The Florida Senate

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Committee on Criminal Justice Senator Victor D. Crist, Chairman

A SURVEY OF THE JURY'S ROLE IN SENTENCING IN DEATH PENALTY CASES

SUMMARY

This report is designed to provide an overview of the jury's role in sentencing in death penalty cases and whether a change in that role would have an impact on the amount of time the Florida Supreme Court spends reviewing death penalty cases. It includes a comparison of the different sentencing schemes nationwide and considers the effect those different schemes have on the time appellate courts spend reviewing death penalty cases. The report also focuses on Florida's use of the judicial "override" when the judge sentences the defendant in a death penalty case in a different manner than the jury recommends.

Findings and conclusions generated from staff research and comments made by interested parties are:

- Unlike Florida, most states require a unanimous vote of the jury in favor of the death penalty for it to be imposed, rather than a simple majority.
- Unlike Florida, the majority of states give the jury sole discretion in capital sentencing. Four states, Alabama, Delaware, Indiana and Florida, provide for an advisory verdict by the jury with the judge as the ultimate sentencing authority.
- Despite having this ability to override the jury's advisory verdict, sentencing judges in Florida rarely do so, and in those infrequent override cases, the Florida Supreme Court vacates roughly 75 percent. Because overrides in favor of the death penalty rarely happen, the elimination of the provisions in the law permitting judicial overrides would not necessarily result in any diminished workload for the Court.
- If the rate of judicial overrides do not increase, requiring a supermajority vote of the jury to impose the death penalty has the potential for reducing the Florida Supreme Court's workload since about 55 percent of the death cases disposed of by the Court come to the Court on a 9-3 or greater jury vote for death.
- While Florida estimates the Florida Supreme Court spends 30-40 percent of its time working on death penalty cases, adequate information was not available from other states with differing sentencing schemes for comparison purposes.
- The Florida Supreme Court reviews all death penalty cases. In order to reduce the death penalty workload of the Court, there must be an overall reduction in the number of cases in which the defendant is sentenced to death.

BACKGROUND

Death Penalty Case Workload of the Florida Supreme Court – The Supreme Court Workload Study Commission was created as part of Chapter 2000-237, L.O.F. 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." *2001 Final Report of the Supreme Court Workload Study Commission,* page 1. Part of the discussion and testimony heard by the Commission included statistics and anecdotal evidence related to the death penalty caseload of the Court.

The Florida Supreme Court must review all cases in which the death penalty has been imposed. *Article V, section (3)(b)(1), Florida Constitution*. Data provided by the Office of the State Courts Administrator indicates that although the total caseload of the court increased substantially during the 1990's, the volume of death penalty cases actually declined. *Workload of the Supreme Court of Florida*, The Office of the State Courts Administrator, November 7, 2000, pages 19, 42. In testimony before the Workload Study Commission, the Clerk of the Court indicated that an average of 70 new death penalty cases are filed each year. There were 71 filed in 2001, and the Clerk estimated that 74 would be filed in 2002. *Minutes of*

the January 16, 2001 Meeting, Supreme Court Workload Study Commission.

The Office of the State Courts Administrator states that "[t]he time required to dispose of death penalty cases is in part a reflection of the typical complexity of the record in a capital case. The volume of the record on appeal, and the thoroughness and number of briefings, is unique in criminal law to capital case litigation. These factors have a very direct bearing on the workload of the court. Furthermore, because of the gravity of the ultimate punishment of death, every case is afforded oral argument, and every decision is released with a written opinion." *Workload of the Supreme Court of Florida*, Office of the State Courts Administrator, November 7, 2000, page 46.

Chief Justice Wells estimated that the Court spends 30 to 40 percent of its time working on death penalty cases. *Minutes of the October 24, 2001 Meeting*, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, page 11. He opined that the Court's workload would decrease if the Legislature modified s. 921.141, F.S., to require a supermajority vote of the jury in favor of the death penalty, rather than the current simple majority. *Minutes of the October 24, 2001 Meeting*, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, pages 11 and 15.

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 supermajority vote - in order to issue that verdict, therefore the number of death penalty cases would not decrease if the statute were modified. *Minutes of the October 24, 2001 Meeting*, Supreme Court Workload Study Commission; *2001 Final Report of the Supreme Court Workload Study Commission*, page 11.

