SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SJR 124

SPONSOR: Senator Burt

SUBJECT: Excessive Punishment

DATE: January 16, 2001 REVISED: 2/06/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/1 amendment
2.			RC	
3.				
4.				
5.				

I. Summary:

Senate Joint Resolution 124 submits to the Florida electors a proposed amendment to Section 17 of Article I of the Florida Constitution, which presently prohibits (and has historically prohibited) "cruel or unusual" punishment, as well as excessive fines, attainder, forfeiture of estate, indefinite imprisonment and unreasonable detention of witnesses. The joint resolution includes a ballot title and summary of the proposed amendment.

The proposed amendment to Section 17 would do the following:

- **P** Prohibit "cruel ***and*** unusual" punishment rather than "cruel ***or*** unusual punishment;
- **P** Require that this prohibition be construed in conformity with decisions of the United States Supreme Court that interpret the federal constitutional prohibition against cruel and unusual punishment;
- **P** Provide that the death penalty is an authorized punishment for any capital crime designated by the Legislature;
- **P** Allow any method of execution not prohibited by the Federal Constitution;
- **P** Provide that the Legislature may designate methods of execution;
- **P** Authorize retroactive application of a change in any method of execution;
- **P** Provide that, when a method of execution is declared invalid, a death sentence shall not be reduced and shall remain in force until it can be carried out by a valid method; and
- **P** Provide for retroactive application of Section 17, as amended.

The proposed amendment to Section 17 would be submitted to the Florida electors for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose.

This joint resolution would substantially amend Section 17 of Article I of the Florida Constitution.

II. Present Situation:

A. Florida's "Cruel or Unusual" Punishment Clause

Article I of Florida's Constitution contains Florida's "Declaration of Rights." These "rights" are considered to be fundamental to the citizens of this State. Section 17 of Article I prohibits "[e]xcessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses. . . ."

Florida's Constitution prohibits "cruel ***or*** unusual" punishment, while the Eighth Amendment of the Federal Constitution prohibits "cruel ***and*** unusual" punishments. With regard to the state "cruel or unusual" punishment clause, the Florida Supreme Court has indicated that alternatives were intended. *See Armstrong v. Harris*, 2000 WL A1260014 (Fla. September 7, 2000); *Brennan v. State*, 754 So.2d 1 (Fla. 1999).

B. Ratification of Amendment No. 2

During the 1998 Legislative Session, the Legislature passed legislation proposing an amendment to Section 17 of Article I of the Florida Constitution. *See* HB 3505. This legislation resulted in the placement of proposed Amendment No. 2 on the ballot during the November 1998 general election. This amendment was approved by 72.8 percent of the Florida electorate, the largest approval percentage of any amendment on the ballot.

The ballot title and summary for Amendment No. 2 provided:

> BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT
>
> BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to the United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

The text (new language is bolded) of Amendment No. 2 provided:

> SECTION 17. Excessive punishments. — Excessive fines, cruel **and** ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. **The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court**

which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in the method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

C. *Armstrong v. Harris*: Florida Supreme Court Holds that Ballot Title and Summary of Amendment No. 2 Are Inaccurate

On September 7, 2000, the Florida Supreme Court, in a 4-3 opinion, held that the ballot title and summary of the proposed amendment failed to meet an "implicit" requirement in Section 5 of Article XI of the Florida Constitution that proposed constitutional amendments "be accurately represented on the ballot." *Armstrong v. Harris*, 2000 WL A1260014 (Fla. September 7, 2000). The Court believed its precedent supported judicial review of the accuracy of ballot titles and summaries. The Court also held that the ballot title and summary had mislead the voters in violation of s. 101.61, F.S., which requires that "the substance of [a proposed constitutional amendment] . . . be printed in clear and unambiguous language." This section, the Court believed, codified the "accuracy requirement" in Section 5 of Article XI. The Court described the inaccuracies of the ballot title and summary as follows:

> Amendment No. 2 fails under article XI, section 5, for several reasons. First, the amendment "flies under false colors." Citizens may well have voted in favor of the amendment based on the false premise that the amendment will promote the basic rights of Florida citizens. Under such circumstances, the true merits of the amendment will have been overlooked or misconstrued. Second the proposed amendment "hides the ball" from the voter. The ballot title and summary give no hint of the radical change in state constitutional law that the text actually foments.

Id. at page 17.

