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 Criminal Justice

BILL:	SPB 7068
INTRODUCER:	For consideration by the Criminal Justice Committee
SUBJECT:	Sentencing for Capital Felonies
DATE:	February 5, 2016
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon		**Pre-meeting**

I. Summary:

SPB 7068 makes changes to Florida's capital sentencing scheme.

On January 12, 2016, the United State Supreme Court held Florida's capital sentencing scheme unconstitutional in an 8 to 1 opinion.[1] The Court ruled that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[2] Several provisions contained within the bill are intended to comply with the United State's Supreme Court ruling.

Specifically, the bill amends Florida's capital sentencing scheme in the following ways:

- The prosecutor is required to provide notice to the defendant and file notice with the court when the state is seeking the death penalty and the notice must contain a list of the aggravating factors the state intends to prove;
- The jury is required to identify each aggravating factor found to exist by a unanimous vote in order for a defendant to be eligible for a sentence of death;
- The jury is required to render a unanimous verdict in recommending a sentence of death;
- The jury is required to recommend a sentence of life imprisonment without the possibility of parole if the recommendation for a death sentence was less than unanimous;
- The judge is permitted to impose a sentence of life imprisonment without the possibility of parole when the jury unanimously recommends a sentence of death; and
- The judge is no longer permitted to "override" the jury's sentence of life imprisonment recommendation by imposing a sentence of death.

[1] *Hurst v. Florida*, 577 U.S. _____ (2016), 2016 WL 112683, at *3 (2016).
[2] *Id.* at *1.

II. Present Situation:

Florida's Capital Sentencing Law

Notice of Intent to Seek the Death Penalty

The Florida Rules of Criminal Procedure require the state to give notice to the defendant of its intent to seek the death penalty.

> Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty. FL R.Cr.P. 3.202(a).

The rule does not require that any further information be conveyed in the notice, however Florida has broad pretrial discovery and should the defendant elect to participate in the discovery process the state's evidence against him or her will become known during the discovery process.

There is no statutory requirement that the aggravating factors upon which the state intends to rely in seeking death be enumerated before the state's evidence is presented at trial or the sentencing phase.

The Florida Supreme Court has not required the state to divulge the aggravating factors upon which it will rely in seeking the death penalty.[3] However, acknowledging the trial court's discretion, the Court has held that "a trial court does not depart from the essential requirements of law by requiring the State to provide pre-penalty phase notice of aggravating factors."[4]

The Jury's Role in Sentencing

In Florida, after a guilty verdict in a capital case, the jury issues a sentencing recommendation – death or life imprisonment – unless the jury is waived.[5] During the sentencing phase the jury hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating

[3] "We have consistently held that because Florida's death penalty statute limits aggravating factors to those listed, ... there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove." *Hitchcock v. State*, 413 So.2d 741, 746 (Fla.1982) (citation omitted); *see also Kormondy v. State*, 845 So.2d 41, 54 (Fla.2003); *Lynch v. State*, 841 So.2d 362, 378 (Fla.2003); *Cox v. State*, 819 So.2d 705, 725 (Fla.2002); *Vining v. State*, 637 So.2d 921, 927 (Fla.1994).

[4] *State v. Steele*, 921 So.2d 538, 542-544 (Fla. 2005).

[5] 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 fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They 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 there were mitigating circumstances which require a lesser penalty. *State v. Dixon*, 283 So.2d 1(Fla. 1973).

circumstances.[6] The aggravating factors must be established beyond a reasonable doubt.[7] The fact-finder must only 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.[8]

If the jury finds one or more aggravating circumstances and determines that these circumstances are sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances. Based upon these considerations, the jury must recommend whether the defendant should be sentenced to life imprisonment or death.[9] However, even if the aggravating circumstances are found to outweigh the mitigating circumstances, the jury is never required to return a recommendation for death and must be so instructed.[10]

A simple majority of the jury is necessary for recommendation of the death penalty. It is not necessary for the jury to list on the verdict the aggravating and mitigating circumstances it finds or to disclose the number of jurors making such findings.[11]

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[6] "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.

[7] "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.*

[8] "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.*

[9] "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.*

[10] "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.*

[11] "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).

The 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., as follows:

> (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 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;

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*.

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.[12]

Judicial Determination of Sentence

After receiving the jury's recommendation the judge must then decide the appropriate sentence.[13] The judge weighs the jury's recommendation and conducts his or her own 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 sentence handed down.[14] The judge may sentence a defendant in a different manner than the jury recommends – this is known as an "override."

