

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJS 16-07 Sentencing for Capital Felonies

SPONSOR(S): Criminal Justice Subcommittee; Trujillo and Spano

TIED BILLS: None **IDEN./SIM. BILLS:** SPB 7068

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	11 Y, 2 N	Aziz	White

SUMMARY ANALYSIS

Under current law, when a defendant is convicted of a capital offense, a separate sentencing proceeding is conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. After hearing the evidence, the jury renders an advisory sentence to the judge based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and based on these considerations, whether the defendant should be sentenced to life imprisonment or death. A simple majority vote of the jury is necessary to recommend the death penalty. Juries are not required to list on the verdict aggravating and mitigating circumstances that the jury finds persuasive or to disclose the number of jurors making these findings.

The judge may sentence a defendant as recommended by the jury or may override the jury's recommendation. If the judge sentences a defendant to death, the judge must make written findings which indicate that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.

On January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional. The Court ruled that, under the Sixth Amendment of the United States Constitution, a jury, not a judge, must find each fact necessary to impose a sentence of death as a jury's "mere recommendation is not enough."

The bill amends Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling. Under the new sentencing scheme, the jury will continue to determine whether an aggravating factor exists, but will be required to make that determination unanimously. If the jury:

- Does not unanimously find at least one aggravating factor, the jury may only recommend a sentence of life imprisonment without the possibility of parole.
- Unanimously finds one or more aggravating factors, the jury may recommend a sentence of death or a life imprisonment without the possibility of parole. To recommend a sentence of death, a minimum of nine jurors must concur in the recommendation. If fewer than nine jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court.

If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence. If the jury recommends a sentence of death, the judge may impose a sentence of death or a sentence of life imprisonment without the possibility of parole after considering each aggravating factor found by the jury and all mitigating circumstances. The judge may only consider an aggravating factor that was unanimously found by the jury.

The bill does not appear to have a fiscal impact.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Death Penalty - Background

In 1972, the United States Supreme Court decided *Furman v. Georgia*, which struck down all of the then-existing death penalty statutes in the United States on grounds that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹

Florida was the first state to reenact a death penalty statute in the wake of *Furman*. This occurred in the fall of 1972, when House Bill 1-A was enacted during a Special Session of the Legislature.² While many statutory changes have been made over the years, this legislation formed the basis for Florida's current capital sentencing proceedings.

Current Death Row Statistics

Florida is currently one of 31 states that impose the death penalty.³ As of January 31, 2016, there were 389 people on death row in Florida – more than any other state aside from California.⁴ Of the 389 inmates on death row, 157 have been on death row for more than 20 years.⁵

Since 1976, Florida has executed 91 inmates.⁶ During the same period, Texas has executed 525 inmates, Oklahoma has executed 112 inmates, and Virginia has executed 110.⁷ Florida executed two death row inmates in 2015, and eight in 2014.⁸

Capital Sentencing Proceedings

Sections 921.141 and 921.142, F.S.,⁹ govern Florida's death penalty. Under these sections, if a defendant is convicted of a capital felony,¹⁰ a separate sentencing proceeding is conducted before the trial jury or, if the defendant pled, before a jury impaneled for that purpose.^{11, 12} During the sentencing proceeding, the jury must determine whether the defendant should be sentenced to death or to life imprisonment.¹³

After hearing all the evidence, the jury is required to render an advisory sentence to the judge based on the following factors:

¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

² The bill was signed by Governor Askew on December 8, 1972. Chapter 72-724, L.O.F. (1973).

³ The other states are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. *Facts About the Death Penalty* (updated June 2, 2015), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf (last visited on January 31, 2016).

⁴ California has 746 inmates on death row. *Id.* See "Death Row Roster" Florida Department of Corrections, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on January 31, 2016).

⁵ *Id.*

⁶ "Death Row" Florida Department of Corrections <http://www.dc.state.fl.us/oth/deathrow/#Statistics> (last visited January 31, 2016).

