

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: SB 664

INTRODUCER: Senator Altman

SUBJECT: Sentencing in Capital Felonies

DATE: April 14, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u><b>Favorable</b></u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u><b>Pre-meeting</b></u>
3.	_____	_____	<u>AP</u>	_____

---

**I. Summary:**

SB 664 requires sentencing juries in capital cases to issue an advisory verdict for the death penalty by a unanimous vote. Current law requires a simple majority vote in the sentencing phase of a capital case.

In sentences in which a jury imposes a death sentence, the jury verdict must be in writing and the verdict must certify the unanimity of the vote.

Current law requires a sentencing jury in a capital case to consider and recommend to the court:

- Whether sufficient aggravating circumstances exist;
- Whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances; and
- Whether the defendant should be sentenced to life imprisonment or death.

This bill also reverses the order a jury is to consider the existence of the mitigating and aggravating circumstances. The bill requires the jury to render to the court whether aggravating factors sufficiently outweigh mitigating factors.

Under current law, the court is required to conduct its own independent analysis of the aggravating and mitigating circumstances. The bill restricts the court's ability to consider aggravating factors. The bill requires that the court consider only the aggravating factors unanimously found to exist by the jury. The bill clarifies that each aggravating circumstance used as persuasive in the jury's recommendation of death must be proven beyond a reasonable doubt.

The bill applies to sentencing in all capital felonies, including capital drug trafficking felonies.

The bill affects sentencing proceedings in death penalty cases beginning as of July 1, 2015 or after. Therefore, the bill applies to capital crimes committed before July 1, 2015 if those cases have not proceeded to the sentencing phase by the July 1, 2015 effective date of the bill.

## II. Present Situation:

### Florida's Capital Sentencing Law

#### *The Jury's Role*

In Florida, after a guilty verdict in a capital case, a jury issues a sentencing recommendation of death or life imprisonment.<sup>1</sup> During the sentencing phase the jury hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating circumstances.<sup>2</sup> The aggravating factors must be established beyond a reasonable doubt.<sup>3</sup> The fact-finder must be convinced by the greater weight of the evidence (a lower standard of proof than beyond a reasonable doubt) as to the existence of mitigating factors.<sup>4</sup>

If the jury finds one or more aggravating circumstances and determines that these circumstances are sufficient to recommend the death penalty, the jury must determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances. Based on these considerations, the jury must recommend whether the defendant should be sentenced to life imprisonment or death.<sup>5</sup> However, even if the aggravating circumstances are found to outweigh

---

<sup>1</sup> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The jury must consider from the facts presented to them, facts in addition to those necessary to prove the commission of the crime, whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether mitigating circumstances require a lesser penalty. *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973).

<sup>2</sup> "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.

<sup>3</sup> "An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven." ... "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole." *Id.*

<sup>4</sup> "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed." *Id.*

<sup>5</sup> "The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor." *Id.*

the mitigating circumstances, the jury must be instructed that they are never required to return a recommendation for death.<sup>6</sup>

A simple majority vote recommended of the jury is necessary for recommendation of the death penalty. Juries are not required to list on the verdict aggravating and mitigating circumstances the jury finds persuasive or to disclose the number of jurors making these findings.<sup>7</sup>

Aggravating and mitigating circumstances and the method by which they must be determined to apply for sentencing are set forth in s. 921.141, F.S.:

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the

<sup>6</sup> “The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.” *Id.*

<sup>7</sup> “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.” *Id.*

sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) 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.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) 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.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) 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.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) 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.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

- (6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:
- (a) The defendant has no significant history of prior criminal activity.
  - (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
  - (c) The victim was a participant in the defendant’s conduct or consented to the act.
  - (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
  - (e) The defendant acted under extreme duress or under the substantial domination of another person.
  - (f) 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.
  - (g) The age of the defendant at the time of the crime.
  - (h) The existence of any other factors in the defendant’s background that would mitigate against imposition of the death penalty.<sup>8</sup>

### ***Judicial Determination of Sentence***

A jury’s recommended sentence is not binding on the court. After receiving the jury’s recommendation, the judge must then decide the appropriate sentence.<sup>9</sup> 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 handed down.<sup>10</sup> The judge may override the jury’s decision.