According to the Court, the amendment flew under false colors because the ballot title and second sentence of the summary failed to apprise the voters of what the Court identified as the main point and effect of the amendment: the amendment effectively nullified the state constitutional right to be free from "cruel or unusual punishments." *Id.* at page 7. The Court appears to indicate (though does not explicitly state) that the state clause provides a more expansive right than the federal clause. *See Kainen v. Harris*, 2000 WL 1459712, page 2 (Fla. October 3, 2000) (Anstead, J, concurring) (". . . [W]e found in *Armstrong* that the ballot summary completely failed to inform the voters that the provision in the Declaration of Rights of the Florida Constitution protecting citizens from "cruel or unusual punishments" would be altered and reduced to provide protection only from "cruel and unusual punishments."). The Court concluded that from the ballot summary description of the change "a citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights when in fact the citizen was doing the exact opposite-i.e., he or she was voting to nullify those rights." *Armstrong* at page 7.

According to the Court, the ballot summary hid the ball because it did not inform the voters that the main effect of the amendment -- nullifying the "cruel or unusual" punishment clause -- "far outstrips the stated purpose (i.e., to 'preserve' the death penalty)" because this clause "applies to *all* criminal punishments, not just the death penalty." *Id.* at page 8. Further, the Court stated that "[t]he voter is not even told on the ballot that the word "or" in the Cruel or Unusual Punishment Clause will be changed to "and" --a significant change by itself." *Id.* (footnote omitted).

III. Effect of Proposed Changes:

Senate Joint Resolution 124 submits to the Florida electors a proposed amendment to Section 17, Article I of the Florida Constitution, which presently prohibits (and has historically prohibited) "cruel or unusual" punishment, as well as excessive fines, attainder, forfeiture of estate, indefinite imprisonment and unreasonable detention of witnesses. The joint resolution includes the following ballot title and summary:

> PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, NOT CRUEL OR UNUSUAL PUNISHMENT.--Proposing an amendment to the State Constitution to prohibit cruel and unusual punishment rather than cruel or unusual punishment; to require that such prohibition be construed in conformity with decisions of the United States Supreme Court which interpret the federal constitutional prohibition against cruel and unusual punishment; to provide that the death penalty is an authorized punishment for any capital crime designated by the Legislature; to allow any method of execution not prohibited by the Federal Constitution; to provide that the Legislature may designate methods of execution; to authorize retroactive application of a change in the method of execution; to provide that, when a method of execution is declared invalid, a death sentence shall remain in force until it can be carried out by a valid method; and to provide for retroactive application of this section.

The proposed amendment to Section 17, as described in the ballot summary would do the following:

- **Prohibit "cruel *and* unusual" punishment rather than "cruel *or* unusual punishment.**

  This would conform the wording of the state clause to that of the federal clause by removing the disjunctive "or" in the current clause and replacing it with the conjunctive "and." There would be no textual basis to conclude that alternatives were intended.

- **Require that this prohibition be construed in conformity with decisions of the United States Supreme Court which interpret the federal constitutional prohibition against cruel and unusual punishment.**

  The right to be free from "cruel or unusual" punishment under the state clause would be reduced, or put another way, the prohibition would be no more expansive than the federal prohibition, as interpreted by the United States Supreme Court. This change would apply to all punishments, not simply the death penalty.

- **Provide that the death penalty is an authorized punishment for any capital crime designated by the Legislature.**

  This provision would provide explicit state constitutional authorization for the death penalty. This provision would, of course, be effectively nullified if the Legislature eliminated capital crimes or the Governor refused to sign death warrants. Additionally, the effect of this provision would be nullified if the United Supreme Court ever declared the death penalty unconstitutional under the Federal Constitution.

- **Allow any method of execution not prohibited by the Federal Constitution.**

  The Federal Constitution or any courts' interpretation of that document currently prohibits no method of execution used in Florida.

- **Provide that the Legislature may designate methods of execution.**

  This is an explicit constitutional statement of the Legislature's authority to designate methods of execution. Currently, electrocution and lethal injection are the only methods of execution approved by the Legislature.

- **Authorize retroactive application of a change in any method of execution.**

  A method of execution can be retroactively applied to a death-sentenced inmate, notwithstanding the fact that this method was not available when he or she was sentenced (See the "Other Constitutional Issues" section of this analysis for a summary of some case law relevant to this provision).

- **Provide that, when a method of execution is declared invalid, a death sentence shall not be reduced and shall remain in force until it can be carried out by a valid method.**

  The invalidity of the method of execution has no bearing on the death sentence imposed.

- **Provide for retroactive application of Section 17, as amended.**

  Section 17 and all the provisions contained therein are given retroactive application.

The proposed amendment to Section 17 would be submitted to the Florida electors for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose.

The proposed amendment does not require any legislation. The only provisions of the proposed amendment that are not self-executing relate to the designation of capital offenses and method(s) of execution. Capital offenses in which the death penalty may be imposed are already designated. *See* ss. 782.04, 790.161, and 893.135, F.S. Methods of executions are designated in s. 922.105, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Several state and federal courts have addressed issues of relevance to the proposed amendment. Provided is a brief summary of some of those cases and issues.

