STORAGE NAME: h3033s1.cp
DATE: February 12, 1998

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: **CS/HB 3033**

RELATING TO: Execution by Lethal Injection

SPONSOR(S): Rep.'s Stafford & Heyman

COMPANION BILL(S): SB 3034

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CRIME AND PUNISHMENT YEAS 7 NAYS 2
(2) GOVERNMENTAL OPERATIONS
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. SUMMARY:

The bill does not change the current method of execution.

The bill creates section 922.105, Florida Statutes, providing that if electrocution is declared to be an invalid method of execution then the method of execution is to be by lethal injection. If electrocution is not declared invalid then electrocution will remain the method of execution in Florida.

The bill permits anyone qualified to administer intravenous drugs to perform as the executioner and exempts this conduct from the definition of "practicing medicine."

The bill provides that if lethal injection is declared invalid then the Department of Corrections is to determine the method of execution which will be any method not declared unconstitutional by the United States Supreme Court.

The bill provides that inmates sentenced to death may not have their sentences reduced in the event that a method of execution is declared invalid, and that the sentences are to be carried out by any lawful method.

The bill is effective upon becoming law.

II. SUBSTANTIVE RESEARCH:

A. **PRESENT SITUATION:**

- Florida's **death-penalty** statute s. 775.082(1), states:

  (1) A person who has been convicted of a capital felony shall be punished by death... .

- Florida's **method-of-execution** statute, s. 922.10, states:

  A death sentence shall be executed by electrocution. ...

- Article I, section 17 of the **Florida Constitution** provides that "cruel **or** unusual" punishment is forbidden.

- The Eighth Amendment to the **United States Constitution** provides that "cruel **and** unusual" punishments may not be inflicted.

Currently, the only method of execution available in Florida is the electric chair. Florida began using the electric chair in 1924 when it was thought to be a more humane method than execution by hanging which occasionally resulted in slow suffocation when improperly performed. The electric chair has recently come under attack as being inhumane when two executions resulted in unnecessary burns to the body of the condemned. Nonetheless, the Florida Supreme Court recently held that the electric chair does not violate constitutional protections against cruel or unusual punishment in Jones v. Butterworth, 22 Fla. L. Weekly S659a (Fla. October 20, 1997).

In Jones, the majority did not distinguish the clause in the Florida Constitution prohibiting cruel **or** unusual punishment as requiring a different analysis than the cruel **and** unusual clause in the federal constitution. The majority emphatically held that the electric chair in its present condition is not cruel **or** unusual:

> There was substantial evidence presented in this case that executions in Florida are conducted without any pain whatsoever, and this record is entirely devoid of evidence suggesting deliberate indifference to a prisoner's well-being on the part of state officials.

The Florida Supreme Court's four to three decision in Jones implied that their decision to uphold the constitutionality of the electric chair is subject to change in the future. One of the votes for the majority, Justice Grimes, is leaving the bench this year. Another justice in the majority, Justice Harding, strongly encouraged the legislature to give inmates an option of lethal injection or electrocution. Justice Harding mentioned the possibility of a "constitutional train wreck" with all the people on Death Row having their sentences commuted to life unless an alternative to electrocution is passed by the legislature. Anderson v. State, 267 So. 2d 8 (Fla. 1972); Furman v. Georgia, 408 U.S.

238 (1972). Justice Overton, who was also with the majority, concurred with Justice Harding's concerns. Five of the seven Justices encouraged the legislature to adopt legislation which would give an inmate the option to choose lethal injection.

Authority for "constitutional train wreck"

Justice Harding in his concurring opinion in the recent Jones case wrote that a new statute providing for a death sentence to be executed either by electrocution or by lethal injection "would avert a possible 'constitutional train wreck.'" Justice Harding attempted to demonstrate the real possibility of death sentences being commuted to life by referring to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) which held that the manner in which the death penalty was being imposed constituted cruel and unusual punishment. Justice Harding noted that before 1972 the United States Supreme Court had consistently held that the death penalty was not cruel and unusual, thus implying that like the federal court, the Florida Supreme Court could suddenly change its position.