### ***Proportionality Review***

A judgment of conviction and a sentence of death is subject to automatic review by the Supreme Court of Florida.<sup>11</sup> The sentence, and the reasons for it, must be reduced to writing so that the Florida Supreme Court can engage in meaningful review.<sup>12</sup>

The Florida Supreme Court engages in a proportionality review in all cases in which the death penalty is handed down. A proportionality review is the comparison of one case in which the defendant was sentenced to death to other similar cases.

---

<sup>8</sup> Aggravating and mitigating circumstances appear in s. 921.142 (6) and (7), F.S., which applies to Capital Drug Trafficking Felonies. Section 921.142, F.S., is also amended by this bill.

<sup>9</sup> “The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to which punishment should be imposed upon the defendant.” *Fla. Standard Jury Instructions, Criminal Cases, Penalty Proceedings Capital Cases, Instr. 7.11.*

<sup>10</sup> 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.”

<sup>11</sup> Section 921.141(4), F.S.

<sup>12</sup> *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973).

When the U.S. Supreme Court upheld Florida's current death penalty sentencing law in 1976 in *Proffitt v. Florida*, the court seemed to rely heavily on the Florida Supreme Court's promise to give each death case a meaningful review.<sup>13</sup> The *Proffitt* Court stated:

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.<sup>14</sup>

To date, Florida's capital sentencing scheme has withstood challenges based on the 8th, 14th, and 6th Amendments.<sup>15</sup>

### ***State v. Steele, The Florida Jury's Responsibility in Finding Aggravating Factors***

Although the U.S. Supreme Court issued rulings in two death penalty cases, *Ring v. Arizona* and *Apprendi v. New Jersey*, indicating that aggravating factors operate as the "functional equivalent of an element of a greater offense,"<sup>16</sup> and therefore must be decided by a jury, the Florida Supreme Court has not yet held that those decisions apply within the context of Florida's death penalty sentencing scheme.<sup>17</sup>

In *State v. Steele*, Justice Cantero wrote for the majority:

Even if *Ring* did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of "an element of a greater offense." *Id.* That finding would be that at least one aggravator exists—not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death. Our interpretation of *Ring* is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250–51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In requiring the jury to consider by majority vote each particular aggravator submitted rather than merely specifying whether one or more

---

<sup>13</sup> *Proffitt v. Florida*, 428 U.S. 242, 258-259 (1976). The Court decided *Proffitt* on 8th and 14th Amendment grounds (cruel or unusual punishment and due process), not on 6th Amendment (right to a jury trial) grounds.

<sup>14</sup> *Id.* at 258-259.

<sup>15</sup> Cruel or unusual punishment, due process and right to jury trial. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989).

<sup>16</sup> See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (ruling that aggravating circumstances must be determined by the jury; quoting *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

<sup>17</sup> *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005).

aggravators exist, the trial court in this case imposed a greater burden than the one the Supreme Court imposed in reviewing Arizona’s judge-only capital sentencing scheme in *Ring*.<sup>18</sup>

Although the Florida Supreme Court declined to require more or different factfinding by a death penalty jury, the *Steele* opinion did contain “suggestions” from the Court: “in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury’s recommendations.”<sup>19</sup>

The Court examined the death penalty sentencing requirements of the other 37 states (at the time of the opinion) and concluded that “Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote.”<sup>20</sup> Finally, Justice Cantero wrote, “Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.”<sup>21</sup>

**Florida-Specific Statistical Information**

Table 1 shows that under current law and practice only 20 percent of death cases over a twelve year period had unanimous jury verdicts. Based on this analysis it is impossible to predict with any degree of accuracy whether requiring a unanimous jury recommendation would result in a marked decline in death cases. It would appear from the current practice that a decline is likely if this bill becomes law, but the degree of the decline is uncertain.