Eighth Amendment and Section 17 of Article I of the Florida Constitution

Following the execution of Pedro Medina on March 25, 1997, attorneys for Leo Jones, a Florida offender subject to imminent execution, initiated a legal challenge in which they contended that Florida's use of the electric chair constitutes a "cruel or unusual" punishment in violation of Section 17 of Article I of the Florida Constitution. On October 29, 1997, the Florida Supreme Court, in a 4-3 decision, upheld Florida's use of the electric chair but in a concurring opinion, Chief Justice Harding stated that providing lethal injection as an alternative "would avert a possible constitutional 'train wreck' if this or any other court should ever determine that electrocution is unconstitutional." *See Jones v. State*, 701 So.2d 76, 78 (Fla. 1997) (Harding, J., specially concurring).

Following the execution of Allen Lee Davis on July 8, 1999, attorneys for Thomas Harrison Provenzano, a Florida offender subject to imminent execution, initiated a legal challenge in which they contended that Florida's use of the electric chair constituted a "cruel or unusual" punishment in violation of Section 17 of Article I of the Florida Constitution. On October 29, 1997, the Florida Supreme Court, in a 4-3 decision, upheld Florida's use of the electric chair, relying on its decision in *Jones* and Justice Harding indicated that the Legislature should allow lethal injection as a method of execution. *Provenzano v. Moore*, 744 So.2d 413, 417 (Harding, J., specially concurring).

On October 26, 1999, the United States Supreme Court granted certiorari to hear a challenge to Florida's electric chair by Anthony Braden Bryan, a Florida offender subject to imminent execution. On January 24, 2000, the United States Supreme Court dismissed certiorari in the *Bryan* case as improvidently granted. *See Bryan v. Moore*, --- U.S. ----, 120 S.Ct. 394, 145 L.Ed.2d 306 (1999), *cert. dismissed*, --- U.S. ----, 120 S.Ct. 1003, 145 L.Ed.2d 927 (2000). The order summarily disposing of certiorari indicates that the dismissal of certiorari was issued "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection, unless petitioner

affirmatively elects death by electrocution' pursuant to the recent amendments to Section 922.10 of the Florida Statutes. . . ." *Id*.

In *Stewart v. Lagrand*, 526 U.S. 115 (1999) (per curiam), the United States Supreme Court held that the petitioner's choice of lethal gas over lethal injection, the State of Arizona's default method of execution, waived any Eighth Amendment objection he might have to lethal gas.

Knowing and Voluntary Waiver

In *Bryan v. Moore*, 753 So.2d 1244 (Fla. 2000), the Florida Supreme Court held without merit a claim that the new execution statute violates the constitutional requirement for a knowing and voluntary waiver of one's rights. The Court relied on its prior holding in *Sims v. State*, 754 So.2d 754 So. 2d 657 (Fla. 2000). *Bryan* at 1255. The Court noted that Sims had also argued that "the law may not presume that a method of execution has been waived merely by being silent," but the Court had rejected that claim. *Id.* The Court further noted that "[f]ederal courts have rejected related claims where defendants argued that having a choice as to execution methods constituted cruel and usual punishment. *See Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir.1997) ("Poland need make no choice. If he says nothing, he will be executed by lethal injection. The mere existence of the option is not a violation of Poland's constitutional rights."), *cert. denied*, 523 U.S. 1082, 118 S.Ct. 1533, 140 L.Ed.2d 683 (1998); *Campbell v. Wood*, 18 F.3d 662, 688 (9th Cir.1994) ("We cannot say the State descends to inhuman depths by allowing the condemned to exercise . . . an election [of execution method]. We believe that benefits to prisoners who may choose to exercise the option and who may feel relieved that they can elect lethal injection outweigh the emotional costs to those who find the mere existence of an option objectionable.") (en banc)." *Id*. The Court stated that it was similarly holding that "the default mechanism . . . does not result in an unconstitutional waiver since the decision to affirmatively elect a preferred method or to simply default to lethal injection is completely within the control of the defendant." *Id.*

Florida's Savings Clause

In *Bryan*, the Florida Supreme Court held without merit a claim that retroactive application of the provision of ch. 2000-2, L.O.F., providing for the choice of death by lethal injection or electrocution violated Section 9 of Article XI of the Florida Constitution, the Savings Clause of the Florida Constitution. The Court relied on its decision in *Sims*, which distinguished the choice provision in ch. 2000-2, L.O.F., from an earlier statute reviewed in *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926). That statute changed the method of execution without preserving the method of execution effective when the defendant committed his offense. The Court stated that "[b]y retroactively applying the new statute allowing the choice between lethal injection and electrocution, death row inmates in Florida are assured that they will not be forced to suffer death by electrocution." *Id*. at page 1253. The Court also stated that "[t]he new lethal injection option allows what is generally viewed as a more humane method of execution." *Id*.