During the 1990's, the Supreme Court's rate of affirming death penalty cases was approximately 50 percent. *Minutes of the January 16, 2001 Meeting*, Supreme Court Workload Study Commission. The chart below illustrates the court's actions on death penalty cases:

Types of Dispositions of Death Penalty Cases 1990-1999

Affirmed or denied	379
Affirmed in part, rev'd in part	2
Rev'd, remanded, or granted	307
Dismissed, transferred	75
TOTAL	763

Workload of the Supreme Court of Florida, The Office of the State Courts Administrator, November 7, 2000, page 27.

The Commission discussed the rate of death penalty cases which are overturned by the Supreme Court, and what effect modifying s. 921.141, F.S., to eliminate the sentencing judge's authority to override the jury's sentencing recommendation may have on the number of death sentences handed down. There was conflicting testimony on this point. The testimony seemed to indicate that trial judges do not often override the jury's advisory verdict of life (to impose the death penalty). Witnesses speculated that overrides are becoming rare, because the reversal rate by the Florida Supreme Court in those cases is high. *Final Report of the Supreme Court Workload Study Commission*, pages 11-12.

Judicial Override of Jury's Life Recommendation – In Florida, the jury in a capital case makes a sentencing recommendation – death or life imprisonment – unless the jury is waived. This recommendation is by majority vote, and is based on the weighing of aggravating and mitigating factors, as well as argument presented during the penalty phase of the trial. The judge must then decide the appropriate sentence, weighing the jury's recommendation along with the aggravating and mitigating factors. The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in a meaningful review. The judge may sentence a defendant in a different manner than the jury recommends – this is known as an "*override.*"

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

The Court scrutinizes overrides very carefully. It has been reported that the Supreme Court of Florida has vacated "roughly three-fourths of death sentences imposed in the face of contrary jury recommendations." Acker and Lanier, *Matter of Life or Death: The Sentencing Provisons in Capital Punishment* S*tatutes*, 31 Crim.Law Bull. 19, at 22 (1995).

The Clerk of the Florida Supreme Court has compiled data which reports judicial overrides from direct capital case appeals the Florida Supreme Court disposed of between 1990 and 1999. This data, in the table below, indicates that the sentencing judge overrode the jury's life recommendation in 7 percent of those cases (34 cases out of a total of 484).

Jury Vote, Categorical Summary, 1990-1999
Death Penalty Cases

Unanimous for Death Sentence	77	15.9%
Majority for Death Sentence	323	66.7%
Judge Override of Jury	*34*	*7.0%*
No Jury Role	37	7.6%
Vote not recorded or available	13	2.7%
TOTAL	484	100%

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

Staff surveyed the State Attorney's Offices in the 20 judicial circuits to attempt to determine the rate of judicial overrides of jury verdicts in death cases. It was found that the data is not routinely gathered by the State Attorneys, but all of the offices attempted to provide the requested information, although in many offices the only source of information is anecdotal. The survey resulted in some confusion, based on interpretation of the questions presented, consequently the data provided should be viewed as an approximation only. For example, some circuits reported cases in which the death penalty cases actually went to trial, while others reported cases in which the Notice of Intention to Seek the Death Penalty was filed, and in some of those cases the death penalty was not ultimately sought. Some circuits counted death penalty cases by defendant while others counted them by multiple capital charges against one defendant. In some cases the jury's advisory verdict was waived. Some cases reported as being death penalty cases had not been resolved at the time of the survey and were still pending.

Florida prosecutors reported that between July 1, 1996, and June 30, 2001, the death penalty was sought in 322 cases. The defendant received the death penalty in 137 cases. The jury recommended the death penalty in 131 cases. The jury recommended life imprisonment, and the judge overrode the jury, imposing the death penalty, in 4 cases. The jury recommended the death penalty and the judge overrode the jury to impose a life sentence in 15 cases. There were 36 cases in which the defendant was either found guilty of a lesser offense or acquitted.

