

# FLORIDA'S CAPITAL SENTENCING JURY OVERRIDE: WHOM SHOULD WE TRUST TO MAKE THE ULTIMATE ETHICAL JUDGMENT?\*

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## I. INTRODUCTION

Perhaps the most controversial statutory provision in Florida's capital sentencing scheme is the provision permitting a judge to override a jury's recommendation of life imprisonment and impose the death penalty.<sup>1</sup> Only three other states permit jury overrides in capital sentencing;<sup>2</sup> for the most part, their statutes are modeled after Florida's trifurcated capital sentencing scheme.<sup>3</sup> For more than a decade, legal critics have asserted that the jury override violates the United States Constitution, the Florida Constitution, and public policy.<sup>4</sup> However, the United States Supreme Court continues to uphold the validity of the jury override.<sup>5</sup>

To understand the importance of the jury override, consider the Raleigh Porter case. On March 1, 1995, Florida Governor Lawton Chiles

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\* An editorialist recently posed the question, "Who, if anyone, should be trusted to take a human life? One judge, or a jury of 12 citizens?" *Eroding the Role of Juries*, ST. PETE. TIMES, Apr. 22, 1995, at A16.

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1. See FLA. STAT. § 921.141(3) (1995) ("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 . . ."). Although this provision authorizes, and was originally intended to permit, the judge to override a jury's recommendation of death and impose a life sentence, the controversy surrounding the statute centers on the overwhelming number of cases in which the judge has overridden a recommendation of life imprisonment and imposed a sentence of death.

2. These states are Alabama, Delaware, and Indiana. See ALA. CODE § 13A-5-47(e) (1994); DEL. CODE ANN. tit. 11, § 4209(d) (1994); IND. CODE § 35-50-2-9(e) (West 1995).

3. United States Supreme Court Justice John Paul Stevens has said: "Florida has adopted an unusual 'trifurcated' procedure for identifying the persons convicted of a capital felony who shall be sentenced to death. It consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence by the trial judge." *Spaziano v. Florida*, 468 U.S. 447, 470 (1984) (Stevens, J., concurring in part and dissenting in part).

4. See, e.g., Michael A. Mello, *The Jurisdiction To Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 927-38 (1991) [hereinafter Mello, *Jurisdiction To Do Justice*]; Michael A. Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 286-90 (1989) [hereinafter Mello, *Taking Caldwell Seriously*]; Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life In Capital Cases*, 13 FLA. ST. U. L. REV. 31, 35-40 (1985) [hereinafter Mello & Robson, *Judge Over Jury*].

5. See, e.g., *Harris v. Alabama*, 115 S. Ct. 1031 (1995) (upholding the constitutionality of Alabama's capital sentencing scheme).

signed a death warrant for Raleigh Porter, whom a jury had convicted on two counts of first degree murder in 1978 for beating and strangling a retired elderly couple.<sup>6</sup> Despite the jury's unanimous recommendation of life imprisonment, the trial judge imposed a sentence of death.<sup>7</sup> Although Porter was scheduled to die at 7:00 A.M. on March 29, 1995, the Eleventh Circuit Court of Appeals granted a last minute stay of execution.<sup>8</sup> The court found that Porter had produced reliable evidence of the trial judge's fixed predisposition to sentence him to death if the jury convicted him.<sup>9</sup> Whatever Raleigh Porter's eventual fate, the recent stay of execution illustrates the controversy over whether it is wise to empower the judiciary with the discretion to override a jury's recommendation of life imprisonment.<sup>10</sup>

United States Supreme Court Justice John Paul Stevens has characterized the imposition of the death penalty as "not a legal but an ethical judgment—an assessment of . . . the moral guilt of a defendant."<sup>11</sup> A sentence of death, Justice William J. Brennan has said, is "truly an awe-

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6. See *Porter v. Singletary*, 14 F.3d 554, 555 (11th Cir.), cert. denied, 115 S. Ct. 532 (1994); *Porter v. State*, 400 So. 2d 5, 6 (Fla. 1981).

7. *Porter*, 14 F.3d at 555-56; Florida Inmate to Die March 29, 1995; Jury Unanimously Says Life; Judge and Governor Say Death, BUS. WIRE, Mar. 9, 1995, available in LEXIS, News Library, WIRES file [hereinafter Florida Inmate to Die].