The Florida Supreme Court was forced to commute death sentences to life after Furman, because the United States Supreme Court had held that the manner in which judges and juries decided whether to impose the death penalty was without standards and the arbitrary manner in which the death penalty was decided upon violated the Cruel and Unusual Clause in the federal constitution. After the Furman decision, the states rectified their death-penalty statutes to ensure that certain standards or guidelines were met. The United States Supreme Court subsequently upheld the new death penalty statutes. Gregg v. Georgia, 428 U.S. 153 (1976).

If the Florida Supreme Court decides to strike down the use of the electric chair, that decision would only invalidate the method of execution, not the imposition of the death penalty itself. However, Justice Harding in the Jones case has pointed out that Florida statutes only provide for one method of execution and that if that method is removed, then the Court's only alternative may be to impose life sentences on all the inmates currently on Death Row. The Court would not necessarily have to come to the conclusion that sentences would have to be commuted. It is not settled that the method of execution must be specified by statute in order for the Governor to execute a lawfully imposed death sentence. Alternatively, the court could acknowledge that the penalty of death remains intact, and stay the execution until the Legislature passed a new law regulating the method of execution.

Governor's Response

In response to the opinion in Jones the Governor has delayed two executions and reset them for the week of May 23, 1998, to "allow the Legislature an opportunity to consider the Court's recommendation." In a letter to the Speaker of the House, the Governor urged the legislature "to act swiftly in adopting an alternative method of execution."

B. **EFFECT OF PROPOSED CHANGES:**

The bill does not change the current method of execution. The statute providing that a death sentence shall be executed by electrocution was not changed.

The bill creates section 922.105, Florida Statutes, providing that if electrocution is declared to be an invalid method of execution, then the method of execution is to be by lethal injection. If electrocution is not declared invalid, then it will remain the method of execution in Florida.

The bill permits anyone qualified to administer intravenous drugs to perform as the executioner and exempts this conduct from the definition of "practicing medicine."

The bill provides that if lethal injection is declared invalid then the Department of Corrections is to determine the method of execution which will be any method not declared unconstitutional by the United States Supreme Court.

The bill exempts the procedure from the administrative rule-making and hearing requirements of Chapter 120.

The bill provides that inmates sentenced to death may not have their sentences reduced in the event that a method of execution is declared invalid, and that the sentences are to be carried out by any lawful method.

The bill is effective upon becoming law.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The bill phases out the electric chair as a lawful means of execution.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

C. STATUTE(S) AFFECTED:

775.082; 922.10

D. SECTION-BY-SECTION RESEARCH:

SECTION 1: See, EFFECT OF PROPOSED CHANGES

SECTION 2: Provides an effective date of "July 1 of the year in which enacted."

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

   See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   None.

2. Recurring Effects:

   None.

3. Long Run Effects Other Than Normal Growth:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   N/A

2. Direct Private Sector Benefits:

   N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has determined that the fiscal impact on the prison population would be insignificant, or none. According to the Department of Corrections analysis, the fiscal impact is “insignificant.”

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because this is a criminal bill, this provision does not apply.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

No.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

No.

V. COMMENTS:

Ex Post Facto Analysis

Both state and federal constitutions contain prohibitions against ex post facto laws (i.e., laws which criminalize, or punish more severely, conduct which occurred before the existence of the law). See, Article I, Section 9 of the Florida Constitution; and Article I, Section 10 of the United States Constitution. The Florida Supreme Court has not delineated a difference between the ex post facto provisions of the Florida and United States Constitutions. The Florida Supreme Court and the United States both use the following test to determine if there is an ex post facto violation:

> In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Gwong v. Singletary, 683 So. 2d 112 (Fla. 1996), citing, California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

If electrocution is held to be unconstitutional, then a change in the method of execution would not be an Ex Post Facto violation because changing the method of execution does not, and can not, increase a penalty of death. Both the United States Supreme Court and the Texas Supreme Court have held that a retrospective change in the method of execution does not violate the Ex Post Facto Clause:

> We conclude in light of these holdings that execution by lethal injection may be imposed upon a defendant even though death by electrocution was the mode of execution authorized by law at the time of the commission of capital murder, at the time of his trial, and even if he had been previously sentenced to die by electrocution. The statute under consideration did not change the penalty of death for capital murder, but only the mode of imposing such penalty. The punishment was not increased, only some of the odious features incident to the former method of electrocution were abated. ...

