death penalty, the jury must find that "sufficient aggravating circumstances exist which outweigh any mitigating circumstances found to exist." This is the opposite of the findings required under current law where the mitigators must outweigh the aggravators.

The jury must certify in writing that each aggravating circumstance used to support its recommendation of death was found to exist beyond a reasonable doubt by a unanimous vote.

The bill limits the sentencing judge to consideration of only the aggravating factors unanimously found to exist by the jury as the judge determines the sentence in the case.

II. Present Situation:

Florida's Capital Sentencing Law

The Jury's Role

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 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]

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[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).

[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

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]

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.

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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).
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*.

(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; 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]

Judicial Determination of Sentence

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."

Records suggest that no Florida judge has overridden a jury's verdict of a life sentence since 1999. According to U.S. Supreme Court Justice Sotomayor's opinion dissenting from the Court's denial of certiorari review in the Alabama death penalty case of *Woodward v. Alabama*:

> Even after this Court upheld Florida's capital sentencing scheme in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), the practice of judicial overrides consistently declined in that State. Since 1972, 166 death sentences have been imposed in Florida following a jury recommendation of life imprisonment. Between 1973 and 1989, an average of eight people was sentenced to death on an override each year. That average number dropped by 50 percent between 1990 and 1994, and by an additional 70 percent from 1995 to 1999. The practice then stopped completely. It has been more than 14 years since the last life-to-death override in Florida; the last person sentenced to death after a jury recommendation of life imprisonment was Jeffrey Weaver, sentenced in August 1999.[11]

[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."
[11] 571 U.S. ____ (2013), in which Justice Breyer joined this part of the dissent.

Proportionality Review

The judgment of conviction and sentence of death is subject to automatic review by the Supreme Court of Florida.[12] The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in a meaningful review.[13]

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.[14] 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).[15]

To date, Florida's capital sentencing scheme has withstood challenges based on the 8th, 14th, and 6th Amendments.[16]

Other States[17]

Of the 32 states that currently authorize capital punishment, 31 require jury participation in the sentencing decision; only Montana leaves the jury with no sentencing role in capital cases.[18] In 27 of those 31 states, plus the federal system,[19] the jury's decision to impose life imprisonment is final and may not be disturbed by the trial judge under any circumstance.

In the remaining four states, the jury has a role in sentencing but is not the final decisionmaker. In Nebraska, the jury is responsible for finding aggravating circumstances, while a three-judge panel determines mitigating circumstances and weighs them against the aggravating circumstances to make the ultimate sentencing decision.[20]

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[12] s. 921.141. F.S.
[13] *State v. Dixon*, 283 So.2d 1 (Fla. 1973).
[14] *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.
[15] *Id*., 258-259.
[16] 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).
[17] Taken from Justice Sotomayor's dissent in *Woodward v. Alabama*, 571 U.S. ____ (2013), in which Justice Breyer joined this part of the dissent.
[18] Mont. Code Ann. §§46–18–301, 46–18–305 (2013).
[19] 18 U. S. C. §3593.
[20] Neb. Rev. Stat. §§29–2520, 29–2521 (2008).

Three states—Alabama,[21] Delaware, and Florida—permit the trial judge to override the jury's sentencing decision.[22]

***State v. Steele*, The Florida Jury's Responsibility in Finding Aggravating Factors**

Although the U.S. Supreme Court issued rulings in two death penalty cases indicating that aggravating factors operate as the "functional equivalent of an element of a greater offense,"[23] 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.[24]

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 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.*[25]

Although the Florida Supreme Court declined to require more or different factfinding by a death penalty jury, the *Steele* opinion did contain "suggestions" from the court: "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."[26]

The court examined 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

[21] In Alabama, a 10-2 vote is sufficient for the jury to recommend a death sentence. Ala. Code § 13A-5-44-53.
[22] In *Spaziano* v. *Florida,* 468 U. S. 447 (1984), the U.S. Supreme Court upheld Florida's judicial-override sentencing statute.
[23] 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).
[24] *State v. Steele*, 921 So.2d 538 (Fla. 2005).
[25] *Id*.
[26] *Id*. at 548.

to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote."[27] 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."[28]

Florida-Specific Statistical Information

Table 1 shows that under current law and practice only 20 percent of death cases over a twelve year period 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[29] (N=296)

Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	%[30]	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[31]	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 to be 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.

[27] *Id*.
[28] *Id*. at 549.
[29] Thirteen years of data compiled by the Supreme Court Clerk's Office.
[30] Calculated percentage excludes the "other" category.
[31] Includes: waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.

TABLE 2

Distribution of Jury Votes in Death Cases Disposed by the Florida Supreme Court on Direct Appeal from Calendar Year 2000 to 2012[32] (N=296)					
Original Jury Vote For Death	TOTAL	Death Sentence Affirmed	Percent Affirmed	Death Sentence Not Affirmed[33]	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 664 passes and becomes law.