8. See *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); see also Florida Inmate To Die, supra note 7.

9. *Porter*, 49 F.3d at 1489. The trial judge allegedly made remarks to the clerk of court during trial, as well as more recent remarks to the media, suggesting that he was predisposed to sentence Porter to death before the penalty proceedings began:

The Clerk stated that either before or during Porter's trial, the judge presiding over the case, the Honorable Richard M. Stanley, stopped by the Clerk's Office early one morning, and the judge and the Clerk drank coffee together. The judge stated that he had changed the venue in the Porter trial from Charlotte County to Glades County because there had been a lot of publicity and Glades County "had good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said, he would send Porter to the chair."

Id. at 1487.

10. The history of the case involving Joseph "Crazy Joe" Spaziano is also instructive. See *infra* notes 53-63 and accompanying text. On June 15, 1995, Governor Chiles stayed the scheduled June 27 execution of Joseph "Crazy Joe" Spaziano for an "indefinite period of time." See Chiles Blocks Spaziano Execution, Pending Study, FLA. TIMES-UNION, June 16, 1995, at B1. Governor Chiles entered the stay to allow an investigation into the reliability of testimony given against Spaziano by a key prosecution witness under hypnosis. *Id.* Although Governor Chiles subsequently signed Spaziano's death warrant, the Florida Supreme Court granted Spaziano an indefinite stay of execution on September 12, 1995, and remanded the case to the trial court for an evidentiary hearing. See *Spaziano v. State*, 660 So. 2d 1363, 1365-66 (Fla. 1995). Spaziano was convicted of first degree murder in 1976 for the 1973 killing of Orlando nurse Laura Harberts. See *Spaziano v. State*, 433 So. 2d 508, 510 (Fla. 1983), *aff'd*, 468 U.S. 447 (1984); see also James Kilpatrick, Is Florida About to Execute an Innocent Man?, FLA. TIMES-UNION, June 8, 1995, at A17. Notwithstanding a jury recommendation of life imprisonment, the trial judge sentenced Spaziano to death. *Spaziano*, 433 So. 2d at 510.

11. *Spaziano v. Florida*, 468 U.S. 447, 481 (1984) (Stevens, J., dissenting in part and concurring in part) (citation omitted).

some punishment . . . [involving], by its very nature, a denial of the executed person's humanity."<sup>12</sup> While a prisoner retains "the right to have rights" and remains "a member of the human family," the imposition of a death sentence is "a way of saying, 'You are not fit for this world, take your chance elsewhere.'"<sup>13</sup> Whether to impose the death penalty is, without doubt, the single most important decision made in the criminal justice system.

The question, then, is whom should society entrust with the heavy burden of making this ultimate ethical judgment? Theoretically, the right should be vested in the community as represented by individual jurors.<sup>14</sup> However, under Florida's capital sentencing scheme, the ultimate power to impose this awesome punishment is vested in a single judge, not a twelve member jury.<sup>15</sup> Governor Chiles has stated that, when it comes to this important decision, "I trust jurors. I trust them if they vote for mercy or for death."<sup>16</sup> Why, then, does the Florida Legislature preserve a system placing this trust in a single elected official?

This article examines Florida's trifurcated capital sentencing scheme, specifically the jury override provision, from its origin to the present. Part II examines the enactment of the jury override in the context of the United States Supreme Court's decision in *Furman v. Georgia*.<sup>17</sup> Part II also illustrates the procedural application of the jury override, reviewing its judicial interpretation by both the Florida Supreme Court and the United States Supreme Court. Part III identifies and analyzes several criticisms of Florida's jury override provision. Part IV examines the potential impact of Florida Committee Substitute for House Bill 1319, which would have given the trial judge sole capital sentencing authority, and which Governor Chiles vetoed on June 14, 1995.<sup>18</sup> Finally, this Article

12. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

13. *Id.* (citation omitted). In contrast to a life sentence, where punishment is revocable, with a death sentence, the executed person loses the right to have rights and the finality of death precludes relief. *Id.*

14. See *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (Stevens, J., concurring in part and dissenting in part) ("A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community"); Spaziano, 468 U.S. at 461 (restating petitioner's argument that "[s]ince the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death.>").