Ex parte Kenneth Granviel, 561 S.W. 2d 503 (Tex. App. 1978), citing Malloy v. South Carolina, 237 U.S. 180 (1915) (footnoted omitted). There is no reason to believe the Florida Supreme Court's ex post facto analysis would be different, if confronted with the same issue.

Saving Clause Analysis

The chief obstacle to any retroactive change to methods of execution is Article X, Section 9 of the Florida Constitution which provides as follows:

> **Repeal of criminal statutes.--** Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

The purpose of this provision, which is commonly referenced as a "saving clause," is to save pending criminal prosecutions and the sentences imposed from the repeal of the underlying statute. Hayward v. State, 467 So.2d 462 (Fla. 2d DCA 1985). The Florida Supreme Court has held that "the effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness." Washington v. Dowling, 109 So. 588 (Fla. 1926).

Florida's saving clause was originally passed in 1885 in response to criminals escaping prosecution because the underlying statute was repealed or amended. In 1923 the Florida legislature abolished death by hanging as the method of execution and enacted a statute that required the death penalty be carried out by electrocution. An inmate who was sentenced to death by hanging before the method of execution was changed argued that he could not be hung because the statute specifically stated that "hanging ...is hereby abolished." The courts had previously held that the inmate could not be electrocuted because the sentence pronounced by the trial court was death by hanging. The Florida Supreme Court in Washington v. Dowling, 109 So. 2d 588 (Fla. 1926), held that the savings clause prevented the retrospective change in the method of execution from hanging to electrocution.

Under the Washington rationale, inmates had to be hung if they were sentenced to death for crimes committed before the effective date of the statute calling for death by electrocution. In Ex parte Browne 111 So. 518 (Fla. 1927) the Florida Supreme Court again held that the statute requiring execution by electrocution could not be applied to crimes committed before the effective date of the statute because the Saving Clause prohibits retroactive changes in punishment. The defendant's case in Browne was remanded to the trial court for resentencing.

Applying the Saving Clause to Future Legislation

The only case law in the country that address whether the method of execution is affected by a saving clause in a state constitution are the 70-year-old cases mentioned above. All the states, except New Mexico and Florida, and the federal government have statutes that save pending criminal prosecutions from a change in the underlying statute. New Mexico has a constitutional provision similar to Florida's, in its state constitution; but there is no case law discussing that provision's effect on changes in the method of execution. If the Legislature changes the current method of execution from electrocution to lethal injection, the Florida Supreme Court could apply the saving clause, and Washington and Browne, to hold that the change in method only applies prospectively.

The saving clause and the reasoning of Washington and Browne could also be used to strike down the retroactive application of a statute that gives an inmate the option to choose how to be executed. The portion of a statute that allows the choosing of lethal injection could be stricken to the extent that it abrogates the people's right to a specified punishment for crimes already committed pursuant to the saving clause. In a worst case scenario, the Court could strike down the option of lethal injection and then, at a later date, rule that electrocution is cruel or unusual. With no remaining methods of execution, the court could

commute sentences to life for first degree murders committed before the effective date of the option statute.

Although there is a legal basis for the Court to strike down that portion of a statute which allows an inmate to choose lethal injection, it is more likely that the Court would uphold a statute that gives an inmate an option to choose the method of execution given the recent positions of the Justices in the Jones v. Butterworth opinion which upholds the use of the electric chair. Presumably, Justice Harding who recommended the option approach to the legislature would vote to uphold the option, and the three justices who dissented would either have to uphold the option or see electrocution again become the only method of execution. In all, five of the seven justices in Jones recommended or concurred in opinions that recommended the option approach. As the Governor's counsel, Tom Crapps, has publicly stated, it is hard to imagine that the Supreme Court would "turn around and bite us..." for doing what the court urged to be done. Furthermore, it would not be difficult for the Court to reverse its decision in Washington and hold that the term "punishment" in the Saving Clause refers only to the **death-penalty** statute, and not to the **method-of-execution** statute. See, Mallory v. South Carolina, 237 U.S. 180, 35 S.Ct. 507 (1915)(change of manner of execution from hanging to electrocution did not change the penalty of death nor increase the punishment).

