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 Rules

BILL:	CS/CS/SB 450
INTRODUCER:	Rules Committee; Criminal Justice Committee; and Senators Ingoglia and Martin
SUBJECT:	Death Penalty
DATE:	March 22, 2023 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Stokes	CJ	**Fav/CS**
2.	Cellon	Twogood	RC	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 450 amends the death penalty statutes found in ss. 921.141 and 921.142, F.S., to clarify the judge and the jury's role in death penalty sentencing proceedings. The bill makes the following amendments to the current death penalty statutes by:

- Deleting current language requiring a unanimous jury recommendation for the imposition of the death penalty and inserting a recommendation of at least 8 jurors.
- Providing that if fewer than 8 jurors vote to recommend the death penalty, the jury's sentencing recommendation must be for life without the possibility of parole and the court is bound by that recommendation.
- Providing that if the jury recommends a sentence of death, the court may impose the recommended sentence of death, or a sentence of life imprisonment without the possibility of parole.
- Specifying that the death penalty may only be imposed if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.

The court must enter a written order whether the sentence is for death or for life without the possibility of parole and the court must include in its written order the reasons for not accepting the jury's recommended sentence, if applicable.

The bill may have an indeterminate fiscal impact. See Section V Fiscal Impact Statement.

The bill becomes effective upon becoming a law.

II. Present Situation:

Case Law and Subsequent Statutory Changes Regarding the Death Penalty

The Sixth Amendment of the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[1] This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.[2]

The U.S. Supreme Court in *Ring v. Arizona*, applied this right to Arizona's capital sentencing scheme, which required a judge to determine the presence of aggravating and mitigating factors and to only sentence a defendant to death if the judge found at least one aggravating factor.[3] The Court struck down the Arizona sentencing scheme, finding it to be a violation of the Sixth Amendment because it *permitted sentencing judges, without a jury, to find aggravating circumstances justifying imposition of the death penalty*.[4]

In 2016, the U.S. Supreme Court issued the *Hurst v. Florida* opinion finding that Florida's death penalty sentencing process was unconstitutional because "the Sixth Amendment requires *a jury, not a judge, to find each fact necessary to impose a sentence of death*."[5] Thereafter, the Legislature amended ss. 921.141 and 921.142, F.S., to incorporate the following statutory changes:

- The jury is required to identify each aggravating factor found to exist by a unanimous vote in order for a defendant to be eligible for a sentence of death;
- The jury is required to determine whether the aggravating factors outweigh the mitigating circumstances in reaching its sentencing recommendation;
- If at least ten of the twelve members of the jury determine that the defendant should be sentenced to death, the jury's recommendation is a sentence of death;
- The jury is required to recommend a sentence of life imprisonment without the possibility of parole if fewer than ten jurors determined that the defendant should be sentenced to death;
- The judge is permitted to impose a sentence of life imprisonment without the possibility of parole when the jury recommends a sentence of death; and
- The judge is no longer permitted to "override" the jury's recommendation of a sentence of life imprisonment by imposing a sentence of death.[6]

Also in 2016, *Hurst v. State,* on remand from the U.S. Supreme Court, was decided by the Florida Supreme Court. In addition to finding that the prior 2016 statutory amendments to the death penalty sentencing provisions were constitutional, the court also held that "in order for the

[1] U.S. CONST. Amend. VI.
[2] *United States v. Gaudin*, 515 U.S. 506, 510 (1995).
[3] *Ring v. Arizona*, 536 U.S. 584, 592 (2002).
[4] *Id*. at 609 (emphasis added).
[5] *Hurst v. Florida*, 577 U.S. 92 (2016) (emphasis added). The *Hurst v. Florida* decision was based on the Sixth Amendment and the 2002 U.S. Supreme Court decision in *Ring v. Arizona*, which held that juries rather than judges acting alone must make crucial *factual* determinations that subject a convicted murderer to the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002) (emphasis added).
[6] Chapter 2016-13, L.O.F.

trial court to impose a sentence of death, the jury's recommended sentence of death must be *unanimous*."[7]

After the *Hurst v. State* decision in 2016, the Legislature again amended ss. 921.141 and 921.142, F.S., this time to require a *unanimous vote of the jury for a sentencing recommendation of death*.[8]

The current sentencing proceeding statutes are more fully set forth below.