Proportionality Review — Proportionality review is the comparison of one case in which the defendant was sentenced to death with other death cases. The Florida Supreme Court engages in proportionality review in all death penalty cases. The origin of proportionality review can be found in *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

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

The Florida Supreme Court has indicated that this automatic review, *and* comparison with other cases in which the death penalty was handed down, could serve to control and channel the discretion in sentencing the *Furman* court struck down. *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

In upholding the death penalty sentencing procedures enacted by the Legislature in response to *Furman*, the Florida Supreme Court gleaned two points from the *Furman* decision: 1) the opinion did not abolish capital punishment; and 2) "the mere presence of discretion in the sentencing procedure cannot render the procedure

violative of *Furman v. Georgia*; it was rather the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman*." (*Id.*at 6)

"If the judicial discretion possible and necessary under Fla. Stat. s. 921.141, F.S.A., can be shown to be *reasonable and controlled*, rather than *capricious and discriminatory*, the test of *Furman v. Georgia* has been met." (*Id.*at 7)

The *Dixon* court found that the Florida Legislature had provided a death penalty sentencing system whereby aggravating and mitigating factors are defined, and the weighing process is left to the carefully scrutinized judgment of jurors and judges. (*Id*. at 7) The court explained the five steps between conviction of a defendant in a capital case and imposition of the death penalty:

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

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

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

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

In his article "*The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida*", 11 St. Thomas L. Rev. 207 (1999), Ken

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

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

Jury Recommendations for Death Sentence

Jury Vote	Number of Sentences	Percentage
12-0	77	15.9%
11-1	59	12.2%
10-2	59	12.2%
9-3	69	14.3%
8-4	72	14.9%
7-5	64	13.2%
6-6	2	0.4%
5-7	1	0.2%
4-8	1	0.2%
vote unknown, life recommended	30	6.2%
jury rec. waived by defendant	19	3.9%
death sentence imposed by judge on remand	18	3.7%
vote not recorded or not available	13	2.7%
TOTAL	484	100%

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

This data indicates that a supermajority of the jury (9-3 vote or greater) voted for the death penalty 54.6 percent of the time that penalty was an option.

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

Supreme Court Workload Study Commission's Findings ─ The Commission made recommendations for further study in two areas. First, the Commission approved a motion 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. Second, the Commission approved a motion finding that preventing the trial judge from overriding a jury recommendation of life imprisonment would also reduce the caseload of the Court. The Commission recommended that the Legislature study the effect these two changes in Florida's death penalty sentencing scheme would have on the Court's workload. *Minutes of the January 29, 2001 Meeting the Supreme Court Workload Study Commission*; *2001 Final Report of the Supreme Court Workload Study Commission*, pages 11-12.

METHODOLOGY

The Criminal Justice Committee Staff researched and reviewed literature, reports, statutes, case law, and rules of court relevant to this topic. Criminal Justice Committee staff conducted a survey which polled the administrative offices of the courts in the 38 states that have the death penalty as a sentencing option as well as Florida prosecuting attorneys.

FINDINGS

Judicial Overrides in other States ─ Based on a staff review, it was found that Alabama, Delaware and Indiana have the same basic sentencing procedures as Florida. The judge in those states has the authority to override the jury's recommendation. In Delaware the jury vote tally is reported to the judge and in Indiana the vote for death must be unanimous, while in Florida a simple majority vote is required.

The jury's recommendation of death in Alabama must be decided by a vote of 10 of the 12 jurors – a verdict of life imprisonment only requires a simple majority. The vote tally is reported to the judge along with the verdict. In Alabama the sentencing judge may override the jury's recommendation, and is only required to

"consider" the recommendation (unlike the *Tedder* "great weight" standard in Florida). A death sentence in Alabama is automatically reviewed by an appellate court, during which the court conducts a proportionality review.

In *Harris v. Alabama*, 513 U.S. 504 (1995) the U.S. Supreme Court considered whether the Eighth Amendment requires the sentencing judge to ascribe any particular weight to the jury's advisory verdict in a capital case. The Court determined that since the Constitution permits a trial judge, acting alone, to impose the death penalty, a sentencing scheme which allows the judge to "consider" a jury recommendation – trusting that the judge will give it proper weight – does not offend the Constitution.