15. See FLA. STAT. § 921.141 (1995).

16. *State Ponders Changing Steps To Execution*, MIAMI HERALD, Mar. 3, 1991, at 6B. See also *This Death Penalty Bill Tramples On Morality*, PALM BCH. POST, May 26, 1995, at 14A [hereinafter *Bill Tramples On Morality*].

17. 408 U.S. 238 (1972) (per curiam) (holding that then-existing death penalty statutes constituted cruel and unusual punishment in violation of the Eighth Amendment).

18. See Fla. CS for HB 1319 (1995); *Veto of Fla. HB 1319 (1995)* (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, June 14, 1995) (on file with Sec'y of State, the Capitol, Tallahassee, Fla.) [hereinafter *Governor's Veto*]; see also *Chiles Vetoes Jury Recommendation Bill*, FLA. TIMES-UNION, June 15, 1995, at B5.

concludes that the Governor's veto was appropriate because Florida's jury override provision represents a valuable balance between the judge and the jury, thus ensuring substantial reliability in the state's capital sentencing scheme.

## II. HISTORICAL BACKGROUND

In 1972, the United States Supreme Court invalidated the existing death penalty statutes of several states in the landmark decision *Furman v. Georgia*.<sup>19</sup> The Supreme Court has since engaged in the systematic practice of "deregulating death"<sup>20</sup> by essentially leaving "it to the states to administer their capital statutes as they see fit."<sup>21</sup> In 1976, the Court laid the framework for this deregulation by holding that the newly created capital sentencing schemes of Florida, Georgia, and Texas complied with the dictates of *Furman* and thus passed constitutional muster.<sup>22</sup> In 1984, the Supreme Court "made [it] clear" that there is no single right way to set up a state capital sentencing scheme.<sup>23</sup> Finally, in 1995, the Supreme Court solidified its view that it is not the Court's responsibility to second-guess such statutory schemes enacted by states.<sup>24</sup> Accordingly, the Supreme Court chose, within the parameters of *Furman*, to defer to the states regulation of capital sentencing.

### A. *Furman v. Georgia* and Florida's Death Penalty Statute

The *Furman* Court struck down the death penalty statutes of Georgia and Texas, holding that they constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>25</sup> Although subsequent decisions have held that capital punishment is not per se violative of either the United States Constitution<sup>26</sup> or the Florida Constitution,<sup>27</sup> courts have interpreted

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19. See 408 U.S. at 239-40.

20. Robert Weisberg originated the phrase "deregulating death." See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

21. Mello, *Jurisdiction To Do Justice*, supra note 4, at 932 (citation omitted).

22. See *Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

23. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

24. *Harris v. Alabama*, 115 S. Ct. 1031, 1035 (1995).

25. *Furman v. Georgia*, 408 U.S. 238, 239-40 (per curiam). The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Florida Supreme Court said "[t]his is the only controlling law which *Furman v. Georgia* . . . provides, as no more specific statement of the law could garner a majority of the members of the high court." *State v. Dixon*, 283 So. 2d 1, 6 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Each of the five justices constituting the *Furman* majority wrote a separate opinion. See 408 U.S. at 238. Justice John Paul Stevens later reasoned that "[p]unishment may be 'cruel and unusual' because of its barbarity or because it is 'excessive' or 'disproportionate' to the offense." *Spaziano*, 468 U.S. at 477 (Stevens, J., concurring in part and dissenting in part).

26. See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

27. See *Raulerson v. State*, 358 So. 2d 826, 829 (Fla.), cert. denied, 439 U.S. 959 (1978).

Furman as requiring all capital sentencing schemes to be “reasonable and controlled, rather than capricious and discriminatory.”<sup>28</sup> In essence, Furman mandates that a state’s capital sentencing scheme must provide clear guidelines precluding the arbitrary and discriminatory imposition of the death penalty, thus affording a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>29</sup>