Florida's Current Sentencing Proceedings in Capital Cases

The statutes governing the proceedings to determine a sentence of either death or life imprisonment without the possibility of parole[9] in capital cases are set forth in ss. 921.141 and 921.142, F.S.[10] The court conducts a sentencing proceeding upon conviction or adjudication of guilt of a defendant in a capital felony.[11] Typically, the proceeding is conducted by the trial judge before the trial jury as soon as practicable.[12]

Aggravating Factors and Mitigating Circumstances

During the sentencing proceeding, the jury (or the judge if the jury is waived by the defendant) considers evidence that is relevant to the nature of the crime and the character of the defendant. The evidence includes matters relating to any of the aggravating factors enumerated in s. 921.141(6). F.S., or mitigating circumstances enumerated in s. 921.141 (7), F.S.[13]

The aggravating factors are limited to the following:

- 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.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- 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.

[7] *Hurst v. State*, 202 So.3d 40, 44, (Fla. 2016), *cert. den.*, 137 S.Ct. 2161 (2017) (emphasis added).
[8] Chapter 2017-1, L.O.F.
[9] Section 775.082(1)(a), F.S.
[10] The sentencing proceedings in s. 921.142, F.S., are virtually identical to the sentencing proceedings found in s. 921.141, F.S., except that s. 921.142, F.S., only applies in capital drug trafficking cases, which contains certain aggravating factors relevant to drug trafficking cases.
[11] Sections 921.141(1) and 921.142(2), F.S.
[12] *Id*.
[13] Notice of the prosecutor's intent to present evidence of particular aggravating factors must be served within 45 days after arraignment. Section 782.04(1)(b), F.S. There are 16 different aggravating factors in s. 921.141(6)(a)-(p), F.S., and eight statutory mitigating circumstances in s. 921.141(7), F.S.

- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- 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.
- The victim of the capital felony was a person less than 12 years of age.
- 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.
- The capital felony was committed by a criminal gang member, as defined in s. 874.03, F.S.
- The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21, F.S., or a person previously designated as a sexual predator who had the sexual predator designation removed.
- The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30, F.S., or s. 784.046, F.S., or a foreign protection order accorded full faith and credit pursuant to s. 741.315, F.S., and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.[14]

Mitigating circumstances are the following:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- 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.
- The age of the defendant at the time of the crime.
- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.[15]

[14] Section 921.141(6)(a)-(p), F.S. See s. 921.142(7)(a)-(j), F.S., for the aggravating factors in a capital drug trafficking felony case.

[15] Section 921.141(7)(a)-(h), F.S. See 921.142(7)(a)-(h), F.S., for the mitigating factors in a capital drug trafficking felony case.

Jury Findings and Recommended Sentence

After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury deliberates and determines if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in s. 921.141(6), F.S.[16]

The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

- Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
- Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
  - Whether sufficient aggravating factors exist.
  - Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
  - Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.[17]

If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.[18]

Imposition of Sentence

If the jury has recommended a sentence of:

- Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
- Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

If the defendant waived his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt.[19]

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[16] Section 921.141(2)(a), F.S.; *See* s. 921.142(3)(a), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.
[17] Section 921.141(2)(b), F.S.; *See* s. 921.142(3)(b), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.
[18] Section 921.141(2)(c), F.S.; *See* s. 921.142(3)(c), F.S., for provisions relating to the findings and recommended sentence by the jury in a capital drug trafficking case.
[19] Section 921.141(3), F.S.; *See* s. 921.141(4), F.S., for provisions relating to the imposition of sentence in a capital drug trafficking case.

Order of the Court and Automatic Review of the Case

In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors found to exist, the mitigating circumstances reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082, F.S.[20]

A judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.[21]

Case Law Interpreting Current Death Penalty Proceeding Requirements in Florida

Death Eligibility Decision is Jury's Only Role in Death Penalty Sentencing Under Poole v. State

Subsequent to the Legislature's 2016 amendments to the death penalty sentencing proceedings in an effort to comply with both *Hurst v. Florida*[22] and *Hurst v. State*[23] the Florida Supreme Court receded from its *Hurst v. State* opinion, eliminating the need for most of the statutory changes made in 2016.[24]

In *Poole v. State*, the Florida Supreme Court opined that the *Hurst v. State* court had gone beyond where the U.S. Supreme Court required in order to bring Florida's death penalty proceedings into compliance with constitutional standards.[25]