**TABLE 1**  
**Distribution of Jury Votes in Death Cases**  
**by Calendar Year of Disposition by Florida Supreme Court<sup>22</sup>**  
**(N=296)**

Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	% <sup>23</sup>	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 <sup>24</sup>	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		

Table 2 analyzes the degree to which a unanimous jury vote results in the case being more likely to be affirmed by the Florida Supreme Court on direct appeal. Sixty-three percent of the 12-0 cases were affirmed by the court compared to 53 percent of the 7-5 cases. It appears then that a

<sup>18</sup> *Id.* at 546.

<sup>19</sup> *Id.* at 548.

<sup>20</sup> *Id.* at 550.

<sup>21</sup> *Id.*

<sup>22</sup> Thirteen years of data compiled by the Supreme Court Clerk’s Office.

<sup>23</sup> Calculated percentage excludes the “other” category.

<sup>24</sup> Includes waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.

unanimous jury vote is not as strongly correlated with an affirmed sentence as perhaps logically predicted.

**TABLE 2**

Distribution of Jury Votes in Death Cases Disposed by the Florida Supreme Court on Direct Appeal from Calendar Year 2000 to 2012 <sup>25</sup> (N=296)					
Original Jury Vote For Death	TOTAL	Death Sentence Affirmed	Percent Affirmed	Death Sentence Not Affirmed <sup>26</sup>	Percent Not Affirmed
7 to 5	32	17	53%	15	47%
8 to 4	42	31	74%	11	26%
9 to 3	66	48	73%	18	27%
10 to 2	54	39	72%	15	28%
11 to 1	42	37	88%	5	12%
12 to 0	60	38	63%	22	37%
TOTAL	296	210	71%	86	29%

Tables 1 and 2 illustrate the wide variability in voting practices in death cases.

#### **American Bar Association Report (2006) and Section Report to the House of Delegates (2015)**

In September of 2006, the American Bar Association (ABA) issued a report entitled “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report.” The authors of the report acknowledged that the Florida Supreme Court has consistently rejected the claims under the U.S. Supreme Court’s decision in *Ring v. Arizona* that the jury must make a unanimous advisory sentence.<sup>27</sup> Despite this recognition and Florida’s practice of not requiring unanimity, the ABA report asserts that by not requiring a unanimous recommendation, meaningful jury deliberation is lessened.<sup>28</sup>

The ABA report cites to a survey of Florida jurors in capital cases who were not required to reach a unanimous vote to recommend a death sentence.<sup>29</sup> The ABA report argues that these jurors were less likely to take longer than 3 hours to reach a sentencing decision and less likely to demonstrate emotional commitment to the punishment decision.<sup>30</sup>

In its recent Report to the House of Delegates, the Section of Individual Rights and Responsibilities of the ABA points out that the penalty phase jury is asked to perform a “complicated and unique analysis” as it weighs aggravating and mitigating factors.<sup>31</sup> The report suggests that “requiring unanimity . . . promotes a thorough and reasoned resolution.”<sup>32</sup>

<sup>25</sup> Source document: Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2000 to 2012

<sup>26</sup> Includes: reversal and remand for trial, reduced to life, dismissal, deceased defendant, and acquittal.

<sup>27</sup> “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report,” American Bar Association, Death Penalty Moratorium Implementation Project (2006), pg. 287.

<sup>28</sup> *Id.* pg. 303.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* pg. 304.

<sup>31</sup> ABA Death Penalty Due Process Review Project, Section of Individual Rights and Responsibilities, Report to the House of Delegates, February, 2015, pg. 4.

<sup>32</sup> *Id.*

### Comparison of Florida to Other States

Of the 32 U.S. states that currently authorize the death penalty, three, including Florida, do not require jury verdicts on life or death be unanimous in its final sentencing recommendation or decision. The federal government also requires unanimity.<sup>33</sup>

Of the three states:

- Alabama authorizes a jury to recommend a death sentence on a vote of 10-2, which is non-binding on the trial court.<sup>34</sup> By judicial decision, every death sentence must be based on a unanimous finding of at least one aggravating circumstance.<sup>35</sup> Alabama also permits the judge to make a decision to issue a death sentence, even after a unanimous jury makes a recommendation for life.
- Delaware requires juries to unanimously find at least one aggravating circumstance beyond a reasonable doubt. The jury must document how each juror voted on the decision of whether aggravating circumstances outweigh the mitigating circumstances. The sentencing decision is left to the trial judge.<sup>36</sup>
- Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved.<sup>37</sup> A Florida jury can 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.<sup>38</sup>

### III. Effect of Proposed Changes:

This bill requires that a death sentence in a capital case be supported by a unanimous vote of a jury as under current law. The jury verdict must be in writing, and a death sentence must certify the unanimity of the vote. Requiring unanimity for death sentences may reduce the number of death sentences issued.