⁷ *Facts About the Death Penalty* (updated June 2, 2015), *supra* note 3.

⁸ "Death Row", *supra* note 6.

⁹ Section 921.142, F.S., addresses capital drug trafficking felonies specified in s. 893.135, F.S., and s. 921.141, F.S., addresses capital premeditated, felony, and other murder offenses. See ss. 782.04(1)(a), 782.09(1)(a), 790.161(4), and 790.166(2), F.S. (specifying capital murder offenses).

¹⁰ Section 893.135, F.S.

¹¹ ss. 921.141(1) and 921.142(2), F.S.

¹² A defendant may waive his or her right to a sentencing proceeding before a jury and, in such case, the judge determines the sentence by following the same process the judge must follow when determining the sentence to impose after receipt of a jury recommendation. *Id.*

¹³ *Id.*

- Whether sufficient aggravating circumstances¹⁴ exist;
- Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.¹⁵

A simple majority vote of the jury is necessary to recommend the death penalty. Juries are not required to list on the verdict aggravating and mitigating circumstances that the jury finds persuasive or to disclose the number of jurors making these findings.¹⁶ However, aggravating circumstances must be proven beyond a reasonable doubt.¹⁷

The aggravating circumstances that may be considered are limited by statute. Section 921.141(5), F.S., which addresses sentencing proceedings for capital murder offenses, provides for the following aggravating circumstances:

- 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.
- 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.

¹⁴ “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.*

¹⁵ ss. 921.141(2) and 921.142(3), F.S.

¹⁶ “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.” *Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.*

¹⁷ *Id.*

- 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 specified injunctions or foreign protection orders and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Section 921.142(6), F.S., which addresses sentencing proceedings for capital drug trafficking offenses, provides for the following aggravating circumstances:

- The capital felony was committed by a person under a sentence of imprisonment.
- The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least one year of imprisonment.
- The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.
- The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.
- The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.
- The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.
- The defendant intentionally killed the victim, intentionally inflicted serious bodily injury which resulted in the death of the victim, or intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.
- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
- The defendant committed the offense after planning and premeditation.
- The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

Mitigating factors are not limited by statute. Sections 921.141(6) and (7), F.S., specify that mitigating circumstances for capital offenses shall include:

- 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.

The following may also constitute a mitigating circumstance: (a) the victim was a participant in the defendant's conduct or consented to the act for a capital murder offense;¹⁸ and (b) the defendant could not have reasonably foreseen that her or his conduct during the commission of the offense would cause or create a grave risk of death to one or more persons for a capital trafficking offense.¹⁹

¹⁸ s. 921.141(6)(c), F.S.

¹⁹ s. 921.142(7)(g), F.S.,

The judge is not required to sentence a defendant as recommended by the jury. The judge conducts an independent 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 ultimate sentence rendered by the judge.²⁰ The judge may override the jury's decision. If the judge sentences a person to death, he or she must make written findings that there are sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.²¹

In sum, Florida does not require a unanimous jury recommendation or a unanimous finding by the jury that any aggravating circumstance has been proved.²² A Florida jury may recommend a death sentence to the trial judge on a simple majority vote of the 12 jurors, and there is no special verdict required to reflect the vote on the aggravating circumstances.²³ From 2000-2012, only 20 percent of jury recommendations were unanimous.

Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court ²⁴ (N=296)																
Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	% ²⁵	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 ²⁶	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		

Each sentence of death is subject to automatic review by the Supreme Court of Florida.²⁷ The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in meaningful review.²⁸ The Florida Supreme Court engages in a 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 to other similar death sentence cases.

The Sixth Amendment, *Ring*, and *Hurst*

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."²⁹ This right, in

²⁰ 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, 910 (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."

²¹ ss. 921.141(3) and 921.142(4), F.S.