The *Poole* court left intact only the requirement that a unanimous jury find a statutory aggravating circumstance by a reasonable doubt standard of proof.[26] This particular part of Florida's death penalty sentencing proceeding is necessary, as the *Poole* court explained, because there are two components to the death penalty sentencing decision-making process: the *eligibility decision* which is the trier of fact's responsibility, and the *selection decision* which is the sentencing judge's responsibility.[27]

As to the eligibility decision, the U.S. Supreme Court has required that the death penalty be reserved for only a subset of those who commit murder. "To render a defendant *eligible* for the

[20] Section 921.141(4), F.S.; *See* s. 921.142(5), F.S., for provisions relating to the order of the court in capital drug trafficking cases.
[21] Section 921.141(5), F.S.; *See* s. 921.142(6), F.S., for provisions relating to the automatic review by the Florida Supreme Court in capital drug trafficking cases.
[22] *Hurst v. Florida*, 577 U.S. 92 (2016).
[23] *Hurst v. State*, 202 So.3d 40 (Fla. 2016), interpreting and applying *Hurst v. Florida*, 577 U.S. 92 (2016).
[24] *Poole v. State*, 297 So. 3d 487 (Fla. 2020), receding from *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[25] *Poole v. State*, 297 So. 3d 487 (Fla. 2020).
[26] *Poole v. State*, 297 So. 3d 487 (Fla. 2020).
[27] *Poole v. State*, 297 So. 3d 487, 501 (Fla. 2020).

death penalty in a homicide case, [the Supreme Court has] indicated that the *trier of fact* must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."[28]

The selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence."[29] The selection decision is a subjective determination to be made by the court. It is not a "fact" or "element" of the offense for the fact-finder to decide.[30]

According to the *Poole* court, the *Hurst v. State* court misinterpreted the *Hurst v. Florida* decision on this key point: the *Hurst v. Florida* decision is about death penalty *eligibility*.

Post-*Poole* if a jury unanimously finds at least one aggravating circumstance exists in a murder case, the defendant is death-eligible.

According to *Poole*, the *Hurst v. State* court had a "mistaken view" of what constitutes an *element* of an offense which is a *fact* that a jury must determine exists beyond a reasonable doubt for a defendant to be death eligible. *Hurst v. State*, therefore, mistakenly decided that the Sixth Amendment right to trial by a jury required:

- Unanimous jury findings as to all of the aggravating factors that were proven beyond a reasonable doubt;
- That the aggravating factors are sufficient[31] to impose a death sentence;
- That the aggravating factors outweigh the mitigating factors;[32] and
- A unanimous jury recommendation of a sentence of death.[33]

In sum, the *Poole* court rejected the *Hurst v. State* court's view of a capital jury's role that goes beyond the "fact-finding" required to determine whether a defendant is death eligible.[34]

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[28] *Poole v. State*, 297 So. 3d 487, 501 (Fla. 2020), quoting *Tuilaepa v. California*, 512 U.S. 967, 971-972 (U.S. 1994) (emphasis added).

[29] *Id*.

[30] *Poole v. State*, 297 So. 3d 487, 504 (Fla. 2020).

[31] [F]or purposes of complying with s. 921.141(3)(a), F.S., "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances." For purposes of complying with s. 921.141(3)(a), F.S., "sufficient aggravating circumstances" means "one or more." *See Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010) ("sufficient aggravating circumstances" means "one or more such circumstances"). *Poole v. State*, 297 So. 3d 487, 502 (Fla. 2020).

[32] "The role of the section 921.141(3)(b) selection finding is to give the defendant an opportunity for mercy if it is justified by the relevant mitigating circumstances and by the facts surrounding his crime." *Poole v. State*, 297 So. 3d 487, 503 (Fla. 2020). See also *Rogers v. State*, 285 So.3d 872, 886 (Fla. 2019).

[33] *Hurst v. Florida* does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed. The Supreme Court in *Spaziano* "upheld the constitutionality under the Sixth Amendment of a Florida judge imposing a death sentence even in the face of a jury recommendation of life—a jury override. It necessarily follows that the Sixth Amendment, as interpreted in *Spaziano*, does not require any jury recommendation of death, much less a unanimous one. And as we have also explained, the Court in *Hurst v. Florida* overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance." *See Hurst v. Florida*, 136 S. Ct. at 624. See also *Spaziano v. Florida*, 468 U.S. 447 at 464-65, (1984) holding that the Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed. *Poole v. State*, 297 So. 3d 487, 505 (Fla. 2020).