In reaching this conclusion, the Court stated: "[O]ur praise for *Tedder* notwithstanding, the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results." (*Id.* at 511)

In 10 cases in Alabama, a *unanimous* life recommendation by the jury was overridden by the sentencing judge. (Silverstein, *"The Judge as Lynch Mob"*, The American Prospect vol. 12 no.8, May 7, 2001, emphasis added) Statistics compiled by the Alabama Prison Project in 1994, and mentioned by the *Harris* Court in its opinion, indicate that there have only been five cases in which the sentencing judge rejected an advisory verdict of death in Alabama. There were 47 instances where the judge overrode a jury verdict of life to impose the death penalty. Although the *Harris* Court found these statistics "ostensibly surprising," it opined that the question of whether a sentencing scheme is constitutional turns on the question of "whether the penalties imposed are the product of properly guided discretion and not of arbitrary whim". (*Id.* at 514)

Of the other three states which have the judicial override sentencing scheme (Alabama, Delaware and Indiana), only the Indiana Office of Supreme Court Administration responded to staff's survey. Indiana reports that there were no judicial overrides of a jury's life recommendation for the period of time between July 1, 1996 and June 30, 2001.

The Jury's Role in Capital Cases Nationwide ─ Jury sentencing is not required by the U.S. Constitution, although the U.S. Supreme Court has noted that "jury sentencing in a capital case can perform an important societal function." *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Five states have a sentencing scheme whereby a judge or a panel of judges hand down the sentence in a death penalty case. These states are Arizona, Colorado, Idaho, Montana, and Nebraska. Critics of the judge-driven sentencing scheme say that giving a judge the power to sentence someone to death is too "political" or that a judge's experience or expertise should not replace the will of a jury, which expresses the conscience of the community.

Four states, Alabama, Delaware, Florida and Indiana, provide for an advisory verdict by the jury, but the judge is the ultimate sentencing authority. The judge has the statutory authority to override the jury's advisory verdict and impose either a life or death sentence. This sentencing scheme has been criticized as making it possible for the jury to not feel a sense of responsibility in the process, therefore not take their role as seriously as they should. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the United States Supreme Court upheld Florida's advisory verdict/judicial override sentencing scheme.

The majority of states that have a death penalty (38) also have sentencing by the jury (29). (The Death Penalty Information Center, Washington, D.C.) In those states in which the jury has sole discretion in capital sentencing, the decision to sentence the defendant to death must be unanimous. In at least five states, the judge has the limited ability to override a jury's death recommendation with a life sentence. These states are California, Kansas, Ohio, South Carolina and Virginia. Acker and Lanier, *Matter of Life or Death: The Sentencing Provisons in Capital Punishment statutes*, 31 Crim.Law Bull. 19, at 21 (1995).

Studies of Capital Juries ─ The chief criticisms of the pure jury-driven sentencing scheme 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. The CJP is designed to better understand the dynamics of juror decision making in capital cases.

In 1990 the CJP researchers began interviewing jurors who had served in capital cases. Analyses of the data

began appearing as early as 1993, with the latest article being published in June of 2001.

According to the Cornell Death Penalty Project, the CJP researchers have interviewed 1,115 jurors who sat on 340 capital trials in fourteen different states. The CJP's aim was to interview at least four jurors from a random sampling of cases, half of which resulted in the death penalty and half of which resulted in a life sentence. Each juror responded to a series of questions about the guilt phase of the trial as well as the penalty phase, the evidence presented, the defendant's demeanor, the victim's family, the lawyers and the judges, the jury instructions, the deliberations of the jury and the verdict reached. (Cornell Death Penalty Project, Cornell Law School, www.lawschool.cornell.edu/lawlibrary/death/cjp.htm)

Juror Responsibility ─ Among the studies published based on the findings of the Capital Jury Project is an article entitled *Jury Responsibility in Capital Sentencing: An Empirical Study*, by Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, 44 Buff.L.Rev. 339 (Spring, 1996). The authors posit that "a reliable sentence requires a responsible sentencer, but if in fact jurors do not believe they are responsible, the resulting sentence is rendered unreliable." (*Id.*)

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 scheme which makes death sentences unreliable and too easy to impose. (*Id.* at 340)

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." (*Id.* at 368)