²² Even in 1976, Florida's capital sentencing scheme was particularly unique in that the jury only recommended a sentence, its recommendation need not be unanimous or by any particular numerical vote, and the trial judge was permitted to override the jury's sentencing vote, whether for a life or death sentence. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984). See also that *Wilcox v. State*, 143 So. 3d 359, 389 (Fla. 2014) (Death sentence involving a seven-to-five jury recommendation was not unconstitutional on that basis); *Kimbrough v. State*, 125 So. 3d 752, 754 (Fla. 2013) and *Mann v. State*, 112 So. 3d 1158 (Fla. 2013) (Non-unanimous jury recommendations to impose sentence of death are not unconstitutional).

²³ ss. 921.141(2)-(3) and 921.142(3)-(4), F.S.; American Bar Association, *Death Penalty Due Process Review Project Section of Individual Rights and Responsibilities, Report to the House of Delegates (108A)*;

http://www.americanbar.org/news/reporter_resources/midyear-meeting-2015/house-of-delegates-resolutions/108a.html.

²⁴ Thirteen years of data compiled by the Supreme Court Clerk's Office. Fla. S. Comm. on Criminal Justice, SB 664 (2015) Staff Analysis 8 (March 9, 2015), available at <http://www.flsenate.gov/Session/Bill/2015/0664/Analyses/2015s0664.pre.cj.PDF>.

²⁵ Calculated percentage excludes the "other" category.

²⁶ Includes waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.

²⁷ Section 921.141(4), F.S.

²⁸ *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973).

²⁹ U.S. CONST. Amend. VI.

conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.³⁰ Applying this right, the United States Supreme Court held in 2000 that any facts increasing the penalty for a defendant must be submitted to a jury and proved beyond a reasonable doubt.³¹ Two years later, the 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.³² The Court struck the sentencing scheme down, 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.³³ This ruling was subsequently held to not apply retroactively to cases already final on direct review.³⁴

In the years following *Ring*, the Florida Supreme Court has repeatedly held that the state's capital sentencing scheme did not violate the Sixth Amendment under *Ring* since s. 921.141, F.S., is unique in allowing the jury to recommend death and the judge impose the sentence.³⁵

Hurst v. Florida

In this case, Timothy Lee Hurst was convicted of first-degree murder for fatally stabbing his co-worker in 1998 with a box cutter.³⁶ A jury recommended a sentence of death by a seven-to-five vote; thereafter, the trial court entered a sentence of death.³⁷ Hurst challenged his sentence arguing that the jury was required to find specific aggravators and to issue a unanimous advisory sentence recommendation.³⁸ The Florida Supreme Court denied Hurst's claims that his sentence violated *Ring* by adhering to Florida's precedent of not adopting *Ring* and citing to the Eleventh Circuit's recent approval of the capital sentencing scheme.³⁹ Hurst appealed this denial to the United States Supreme Court arguing that Florida's capital sentencing scheme violated *Ring* because the jury recommends the sentence with only a simple majority, the judge finds the facts necessary for imposition of the death penalty, and the judge imposes the death penalty.⁴⁰

On January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional in an eight-to-one opinion.⁴¹ The Court ruled that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death as a jury's "mere recommendation is not enough."⁴² The Court compared Florida's sentencing scheme to Arizona's in *Ring* and found Florida's distinctive factor of the advisory jury verdict immaterial. Like the unconstitutional practice in *Ring*, the judge in *Hurst* performed her own fact finding and increased Hurst's authorized punishment, thereby violating the Sixth Amendment.⁴³ The Court also expressly overruled its past decisions upholding Florida's capital sentencing scheme which were issued prior to *Ring*.⁴⁴

The Court's opinion did not address Hurst's contention that a jury's advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments. Neither the United States Supreme Court nor the Florida Supreme Court has required unanimity in a jury's capital

³⁰ *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

³¹ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

³² *Ring v. Arizona*, 536 U.S. 584, 592 (2002).

³³ *Id.* at 609.

³⁴ *Schiro v. Summerlin*, 542 U.S. 348, 358 (2004).

³⁵ *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) cert. denied, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) cert. denied, 537 U.S. 1067 (2002); and *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005).