[34] "This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death."

Other States

Twenty-seven states have death penalty statutes, however there are only 22 states with an active death penalty. Three states have governor-issued moratoriums in place (Oregon, California, and Pennsylvania). The Delaware and Washington state courts have ruled their death penalties unconstitutional. Twenty-three states have abolished the death penalty.[35]

Of the 22 active death penalty states, only Alabama allows a judge to impose a death sentence based upon a non-unanimous (10-2 jury vote) jury verdict for death. If the jury returns a verdict of death, "the court shall sentence the defendant to death."[36]

Most states with the death penalty impose a life sentence if the jury makes a non-unanimous death recommendation. However, in some instances, if the jury cannot reach a unanimous decision:

- 5 states provide for the state to have another opportunity at a new sentencing hearing with a different jury (Alabama, Arizona, California, Kentucky, and Nevada); and
- Indiana and Missouri juries are considered to be "hung juries," and the judge becomes the decision-maker.
- In Montana, the judge sentences based on a jury finding of aggravating factors.
- In Nebraska, a panel of judges decides the sentence and if the panel is non-unanimous, the sentence must be for life.[37]

III. Effect of Proposed Changes:

The bill amends ss. 921.141 and 921.142, F.S., to clarify the judge and the jury's role in death penalty sentencing proceedings.

Specifically, the bill amends ss. 921.141 and 921.142, F.S., by:

- Deleting current law requiring a unanimous jury recommendation for the imposition of the death penalty and inserting a recommendation of at least 8 jurors recommending the death penalty.
- Providing that if fewer than 8 jurors vote to recommend the death penalty, the jury's sentencing recommendation must be for life without the possibility of parole and the court is bound by that recommendation.
- Providing that if the jury recommends a sentence of death, the court may impose the recommended sentence of death, or a sentence of life imprisonment without the possibility of parole.

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[35] States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums, Britannica ProCon.org, available at https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/; (last visited February 24, 2023); Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings, Death Penalty Information Center, available at https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings (last visited February 24, 2023); and Map: These are the states that allow the death penalty, Joe Murphy, NBC News, October 27, 2021, available at: https://www.nbcnews.com/news/all/map-these-are-states-allow-death-penalty-n1282556 (last visited February 24, 2023).

[36] Sections 13A-5-46, and.13A-5-47, A.C.

[37] *See* supra note 36.

- Specifying that the death penalty may only be imposed if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.
- The court must enter a written order whether the sentence is for death or for life without the possibility of parole and the court must include in its written order the reasons for not accepting the jury's recommended sentence, if applicable.

The bill becomes effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be an indeterminate fiscal impact on the criminal trial courts, appellate courts, prosecutors, defense attorneys, and appellate counsel as a result of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

CS/CS by Rules on March 22, 2023:
The committee substitute:

- Removes language providing that if at least 10 jurors recommend a sentence of death, the court must impose the recommended sentence of death.
- Removes language providing that if either 8 or 9 jurors recommend a sentence of death, the court may sentence the defendant to life or death.
- Provides that if fewer than 8 jurors vote to recommend a death sentence, the jury's recommendation must be for life imprisonment without the possibility of parole, and the court must impose the life sentence.
- Provides that if at least 8 jurors recommend a sentence of death, the court may impose the recommended sentence of death if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt, or the court may impose a sentence of life imprisonment without the possibility of parole.

CS by Criminal Justice on March 6, 2023:
The committee substitute:

- Keeps the necessary jury vote count for the court to impose the death sentence to at least 8 jurors voting for death but refines the court's sentencing options related to the jury vote count.
- Provides that if at least 10 jurors recommend a sentence of death, the court must impose the recommended sentence of death, if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.
- Provides that if either 8 or 9 jurors recommend a sentence of death, the court may sentence the defendant to life or death, but may only render a sentence of death if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.
- Additionally, the court must enter a written order whether the sentence is for death or for life without the possibility of parole and the court must include in its written order the reasons for not accepting the jury's recommended sentence, if applicable.

B. Amendments:

None.