American Bar Association Report (2006) and Section Report to the House of Delegates (2015)

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.[34] 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.[35]

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.[36] 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.[37]

In its recent Report to the House of Delegates, the Section of Individual Rights and Responsibilities of the ABA points out that the penalty phase jury is asked to perform a

[32] Source document: Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2000 to 2012
[33] Includes: reversal and remand for trial, reduced to life, dismissal, deceased defendant, and acquittal.
[34] "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.
[35] *Id*. pg. 303.
[36] *Id*.
[37] *Id*. pg. 304.

"complicated and unique analysis" as it weighs aggravating and mitigating factors.[38] The report suggests that "requiring unanimity…promotes a thorough and reasoned resolution."[39]

III. Effect of Proposed Changes:

The provisions in the bill apply to s. 921.141, F.S., which relates to sentencing in capital felonies as well as s. 921.142, F.S., which applies to sentencing for capital drug trafficking felonies.

The bill effects sentencing proceedings in death penalty cases commencing on or after July 1, 2015. This effective date means that the new procedures will apply to capital crimes committed before July 1, 2015.

Effect of the Bill on the Jury's Role

Rather than having the sentencing jury render a recommendation for the death penalty by a simple majority vote, the bill requires a unanimous recommendation. It requires the jury to certify in writing that the vote for death was unanimous.

In the penalty phase of a capital case, aggravating factors must be proven to exist at the "beyond a reasonable doubt" standard while mitigating factors must only be shown to exist at the "greater weight of the evidence" standard. The bill requires that in order to recommend the death penalty, the jury must find that "sufficient aggravating circumstances exist which outweigh any mitigating circumstances found to exist." This is the opposite of current law which requires that sufficient mitigators outweigh any aggravators found to exist. It is unclear how this change will actually effect a jury's penalty phase deliberations.

The same new analysis of mitigating and aggravating factors must be applied by the sentencing judge. The judge is limited by the bill to considering only the aggravating factors unanimously found by the jury to exist.

The jury must record its certification that each aggravating circumstance used to support its recommendation of death was found to exist beyond a reasonable doubt by a unanimous vote.

The application of the provisions in the bill will require that the jury be provided with a special verdict form. Jury instructions in capital cases must also be created to conform to the provisions in the bill.

Effect of the Bill on the Judicial Sentencing Function

Under current law, the sentencing court is required to weigh the jury's recommended sentence, which is given great weight in the court's decision to impose a death or life in prison sentence. The court is also required to conduct its own independent analysis of the aggravating and mitigating circumstances. If the court imposes a death sentence, the sentencing order must

[38] ABA Death Penalty Due Process Review Project, Section of Individual Rights and Responsibilities, Report to the House of Delegates, February, 2015, pg. 4.
[39] *Id*.

contain specific findings of fact based upon the aggravating and mitigating factors, the trial record, and sentencing proceedings.[40]

The bill restricts the court's ability to consider aggravating factors. The bill requires that the court only consider the aggravating factors "unanimously found to exist by the jury."[41] Therefore the court will not be able to engage in weighing the evidence of mitigating and aggravating factors as it currently does in determining its sentence in a case.

Other Potential Implications

Although the new sentencing provisions are effective for "sentencing proceedings commencing on or after July 1, 2015," 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 they must be answered and litigated by the Attorney General.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill is effective for sentencing proceedings commencing on or after July 1, 2015.[42] Generally when the Legislature amends a "criminal statute" the amendment effects criminal conduct occurring after the effective date of the amendment.

The bill's effective date means that a defendant who committed a capital murder offense at any time, even decades ago, who has not been sentenced for the crime prior to July 1, 2015, will be sentenced under the new capital case sentencing procedures created by the bill.

Arguably this effective date, because it is an unusual one, could result in litigation focusing on matters such as whether the new sentencing scheme is a "benefit" to a

[40] s. 921.141(3), F.S. See also s. 921.142(4), F.S.
[41] See lines 74-77 and 133-136 of the bill.
[42] See lines 40-41 and 99-100 of the bill.

defendant and, if so, whether the Savings Clause in the Florida Constitution is somehow implicated.[43]

Likewise, a defendant sentenced after July 1, 2015, but who committed the murder for which he or she faces the possibility of the death penalty prior to that date, might argue that the pre-July 1 sentencing procedures could have been a benefit to him or her and therefore a violation of the constitutional prohibition on ex post facto laws has occurred.[44]

Although it is unlikely either of these constitutional arguments will prevail, it can be stated with near certainty that the issues will at least be litigated.

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.[45]

However, the Office of the State Courts Administrator reports that although there may be a reduction in death penalty litigation resulting from the increased thresholds created by the bill, this may be offset somewhat at the trial court level. There may be more death penalty cases taken to trial, rather than pleas entered, because it will be less likely that a defendant will receive the death penalty under the bill's provisions. The fiscal impact cannot be determined due to the lack of data needed to determine the impact on court and judicial workload.[46]

It should also be noted that jury instructions will have to be amended to be consistent with the bill.