³⁶ *Hurst v. State*, 147 So. 3d 435, 437 (Fla. 2014), *rev'd and remanded*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016).

³⁷ *Id.* at 440.

³⁸ *Id.* at 446.

³⁹ *Id.* at 446-447. See *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249(11th Cir. 2012), cert. denied, 133 S.Ct. 2393 (2013)(Citing *Hildwin v. Florida*, 490 U.S. 638 (1989), where the United States Supreme Court upheld Florida capital sentencing scheme thirteen years before *Ring*).

⁴⁰ Brief for Petitioner at 17-52 *Hurst v. Florida*, 2016 WL 112683 (2016) (No. 14-7505), 2015 WL 3542784.

⁴¹ *Hurst v. Florida*, 2016 WL 112683, at *3 (2016) .

⁴² *Id.* at *5.

⁴³ *Id.* at *6.

⁴⁴ *Id.* at *7.

sentencing recommendation. Alabama's capital sentencing scheme allows the imposition of the death penalty with a 10-2 jury sentencing recommendation.⁴⁵ Similarly, Delaware requires unanimity regarding the finding of aggravating factors, but does not require unanimity in a sentencing recommendation.⁴⁶ Furthermore, in the 2006 Legislative Session, the Florida House of Representatives passed a resolution stating the House "believes that the public policy of this state should be that unanimous jury recommendations not be required in death penalty cases."⁴⁷ The Resolution provided that requiring unanimity is inappropriate since it allows a "single juror the ability to override the reasoned judgment of all other jurors weighing and considering the same facts and circumstances."⁴⁸ In support of a non-unanimous jury recommendation, the resolution states some of Florida's most notorious murderers were sentenced with a less than unanimous recommendation, such as Theodore Bundy and Ailen Wuornos.⁴⁹

Effect of the Bill

The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court's holding that a jury, not a judge, must find each fact necessary to impose a sentence of death. Under the bill, the jury, after hearing all of the evidence presented on aggravating factors and mitigating circumstances, must determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor and must return findings identifying each aggravating factor found. Such findings must be unanimous. If the jury:

- Does not unanimously find an 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 must recommend to the court whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death.

In making its recommendation, the jury must weigh the following:

- Whether sufficient aggravating factors exist.
- Whether sufficient mitigating circumstances exist that outweigh the aggravating factors found to exist.
- Based on these considerations, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

To recommend a sentence of death, a minimum of nine jurors must concur in the recommendation. If fewer than nine jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court.

If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence. If the jury recommends a sentence of death, the judge may impose a sentence of death or a sentence of life imprisonment without the possibility of parole. The judge may only consider an aggravating factor that was unanimously found by the jury. If the defendant waived his or her right to a sentencing proceeding by a jury, the court may impose a sentence of death or life imprisonment without the possibility of parole. The court, sitting without a jury, still must weigh aggravating factors against mitigating circumstances and may only impose death if the court finds at least one aggravating factor to have been proven beyond a reasonable doubt.

To impose the jury's recommendation, the judge must enter a written order imposing the sentence for the defendant. In writing the order, the judge must consider the records of the trial and sentencing

⁴⁵ ALA. CODE § 13A-5-46(f) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.). See also *Gobble v. State*, 104 So. 3d 920, 977 (Ala. Crim. App. 2010) ("Ring does not require a unanimous recommendation for the death penalty before a defendant may be sentenced to death.").

⁴⁶ DEL. CODE ANN. tit. 11, § 4209.

⁴⁷ Fla. HR 1627 (2006).

⁴⁸ *Id.*

⁴⁹ *Id.* The Staff Analysis states Bundy, Wuornos, and Joe Nixon all received a 10-2 recommendation. Fla. H.R. Justice Council, HR 1627 (2006) Staff Analysis 6 (April 10, 2006) available at

<http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1627b.JC.doc&DocumentType=Analysis&BillNumber=1627&Session=2006> .

proceedings and address the aggravating factors found to exist by the jury and mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the judgment and sentence were rendered, the court must impose a sentence of life imprisonment without the possibility of parole.