Separation of Powers

In *Bryan*, the Florida Supreme Court held without merit a claim that ch. 2000-2, L.O.F, is unconstitutional because the Legislature engages in constitutional interpretation, which is the exclusive domain of the judiciary. The provisions of the chapter provide if one method of execution is found unconstitutional then an alternative method shall be used, the provisions of *Malloy v. South Carolina*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915), are adopted, and that a change in the method of execution does not change the punishment of death for capital murder. The Court relied on its opinion in *Sims* in which it found the provisions constitutional, "thus exercising this Court's power and duty to adjudicate conflicts arising from the interpretation or application of laws."

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Government sector impact, if any, would likely consist of the costs incurred by the Attorney General in defending State officials against any legal challenges to the proposed amendment. There may also be some costs to the Capital Collateral Representatives.

VI. Technical Deficiencies:

None.

VII. Related Issues:

A. 1998 Amendment to Florida's Execution Law

During the 1998 Legislative Session, the Legislature passed legislation providing for executions by means of lethal injection only if electrocution were held unconstitutional. Ch. 98-4, L.O.F.

B. 2000 Amendments to Florida's Execution Law

On December 7, 1999, Florida Governor Jeb Bush announced a Special Session from January 5, 2000 to January 7, 2000. The Governor's Proclamation identified the call as including "[l]egislation authorizing that death sentences be carried out by lethal injection or electrocution, and exemptions from public records law thereto. . . ." The Legislature passed and the Governor signed legislation that again amended the law relating to the State's methods of execution. Ch. 2000-2, L.O.F.

The amendment to Florida's execution law, s. 922.105, F.S., provides, in part, for execution by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution. The election of death by electrocution is waived unless made in accordance with the time requirements and other requirements of the statute.

C. 2000 Amendment of Ballot Title/Summary Law

Section 101.161, F.S., provides that the substance of a proposed amendment to the Florida Constitution shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the amendment. This requirement used to apply to an amendment proposed by joint resolution, but in the 2000 Legislative Session the Legislature made an exception from this requirement for joint resolutions. Ch. 2000-361, L.O.F. Consequently, there is no statutory provision precluding a ballot summary of any length on an amendment proposed by joint resolution, and the Legislature could include the whole text of the proposed amendment in the ballot summary.

D. Comparison of Proposed Amendment to Amendment of Section 12 of Article I

The approach taken by the proposed amendment regarding the construction of the state clause in Section 17 of Article I is similar to that taken in Section 12 of Article I of the Florida Constitution as it relates to searches and seizures. In 1982, Section 12 was amended to provide that the "right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against unreasonable interception of private communications by any means" is to "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In *Bernie v. State*, 524 So.2d 988, 990-91 (Fla. 1998), the Florida Supreme Court described the effect of the amendment as follows:

> Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution, [*State v.*] *Lavazzolli*, 434 So.2d [321, 323 (Fla. 1983)]. With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.

Similarly, the proposed amendment would require state courts that are determining whether a punishment is "cruel or unusual" or "cruel and unusual" to follow the United States Supreme Court's interpretation of the prohibition against "cruel and unusual" punishments in the Eighth Amendment of the Federal Constitution. However, it is noted that in construing the 1982 amendment to Section 12, the Florida Supreme Court has stated that "when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us to review, we are free to look to our own precedent for guidance." *Rolling v. State*, 695 So.2d 278, 297 n. 10 (Fla. 1997). *See also Soca v. State*, 673 So.2d 24 (Fla. 1996).

In construing Section 12, "[t]he language of article I, section 12, clearly indicates an intention to apply all United States Supreme Court decisions regardless of when they are rendered." *Bernie* at 989.

E. Proportionality Review

In *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998), the Florida Supreme Court stated that proportionality review is intended to ensure that death is administered proportionately. While the Court stated in *Urbin* that there are a "variety of sources in Florida law" for proportionality review, *id*., the Court has also subsequently stated that it "performs proportionality review to prevent the imposition of 'unusual' punishments." *Sexton v. State*, 2000 WL 1508567, page 11 (Fla. October 12, 2000). Section 17 of Article I of the Florida Constitution is one source for this review because "[i]t clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper." *Urbin* at 417. "Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, s. 9, Fla. Const.. . . ." *Id.*

VIII. Amendments:

#1 by Criminal Justice:
Provides a ballot summary that consists of the text of the proposed amendment, as well as a summary of the proposed amendment that includes statements regarding an identical amendment approved by the voters in 1998 and statements identifying the chief purpose and main effect of the proposed amendment and describing the provisions of the proposed amendment.