Records suggest that no Florida judge has overridden a jury's verdict of a life sentence since 1999. According to U.S. Supreme Court Justice Sotomayor's opinion dissenting from the Court's denial of certiorari review in the Alabama death penalty case of *Woodward v. Alabama*:

> Even after this Court upheld Florida's capital sentencing scheme in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), the practice of judicial overrides consistently declined in that State. Since 1972, 166 death sentences have been imposed in Florida following a jury recommendation of life imprisonment. Between 1973 and 1989, an average of eight people was sentenced to death on an override each year. That average number dropped by 50 percent between 1990 and 1994, and by an additional 70 percent from 1995 to 1999. The practice then stopped completely. It has been more than 14 years since the last life-to-death override in Florida; the last person sentenced to death after a jury recommendation of life imprisonment was Jeffrey Weaver, sentenced in August 1999.[15]

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

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[16] This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.[17]

Applying this right, the United States Supreme Court held in 2000 that any facts increasing the penalty for a defendant must be submitted to a jury and proved beyond a reasonable doubt.[18]

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[12] Aggravating and mitigating circumstances appear in s. 921.142, F.S., which applies to Capital Drug Trafficking Felonies. Section 921.142, F.S., is also amended by this bill.

[13] "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.

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

[15] 571 U.S. ____ (2013), in which Justice Breyer joined this part of the dissent.

[16] U.S. CONST. Amend. VI.

[17] *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

[18] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Two years later, the Court in *Ring v. Arizona*, applied this right to Arizona's capital sentencing scheme, which required a judge to determine the presence of aggravating and mitigating factors and to only sentence a defendant to death if the judge found at least one aggravating factor.[19] The Court struck the sentencing scheme down, finding it to be a violation of the Sixth Amendment because it permitted sentencing judges, without a jury, to find aggravating circumstances justifying imposition of the death penalty.[20] This ruling was subsequently held to not apply retroactively to cases already final on direct review.[21]

Hurst v. Florida

Until the U.S. Supreme Court issued its opinion in *Hurst v. Florida*[22] on January 12, 2016, Florida's capital sentencing scheme has withstood challenges based on the 8th, 14th, and 6th Amendments.[23]

In this case, Timothy Lee Hurst was convicted of first-degree murder for fatally stabbing his co-worker in 1998 with a box cutter.[24] A jury recommended a sentence of death by a seven-to-five vote; thereafter, the trial court entered a sentence of death.[25] Hurst challenged his sentence arguing that the jury was required to find specific aggravators and to issue a unanimous advisory sentence recommendation.[26] The Florida Supreme Court denied Hurst's claims that his sentence violated *Ring* by adhering to Florida's precedent of not adopting *Ring* and citing to the Eleventh Circuit's recent approval of the capital sentencing scheme.[27] Hurst appealed this denial to the United States Supreme Court arguing that Florida's capital sentencing scheme violated *Ring* because the jury recommends the sentence with only a simple majority, the judge finds the facts necessary for imposition of the death penalty, and the judge imposes the death penalty.[28]

On January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional in an eight-to-one opinion.[29] The Court ruled that *"the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."*[30]

The Court compared Florida's sentencing scheme to Arizona's in *Ring* and found Florida's distinctive factor of the advisory jury verdict immaterial. Like the unconstitutional practice in *Ring*, the judge in *Hurst* performed her own fact finding and increased *Hurst's* authorized

[19] *Ring v. Arizona*, 536 U.S. 584, 592 (2002).
[20] *Id*. at 609.
[21] *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).
[22] 577 U.S. ____ (2016).
[23] 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).
[24] *Hurst v. State*, 147 So. 3d 435, 437 (Fla. 2014), *rev'd and remanded*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016).
[25] *Id*. at 440.
[26] *Id*. at 446.
[27] *Id*. at 446-447. *See Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249(11th Cir. 2012), *cert. denied*, 133 S.Ct. 2393 (2013)(Citing *Hildwin v. Florida*, 490 U.S. 638 (1989), where the United States Supreme Court upheld Florida capital sentencing scheme thirteen years before *Ring*).
[28] Brief for Petitioner at 17-52 *Hurst v. Florida*, 2016 WL 112683 (2016) (No. 14-7505), 2015 WL 3542784.
[29] *Hurst v. Florida*, 577 U.S. _____ (2016), 2016 WL 112683, at *3 (2016).
[30] *Id*. at *1.