The bill also amends s. 775.082, F.S., relating to penalties, to reflect that a person who has been convicted of a capital felony will be punished by death if the capital punishment scheme in s. 921.141, F.S., results in a determination that the person will be punished by death. The bill also reenacts ss. 782.04, 794.011, and 893.135, F.S., to incorporate the amendments made by the bill.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1. Amends s. 775.082, F.S., relating to penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

Section 2. Amends s. 921.141, F.S., relating to the sentence of death or life imprisonment for capital felonies.

Section 3. Amends s. 921.142, F.S., relating to the sentence of death or life imprisonment for capital drug trafficking felonies.

Section 4. Reenacts s. 782.04, F.S., relating to murder.

Section 5. Reenacts s. 794.011, F.S., relating to sexual battery.

Section 6. Reenacts s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

Section 7. Provides the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Retroactivity

Any decision of the United States Supreme Court which results in a “new rule” of constitutional law applies retroactively to all criminal cases still pending direct review.⁵⁰ It is likely the Court’s ruling in *Hurst* will apply retroactively to pending or future appeals on direct review.⁵¹

Whether *Hurst* will apply retroactively to death row appeals on collateral review or inmates who have exhausted their appeals will depend on whether the holding in *Hurst* is determined to be substantive or a watershed rule of criminal procedure.⁵² For example, in *Schriro v. Summerlin*, the United States Supreme Court held that the *Ring* decision was not retroactive.⁵³ In determining that *Ring*’s holding was merely procedural, rather than substantive or a watershed rule, the Court stated:⁵⁴

Ring held that “a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.” 536 U.S., at 609. Rather, “the Sixth Amendment requires that [those circumstances] be found by a jury.” *Ibid.* This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment’s jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules.

Given this ruling by the Court and the fact that the holding in *Hurst* is effectively the same as the holding in *Ring*, it seems probable that the Florida Supreme Court, under the precedent of *Summerlin*, would find that *Hurst* does not meet the test for retroactivity on collateral review.⁵⁵

⁵⁰ *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(holding that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past); *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)(stating that “when a decision of this Court results in a ‘new rule,’ that rule applies to all criminal cases still pending on direct review.”); *Johnson v. State*, 904 So. 2d 400, 407 (Fla. 2005)(stating “It is clear that new law announced by this Court or the United States Supreme Court applies to all non-final criminal cases – that is, to all cases involving convictions for which an appellate court mandate has not yet issued.”).

⁵¹ Currently, there are 43 cases involving a sentence of death that is on direct review. E-mail from the Department of Legal Affairs dated January 27, 2016 (on file with the Criminal Justice Subcommittee).

⁵² *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). Retroactivity only applies to: (1) a substantive rule that “places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense”; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 498 U.S. 288, 310-13 (1989).

⁵³ *Schriro*, 542 U.S. at 358.

⁵⁴ *Id.*

⁵⁵ *See Schiro*, 542 U.S. at 358 (“The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment’s guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new

The Florida Supreme Court held oral arguments on the applicability of *Hurst* to pending collateral appeals on February 2, 2016.⁵⁶ They have since stayed the execution of Cary Michael Lambrix.⁵⁷

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

procedural rule that does not apply retroactively to cases already final on direct review.”). In 2005, the Florida Supreme Court held that *Ring* did not apply retroactively in Florida to defendants whose convictions were final when that decision was rendered. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).

⁵⁶ *Lambrix v. Florida*, Case No. SC16-8 & SC 16-56, Order Jan. 15, 2016 (available at https://efactssc-public.flcourts.org/casedocuments/2016/8/2016-8_order_208838.pdf).

⁵⁷ *Lambrix v. Florida*, Case No. SC16-8 & SC 16-56, Order Feb. 2, 2016 (available at https://efactssc-public.flcourts.org/casedocuments/2016/8/2016-8_order_209322.pdf).

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