Current law requires a sentencing jury in a capital case to consider and recommend to the court:

- Whether sufficient aggravating circumstances exist;
- Whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances; and
- Whether the defendant should be sentenced to life imprisonment or death.

<sup>33</sup> Fed. R. Crim. P. 31 (a).

<sup>34</sup> Ala. Code § 13A-5-46-47 (2012).

<sup>35</sup> See, e.g., *Ex parte McNabb*, 887 So. 2d 998, 1005-05 (Ala. 2004); *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002); *McCray v. State*, 88 So. 3d 1, 82, and n.33 (Ala. Crim. App. 2010).

<sup>36</sup> Del. Code Ann. Tit. 11, § 4209(c)(3)(A) (West 2013).

<sup>37</sup> 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*, 428 U.S. at 252; *Spaziano v. Florida*, 468 U.S. 447 (1984).

<sup>38</sup> Fla. Stat. §§921.141(2)-(3) (2014); 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](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2015/house-of-delegates-resolutions/108a.html)

In addition to requiring unanimous verdicts in capital cases, this bill also reverses the order that juries are directed to consider of the existence of mitigating and aggravating circumstances. The bill requires the jury to recommend to the court whether aggravating factors sufficiently outweigh mitigating factors. This change may also have the effect of decreasing the number of capital cases resulting in death sentences.

Under current law, the court is required to conduct its own independent analysis of the aggravating and mitigating circumstances. If the court imposes a death sentence, the sentencing order must contain specific findings of fact based upon the aggravating and mitigating factors, the trial record, and sentencing proceedings. The bill restricts the court's ability to consider aggravating factors. The bill requires that the court consider the aggravating factors "unanimously found to exist by the jury."<sup>39</sup> Therefore the court will not be able to engage in weighing the evidence of mitigating and aggravating factors as it currently does in determining its sentence in a case. This provision comports with the findings in *Ring v. Arizona*.

The bill clarifies that each aggravating circumstance used as persuasive in the jury's recommendation of death must be proven beyond a reasonable doubt. This change codifies standard jury instructions in capital cases, which require aggravating circumstances to be established beyond a reasonable doubt. However, no heightened standard of proof is required for a jury to find the existence of mitigating circumstances.

The bill applies to sentencing in capital felonies as well as for capital drug trafficking felonies.

The bill affects sentencing proceedings in death penalty cases beginning as of July 1, 2015 or after. Therefore, the bill applies to capital crimes committed before July 1, 2015 if those cases have not proceeded to the sentencing phase by the July 1, 2015, effective date of the bill. Still, defendants sentenced to death prior to the effective date may challenge the application of the provisions to their cases.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This bill does not appear to require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 10 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

---

**D. Other Constitutional Issues:**

The bill applies to sentencing proceedings held on or after July 1, 2015. Generally when the Legislature amends a criminal statute application is prospective and the bill affects criminal conduct occurring after the effective date of the bill.

Under the bill, a defendant who committed a capital murder offense at any time but who has not been sentenced for the crime prior to July 1, 2015 will be sentenced under the new procedures created by the bill.

Arguably a defendant may bring a challenge based on whether the new sentencing scheme is a “benefit” to a defendant and, if so, whether the Savings Clause in the Florida Constitution is implicated. Article X, Section 9, of the state constitution provides:

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

Likewise, a defendant sentenced after July 1, 2015, but who committed a capital crime might argue that the pre-July 1 sentencing procedures could have been a benefit to him or her and therefore a violation of the constitutional prohibition on ex post facto laws.<sup>40</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Office of the Attorney General may experience a fiscal impact from the bill.