The saving clause may prohibit a retroactive repeal of execution by electrocution, however, it could not prohibit an alternative method of execution if electrocution is found unconstitutional. The saving clause does not refer to punishments found unconstitutional, it only prohibits a retroactive amendment or repeal of a criminal statute. It would be irrational for a court to hold that this clause, which was adopted to ensure the People's right to punishment, prohibits lethal injection from replacing the electric chair if execution by electrocution is found unconstitutional. A statute authorizing the option approach could include an additional safeguard which makes lethal injection the method of execution if the option is struck down and electrocution is found unconstitutional.

California

California has recently litigated issues relating to their methods of execution in both state and federal courts. A review of this litigation could give Florida guidance on constitutional limits to legislation regulating methods of execution.

Last year the United States Court of Appeals for the Ninth Circuit in the case of Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996) held that the gas chamber used by California violated the Cruel and Unusual clause of the United States Constitution. At the time of the sentencing of David Fierro the sole method for execution was lethal gas. However, before the Fierro case was decided California amended state law to allow all inmates sentenced prior to or after the effective date of the law to choose between lethal injection and lethal gas. Lethal gas was the default method if a person did not make a choice within ten days of being served with an execution warrant. The option method that California passed also provided that if either manner of execution is held invalid, the punishment shall be imposed by the alternative means remaining. The Ninth Circuit acknowledged that regardless of their holding, that lethal gas is unconstitutional, the inmate's sentence of death remained unaffected.

During the same year that the Ninth Circuit held lethal gas to be cruel and unusual, California passed a third change to their law which made lethal injection the default method of execution. The United States Supreme Court vacated the Ninth Circuit's decision in Fierro "in light of" the new change to the California law without further explanation. Justice Harding in a concurring opinion in Jones v. Butterworth (Florida Supreme Court upheld use of electric chair as not being cruel or unusual), wrote that "the United States Supreme Court [in Fierro] impliedly approved the course of action taken by the California Legislature" and the Justice urged the Florida Legislature to adopt the California approach.

The litigation in California demonstrates a slight benefit to the option as opposed to having a primary method of execution, supplemented by an alternate method which takes effect if the primary method is ruled unconstitutional. The California Supreme Court and the United States Ninth Circuit Court of Appeals have both held that only the primary method of execution may be challenged as being cruel and unusual. An affirmative choice of an alternate method waives any challenge that the alternate method is cruel and unusual. See, People v. Bradford, 929 P.2d 544 (Ca. 1997); and Poland v. Stewart, 92 F.3d 881 (9th Cir. 1996). The court in Poland further held that "the mere existence of the option is not a violation of Poland's constitutional rights."

Under the rational of Bradford and Poland, HB 3033 by Rep. Stafford will prohibit inmates currently on Death Row from challenging the constitutionality of lethal injection, but the default method, electrocution, would continue to be challenged regardless of which method the inmate chooses. Lethal injection will be challenged by defendants who commit crimes punishable by death in the future, since the bill requires lethal injection for crimes that occur on or after the effective date of the bill. The California experience also suggests that even if the Court finds a method of execution unconstitutional the penalty would still be death. People v. Holt, 937 P.2d 213 (Cal. 1997)(invalidation of the means by which a sentence is carried out does not affect the validity of the sentence).

Senate Deliberations

The Senate initially took up a bill similar to HB 3033 and various amendments were debated and adopted. The Senate then adopted a strike-everything amendment which discarded the option approach and was passed out of the Senate during the special session. The bill that passed the Senate states the following:

> If electrocution is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, all persons sentenced to death for a capital crime shall be executed by lethal injection.