Juror Characteristics ─ In another study based on interviews of 187 jurors who served on 53 capital cases tried in South Carolina, Eisenberg, Garvey and Wells suggest that race, religion, and belief that the death penalty is the only acceptable punishment for murder are individual characteristics in jurors that influence their decision making in capital cases. The authors believe that the influence of these characteristics "point to serious problems in the way death sentences are now imposed". Eisenberg, Garvey and Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277 (June 2001). The study suggests that "[a]ll else being equal, white jurors are more apt to vote for death than are black jurors. (*Id.* at 308) Further the authors suggest that although it is unconstitutional to exclude prospective jurors based solely on race or possibly religion (the U.S. Supreme Court has not addressed that issue), the law should do more to enforce the guarantee that jurors are impartial. (*Id.* at 309)

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*, by Stephen P. Garvey, Sheri Lynn Johnson and Paul Marcus, 85 Cornell L.Rev. 627 (2000), which examines the Virginia case of Lonnie Weeks. 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.

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. 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…." *Weeks v. Angelone*, 528 U.S. 225, 236 (2000).

Basing the *Correcting Deadly Confusion* study on the facts of the Weeks case, but modifying one variable with regard to a clarifying jury instruction, a mock jury of 154 people was used to test jury confusion with regard to the instructions given in the Weeks trial. The outcome of the study showed that jurors who understood the instruction were more likely to vote for life compared to jurors who misunderstood it. "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." Garvey, Johnson and Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L.Rev. 629 (2000).

Appellate Workload in Death Penalty Cases – A Statistical Comparison ─ To determine how much time appellate courts spend on death penalty cases, staff polled court administrators in the 38 states that have the death penalty. Twenty-seven of the 38 states responded.

Those states that have inmates on death row and who provided a meaningful response to the question of what percentage of time the appellate court spends on death penalty cases indicated a wide range – from 1 percent (Wyoming) to 30-40 percent (Florida). With the exception of Florida and Indiana, the states indicated in the chart that follows have sentencing by the jury in death penalty cases. All states except Florida require a unanimous jury verdict for the death penalty to be imposed. Florida requires a simple majority.

State	Time Spent on Death Penalty Cases by Appellate Court
Arkansas	5%
Florida*	30-40%
Indiana*	substantial, but statistics not kept
Kansas	1 case since death penalty reenacted in 1994
Nevada	17 of 1700 appeals filed in the year 2000
New Mexico	2%
Oklahoma	15% (est.)
Tennessee	10%
Texas	33%
Utah	15-20%
Wyoming	1%

*Judicial override states

There can be no assessment of a correlation between the amount of time appellate courts spend on death penalty cases with the required jury vote for imposition of the death penalty or whether a state has the judicial override sentencing scheme due to a lack of data. Most of the states that responded to staff's survey report that they simply do not gather such statistics.

In order to reduce the death penalty workload of the Florida Supreme Court, there must be a reduction in cases in which the defendant receives the death penalty. This is so because the Court automatically reviews all death penalty cases.

Increasing the jury vote to a supermajority has the potential for reducing the court's workload – 54.6 percent of the death cases disposed of by the court between 1990 and 1999 came to the court on a jury vote of 9-3 or greater for death. Prosecutors may be less inclined to seek the death penalty if the number of jurors that must be convinced the death penalty is appropriate is increased. However, it must be remembered that, as the testimony received by the Supreme Court Workload Study Commission indicated, a jury may work until they find the requisite number of votes, no matter what that number is.

With regard to the elimination of judicial overrides as a method by which the court's death penalty workload could be reduced, the data gathered indicates that a very low number of death sentences result from overrides. There is a possibility, however, that overrides may increase if the jury vote requirement is raised to a supermajority, resulting in no real reduction of the workload.

RECOMMENDATIONS

Although the Florida data suggests that requiring a supermajority vote of the jury before the death penalty could be imposed would result in fewer death cases for review at the appellate level, even if that change is made, it is difficult to predict the effect of two additional factors: the judicial override and whether jury voting trends would change. Given those uncertainties and the lack of adequate data from other states with regard to the amount of time other appellate courts spend on death penalty cases, staff recommends no modification of the current law.