punishment, thereby violating the Sixth Amendment.[31] The Court also expressly overruled its past decisions upholding Florida's capital sentencing scheme which were issued prior to *Ring*.[32]

The Court's opinion did not address Hurst's contention that a jury's advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments. Neither the United States Supreme Court nor the Florida Supreme Court has required unanimity in a jury's capital sentencing recommendation. Alabama's capital sentencing scheme allows the imposition of the death penalty with a 10-2 jury sentencing recommendation.[33] Delaware requires unanimity regarding the finding of aggravating factors, but does not require unanimity in a sentencing recommendation.[34]

Current Effect of Hurst

The *Apprendi/Ring/Hurst* Sixth Amendment issue has been preserved and raised on appeal in Florida death sentence cases since the *Apprendi* decision was issued by the U.S. Supreme Court in 2000. The Florida Supreme Court denied claims based on *Apprendi* and *Ring* over the last 15 years, finding that Florida's sentencing scheme in death cases had not been found to be constitutionally lacking by the U.S. Supreme Court and was therefore a valid sentencing scheme.[35]

The Florida Supreme Court must now decide how *Hurst* applies to death cases that have moved from the trial stage to the direct and collateral appeal process. The Court heard oral argument on February 2, 2016 in an active death warrant case, *Lambrix v. Florida*.[36] The Court had specifically required briefing in the case on the *Hurst* issue. After oral arguments the Court stayed the impending execution. It cannot be known when the Court will issue its ruling in the case. Meanwhile, until both the Court and the Legislature act, Florida's death penalty sentencing scheme is unsettled.

Florida Statistics on Jury Votes in Death Cases

Table 1 shown below provides a fifteen year trend analysis on jury votes in death cases. Under current law and practice only 21 percent of the death cases over the past fifteen years had unanimous jury verdicts. Based on this analysis it is impossible to predict 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.

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[31] *Id*. at *6.
[32] *Id*. at *7.
[33] ALA. CODE § 13A-5-46(f)("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.). *See also Gobble v. State*, 104 So. 3d 920, 977 (Ala. Crim. App. 2010)("*Ring* does not require a unanimous recommendation for the death penalty before a defendant may be sentenced to death.").
[34] DEL. CODE ANN. tit. 11, § 4209.
[35] *See* Porter v. Crosby, 840 So.2d 981 (Fla. 2003); Hurst v. State, 819 So.2d 689 (Fla. 2002); Mills v. Moore, 786 So.2d 532, 536-37 (Fla. 2001); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla.2002).
[36] *Lambrix v. Florida*, Case No. SC16-8 & SC 16-56, Order Jan. 15, 2016 (available at https://efactssc-public.flcourts.org/casedocuments/2016/8/2016-8_order_208838.pdf).

TABLE 1 Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court[37] (N=330)																		
Original Jury Vote	**'00**	**'01**	**'02**	**'03**	**'04**	**'05**	**'06**	**'07**	**'08**	**'09**	**'10**	**'11**	**'12**	**'13**	**'14**	**Total**	**%[38]**	**Cum %**
7-5	6	1	4	4	0	3	0	2	4	1	3	2	2	5	3	40	12%	12%
8-4	4	6	2	6	2	0	3	0	**2**	9	2	1	5	2	3	47	14%	26%
9-3	4	4	3	6	2	2	11	3	5	6	6	9	5	2	1	69	21%	47%
10-2	3	12	4	3	3	3	2	2	2	5	11	1	3	2	4	60	18%	65%
11-1	2	8	5	5	3	1	1	2	1	5	5	1	3	2	1	45	14%	79%
12-0	9	6	8	4	2	3	6	7	6	0	1	6	2	6	3	69	21%	100%
Subtotal	28	37	26	28	12	12	23	16	20	26	28	20	20	19	15	330	100%	
Other[39]	3	1	2	3	4	2	0	0	1	4	3	1	0	1	0	25		
TOTAL	31	38	28	31	16	14	23	16	21	30	31	21	20	20	15	355		

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. It appears that a unanimous jury vote is not strongly correlated with an affirmed sentence.