The Office of the State Courts Administrator (OSCA) reports that although there may be a reduction in death penalty litigation resulting from the increased thresholds created by the bill, this may be offset somewhat at the trial court level. OSCA bases this on anticipating more death penalty cases taken to trial rather than pleas entered, as it will be less likely that a defendant will receive the death penalty. The fiscal impact cannot be

---

<sup>40</sup> Article I, Section 10 of the Florida Constitution provides: No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. A primary purpose of the Ex Post Facto Clause is to ensure that citizens have prior notice of the consequences of committing a crime before the crime is committed. *Westerheide v. State*, App. 5 Dist., 767 So.2d 637 (Fla. 2000), approved by the Florida Supreme Court in 831 So.2d 93 (Fla. 2002).

determined due to the lack of data needed to determine the impact on court and judicial workload.<sup>41</sup> Jury instructions will have to be amended to conform to the bill.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

In *Hurst v. State*, a criminal defendant was convicted of murder. The jury issued a death sentence on a vote of 7-5. On appeal to the Florida Supreme Court, Hurst asked the court to review three issues:

- Proper court procedure when the defense asserts that he or she has mental retardation;
- Proportionality of the sentence in consideration of the totality of the circumstances; and
- Review of state precedent in not requiring the jury to make specific findings of aggravating factors or a unanimous jury recommendation for a sentence, in light of *Ring v. Arizona*.<sup>42</sup>

Although the Court upheld the death sentence, the *Hurst* court was divided on the application of *Ring* and other possible constitutional implications.<sup>43</sup>

On March 9, 2015, the United States Supreme Court accepted the defendant's petition for certiorari review.<sup>44</sup> In so doing, the Court limited review to the following question: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona* ...."<sup>45</sup>

The dissenting opinion in the *Hurst* case may provide some insight into the U.S. Supreme Court's focus on the Sixth and Eighth Amendments and the *Ring* decision in the question to be decided by the United States Supreme Court.<sup>46</sup>

- It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.<sup>47</sup>
- As interpreted in *Ring*, the Sixth Amendment requires a jury to find aggravating factors. As Justice Scalia explained in his concurring opinion in *Ring*, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the

<sup>41</sup> Office of the State Courts Administrator, *Judicial Impact Statement* (Mar. 9, 2015) (on file with the Senate Judiciary Committee.)

<sup>42</sup> *Hurst v. State*, 147 So.3d 435, 441-447 (Fla. 2014).

<sup>43</sup> Justice Pariente wrote a dissenting opinion as to all but one issue in the *Hurst* case and Justices Labarga and Perry concurred with Justice Pariente's dissent. *Id.* at 449-452.

<sup>44</sup> Case No. 14-7505, *Hurst v. Florida*. <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-7505.htm>

<sup>45</sup> *Id.*

<sup>46</sup> The Sixth Amendment to the U.S. Constitution guarantees the right to trial by jury; the Eighth Amendment protects persons from cruel and unusual punishment, which is related to the "arbitrary and capricious" application of the death penalty. The Florida Supreme Court has declined to apply the *Ring* case's holding to the Florida death penalty scheme since the case was decided by the U.S. Supreme Court in 2002. (*Ring v. Arizona*, 536 U.S. 584, 609 (2002).

<sup>47</sup> *Hurst*, *supra* note 42, at 450.

statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury.” *Ring*, 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).<sup>48</sup>

- [T]he use of a special verdict form during the penalty phase would enable this Court “to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous.” *Coday*, 946 So.2d at 1024 (Pariente, J., concurring in part and dissenting in part).<sup>49</sup>
- In addition to Florida’s outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of three states to permit the jury to recommend death by a less than unanimous vote.<sup>50</sup>
- The United States Supreme Court has repeatedly explained that “death is different” from every other form of punishment. *See, e.g., Ring*, 536 U.S. at 605–06, 122 S.Ct. 2428; *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The Supreme Court has also emphasized the “heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case.”<sup>51</sup>

The case will be heard and decided during the court’s October 2015 term.

### VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 921.141 and 921.142.

### IX. Additional Information:

#### A. Committee Substitute – Statement of Changes:

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

None.

#### B. Amendments:

None.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

---

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 451.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 452.