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[43] Article X, Section 9 of the Florida Constitution provides: Repeal of criminal statutes**.**—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

[44] Article I, Section 10 of the Florida Constitution provides: No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. A primary purpose of the Ex Post Facto Clause is to ensure that citizens have prior notice of the consequences of committing a crime before the crime is committed. Westerheide v. State, App. 5 Dist., 767 So.2d 637 (Fla. 2000), review granted 786 So.2d 1192, approved 831 So.2d 93.

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

[46] Office of the State Court Administrator, Judicial Impact Statement, March 9, 2015. (on file with the Senate Criminal Justice Committee.)

VI. Technical Deficiencies:

None.

VII. Related Issues:

On March 9, 2015, the Supreme Court of the United States granted Timothy Lee Hurst's petition for certiorari review.[47] *Hurst* is a Florida death case.[48] Hurst was convicted of the 1998 murder of a co-worker. The trial jury recommended a death sentence by a vote of 7-5 and the trial judge entered a sentence of death.

The U.S. Supreme Court will consider "whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)."[49] The case will be heard and decided during the court's October 2015 term.

The *Ring* case required that juries rather than judges *acting alone*, as in the Arizona death penalty scheme, must make crucial factual determinations that subject a convicted murderer to the death penalty.

The *Ring* decision was not clear about whether Florida's sentencing scheme was effected by the *Ring* decision because Florida's procedures are different than Arizona's at the time of the *Ring* decision. The Florida Supreme Court has never agreed by a majority that the 2002 *Ring* decision applies to Florida's death penalty scheme.[50]

The *Hurst* majority declined to revisit the Court's 12 years of precedent on the *Ring* question. However, the *Hurst* court was divided on the application of *Ring* and other possible constitutional implications.[51]

The dissenting opinion in the *Hurst* case may provide some insight into the U.S. Supreme Court's focus on the Sixth and Eighth Amendments and the *Ring* decision in the question to be decided by the court on certiorari review in *Hurst*.[52]

For example, the dissent states in pertinent part:

- It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed

[47] Case No. 14-7505, *Hurst v. Florida*. http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-7505.htm
[48] *Hurst v. State*, 147 So.3d 435 (Fla. 2014).
[49] Case No. 14-7505, *Hurst v. Florida*. http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-7505.htm
[50] See the discussion of the Florida Supreme Court's *Steele* opinion beginning at page 7 above.
[51] Justice Pariente wrote a dissenting opinion as to all but one issue in the *Hurst* case and Justices Labarga and Perry concurred with Justice Pariente's dissent. *Hurst v. State*, 147 So.3d 435, 449 (2014).
[52] Briefly stated, the Sixth Amendment to the U.S. Constitution guarantees our right to trial by jury; the Eighth Amendment protects us from cruel and unusual punishment, which is related to the "arbitrary and capricious" application of the death penalty. The Florida Supreme Court has declined to apply the *Ring* case's holding to the Florida death penalty scheme since the case was decided by the U.S. Supreme Court in 2002. (*Ring v. Arizona*, 536 U.S. 584, 609 (2002).

by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.[53]

- In addition, as interpreted by the United States Supreme Court in *Ring*, the Sixth Amendment requires that a jury find those aggravating factors. As Justice Scalia explained in his concurring opinion in *Ring*, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring*, 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).[54]
- [T]he use of a special verdict form during the penalty phase would enable this Court "to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous." *Coday*, 946 So.2d at 1024 (Pariente, J., concurring in part and dissenting in part).[55]
- I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases. Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance.[56]
- In addition to Florida's outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of the only states to permit the jury to recommend death by a less than unanimous vote.[57]
- The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. *See, e.g., Ring*, 536 U.S. at 605–06, 122 S.Ct. 2428; *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case."[58]

Although the question posed by the court[59] and perhaps the dissenting opinion in the *Hurst* case in the Florida Supreme Court, provide some insight, one cannot be certain how the U.S. Supreme Court will rule in the *Hurst* case.

Likewise it is not possible to determine with certainty what effect that ruling may have on Florida's death penalty scheme. The question also remains, will the court's opinion – assuming it changes the way Florida metes out the death penalty – only apply prospectively or will the

[53] *Hurst* at page 450.
[54] *Id.*
[55] *Id., at 451.*
[56] *Id.*
[57] *Hurst,* footnote 8 at 451.
[58] *Hurst* at 452.
[59] "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)." Case No. 14-7505, *Hurst v. Florida*. http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-7505.htm

court's ruling sweep in death cases that are "in the pipeline."[60] Adding to the uncertainty is the question of what effect, if any, the passage of SB 664 would have on the court's ruling.

VIII. Statutes Affected:

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

IX. Additional Information:

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

None.

B. Amendments:

None.

[60] Cases which have not completed the direct or collateral appeal process. See for discussion *Schirro v. Summerlin* 124 S.Ct. 2519 (2004), *In re Hill*, 777 F.3d 1214 (11th Cir. 2015) and *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003).