TABLE 2 Distribution of Jury Votes in Death Cases Disposed by the Florida Supreme Court on Direct Appeal from Calendar Year 2000 to 2014[4] (N=330)					
Original Jury Vote For Death	**TOTAL**	**Death Sentence Affirmed**	**Percent Affirmed**	**Death Sentence Not Affirmed[5]**	**Percent Not Affirmed**
7 to 5	40	25	62%	15	38%
8 to 4	47	34	72%	13	28%
9 to 3	69	51	74%	18	26%
10 to 2	60	43	72%	17	28%
11 to 1	45	40	89%	5	11%
12 to 0	69	47	68%	22	32%
TOTAL	330	240	72%	90	28%

[37] Fifteen years of data collected by the Supreme Court Clerk's Office compiled by the Senate Criminal Justice staff.

[38] Calculated percentage excludes the "other" category.

[39] Includes waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.[4] Source documents: Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2000 to 2012 and Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2013 to 2014 [5] Includes: reversal and remand for trial, reduced to life, dismissal, deceased defendant, and acquittal.

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.[40]

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.[41] By judicial decision, every death sentence must be based on a unanimous finding of at least one aggravating circumstance.[42] 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.[43]
- Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved.[44] 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.[45]

III. Effect of Proposed Changes:

The bill changes the current death penalty sentencing scheme in four major ways.

The Notice of Aggravating Factors

In premeditated first degree murder cases, felony murder cases, and felony drug trafficking cases where the death penalty is a possible sentence, if the state intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court. The notice must contain a list of the aggravating factors the state intends to prove beyond a reasonable doubt in support of a death sentence.[46]

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[40] Fed. R. Crim. P. 31 (a).
[41] Ala. Code § 13A-5-46-47 (2012).
[42] *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).
[43] Del. Code Ann. Tit. 11, § 4209(c)(3)(A) (West 2013).
[44] 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).
[45] 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
[46] Section 782.04(1)(b), F.S.

The court may allow the prosecutor to amend the notice upon a showing of good cause. This provision gives the court discretion to make decisions to allow for changing circumstances and evidentiary considerations as the case progresses.

The Jury's Findings Making the Defendant Death Eligible or Ineligible

Sections 921.141 and 921.142, F.S., are amended to require a more specified role for the jury in sentencing in cases where death is a possible sentence.

Having found the defendant guilty, in the penalty phase the jury must first find whether the defendant is death eligible. In order to find the defendant death eligible, the jury must deliberate and determine whether the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor.

The jury must return specific findings to the court *identifying each aggravating factor found to exist*. *A finding that an aggravating factor exists must be unanimous*.

If the jury does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death and will therefore be sentenced by the court to life imprisonment without the possibility of parole.

If the jury unanimously finds at least one aggravating factor, the defendant is *death eligible* and the jury continues the deliberation process in order to arrive at a sentencing recommendation.

The Jury's Sentencing Recommendation

Having found the defendant *eligible* for a sentence of death, the jury must then weigh the following to arrive at the jury's sentencing recommendation:

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

If a *unanimous jury* determines that the defendant should be sentenced to *death*, the jury's recommendation shall be a sentence of death. *If less than* a *unanimous jury determines that the defendant should be sentenced to death, the jury must recommend a sentence of life imprisonment without the possibility of parole.*

The Imposition of Sentence

If the jury recommends a sentence of *life* imprisonment without the possibility of parole, the *court must impose that sentence*. This eliminates the "override" by the judge of the jury's *life* sentencing recommendation.

If the jury recommends a *death* sentence, the court must consider the aggravating factor(s) found unanimously by the jury and all mitigating circumstances. *The court may then impose the death*

sentence unanimously recommended by the jury, or the court may impose a life sentence of imprisonment without the possibility of parole. This provision preserves the court's ability to "override" a death recommendation by the jury.

If the court imposes a death sentence in the case, the court must write a sentencing order as is required in current law which provides the basis of the Florida Supreme Court's proportionality review on direct appeal.

Other Statutes Amended or Reenacted, Effective Date

Section 775.082(1)(a), F.S., is amended by the bill to conform that section to the new sentencing procedures created in s. 921.141, F.S. Additionally, ss. 794.011(2)(a), and 893.135(1)(b) through (l), F.S., are reenacted to incorporate amendments made by the bill.

The bill is effective upon becoming a law and the amendments made by the bill only apply to criminal acts that occur on or after the effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Litigation is expected to result from the *Hurst* decision (discussed herein). It is also likely that the application of the amendments to the death penalty sentencing scheme will be the subject of litigation. No estimates of the potential fiscal impact on the courts, the state attorneys, the Office of the Attorney General, the public defenders, or Capital Collateral Regional Counsel have been submitted as of the writing of this analysis.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.082, 782.04, 794.011, 893.135, 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.