Other Issues Relating to Implementation of HB 3033

1. The bill requires that particular lethal drugs be injected, namely, an ultra short-acting barbiturate and a chemical paralytic agent. Such specification could prevent the use of new and better drugs. The highest criminal court in Texas rejected vagueness arguments raised against its lethal injection statute which reads, in part:

   > ...the sentence shall be executed ... by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death.

Ex parte Granviel, 561 S.W.2d 503 (Tx. 1978).

2. The bill requires that the lethal injection be administered by any person qualified to administer the injections. The "term" qualified means licensed or certified medical person. It may be difficult to find a medical doctor willing to participate in the execution which could violate the Hippocratic oath. Furthermore, the American Medical Association has taken a position against medical doctors performing executions. The Senate considered an amendment which called for the injection to be performed by "any person who is competent to prepare and administer intravenous injections." However, this language was not adopted in the Senate's final bill.

3. The bill makes an election of lethal injection apply to all successive dates of execution, but it is not clear if the election may be revoked or changed before each execution date.

4. The bill allows an inmate to choose execution by lethal injection "within 24 hours of the scheduled execution when the time period is less than 7 days." The time period that the bill refers to is not defined. Furthermore, the Department of Correction's position is that more than 24 hours are needed to prepare for an execution. Other states simply require the election be made 7 to 15 days before the scheduled date of execution. Or within 7 to 15 days of the service of the warrant.

5. Florida Corrections Commission has gathered information that indicates that 5.28% of executions in the United States by lethal injection have been problematic or "botched" compared to 5.97% of executions by electrocution. Problems encountered with lethal injection are:

   - ♦ Difficulty of locating and inserting intravenous connection into a viable vein
   - ♦ Violent reaction to lethal drugs
   - ♦ Tightness of leather straps which prevented the flow of chemicals
   - ♦ Lethal drugs clogged the tube and stopped the process, which required that the clogged tube be replaced

Does a Change In the Method Of Execution Cause Delays?

Of the 32 states which currently use lethal injection, 16 states provide it as an option. Committee staff contacted the attorney general's office in 10 states using lethal injection as an **option**, or as their **only** method of execution, and asked whether they experienced any delays in the rate of execution as a result of passing their lethal injection legislation. Every office claimed to have experienced **no delays**.

The following table contains a list of those authorities.

STATE	YEAR PASSED	TYPE OF STATUTE	AUTHORITY FOR OPINION THAT PASSAGE OF LETHAL INJECTION LAW DID NOT DELAY RATE OF EXECUTION IN THEIR STATE
CALIFORNIA	1996	option	Dane Gillette A.A.G., Chief of Capital Appeals
MISSOURI	1988	option	Jack Morris A.A.G., Chief of Capital Appeals
OHIO	1994	option	S. McClellan A.A.G., Chief of Capital Appeals
OKLAHOMA	1976	option	Sandy Howard A.A.G., Chief of Capital Appeals
S. CAROLINA	1995	option	Don Zelinka A.A.G., Chief of Capital Appeals
VIRGINIA	1995	option	K. Baldwin A.A.G., Chief of Capital Appeals
WASHINGTON	1981	option	Paul Weisser A.A.G., Chief of Capital Appeals
LOUISIANA	1991	injection only	Fred Dewy A.A.G., Chief of Capital Appeals
NEVADA	1981	injection only	D. Surnowski A.A.G., Chief of Capital Appeals
TEXAS	1977	injection only	Gina Blunt A.A.G., Assistant Chief of C.A.'s

Finally, it is also the opinion of the Attorney General of the State of Florida that giving an inmate the option to choose a method of execution will not result in a delay of the process. However, it is possible that if the method of execution is changed or inmates are given the option, then the trial court may have to resentence the inmates on death row.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The bill passed favorably through the Crime & Punishment Committee with one amendment, on February 3, 1998. The committee adopted a strike-everything amendment that was offered by Representative Crist. This bill research statement reflects the substance of that amendment. The bill was made into a committee substitute.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by: Legislative Research Director:

Jamie Spivey J. Willis Renuart