Furman’s practical effect was to invalidate capital sentencing schemes which the Supreme Court considered arbitrary and capricious. One such scheme was Florida’s “mercy statute,”<sup>30</sup> under which a death sentence was mandatory upon conviction of a capital felony unless the jury specifically voted for mercy.<sup>31</sup> Pursuant to Florida’s “mercy statute,” which had been in effect for more than a century prior to Furman, the fate of a capital defendant was solely within the “complete and unbridled” province of a majority of the jury—unless, of course, the defendant chose to waive trial by jury.<sup>32</sup> Furthermore, although the statute entitled all convicted capital defendants to a direct appeal to the Florida Supreme Court, judicial review “was limited to the question of guilt or innocence and not the question of punishment.”<sup>33</sup> Because of the procedure’s arbitrary and unbridled nature, Furman effectively invalidated Florida’s mercy statute.<sup>34</sup>

The Florida Legislature enacted the current capital sentencing scheme in 1972, complying with Furman by providing capital defendants with more judicial protection.<sup>35</sup> Upon conviction or adjudication of guilt of a capital offense,<sup>36</sup> the trial court conducts a separate sentencing hearing before the jury to determine whether the defendant should be sentenced to

28. Dixon, 283 So. 2d at 7 (“[I]f the judicial discretion possible and necessary under [the capital sentencing scheme] can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia* has been met.”); see *Gregg*, 428 U.S. at 188 (“Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

29. *Furman*, 408 U.S. at 313 (White, J., concurring).

30. Florida’s pre-*Furman* capital sentencing scheme was codified at FLA. STAT. § 755.082(1) (1971).

31. See Dixon, 283 So. 2d at 12. If the jury recommended mercy, the defendant was sentenced to life imprisonment. *Id.* For a lengthy list of post-*Furman* per curiam opinions which invalidated unexecuted death sentences imposed under Florida’s “mercy statute,” see *id.* at 6n.2.

32. *Id.* at 13.

33. *Id.*

34. See 408 U.S. at 239-40 (per curiam).

35. See *Dobbert v. Florida*, 432 U.S. 282, 294-95 (1977); *Proffitt*, 428 U.S. 247; Dixon, 283 So. 2d at 13. The United States Supreme Court has described Florida’s capital sentencing scheme as “patterned in large part on the Model Penal Code.” *Proffitt*, 428 U.S. at 248.

36. Florida law presently provides for two capital offenses: first degree murder, and throwing or discharging any destructive device that results in the death of another person. FLA. STAT. §§ 782.04(1)(a), 790.161(4) (1995).

death or life imprisonment.<sup>37</sup> During this hearing, the trial judge must permit the introduction of any relevant evidence regarding the nature of the crime and the defendant's character.<sup>38</sup> The jury must then consider the aggravating and mitigating circumstances and provide the trial judge with an advisory sentence.<sup>39</sup> Irrespective of the jury's recommended sentence, the trial judge must independently weigh the aggravating and mitigating circumstances and determine the appropriate sentence.<sup>40</sup>

Immediately after the Florida Legislature enacted the new sentencing scheme, the Florida Supreme Court upheld its constitutionality in *State v. Dixon*.<sup>41</sup> The court enumerated five procedural steps which the statute provided to the defendant between conviction and the imposition of the death penalty: (1) reserving the issue of punishment for a separate post-conviction sentencing hearing; (2) empowering the jury to provide the judge with an advisory sentence; (3) requiring the judge to impose an independent sentence guided by the jury's advisory sentence; (4) mandating that the trial court justify a sentence of death in writing; and (5) providing immediate judicial review of a death sentence by the Florida Supreme Court.<sup>42</sup> The court found that these procedural steps provided "concrete safeguards beyond those of the trial system to protect . . . [the defendant] from death where a less harsh punishment might be sufficient."<sup>43</sup> Noting in addition that the death penalty was not per se unconstitutional, the *Dixon* court upheld Florida's capital sentencing scheme as "reasonable and controlled, rather than capricious and discriminatory."<sup>44</sup>

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37. *Id.* § 921.141(1). If the capital defendant has waived jury trial, the trial court must impanel a jury for the sole purpose of providing an advisory sentence. *Id.*

38. *Id.*

39. *Id.* § 921.141(1)-(2). The advisory sentence should inform the trial judge of the jury's determination as to whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist, and whether, based upon these circumstances, the defendant should be sentenced to death or life imprisonment. *Id.* § 921.141(2).

40. *Id.* § 921.141(3). The Florida Supreme Court presumes that a sentence of death is appropriate when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), 416 U.S. 943 (1974).

41. 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974).

42. *Id.* at 7-8. In addition, the defendant is permitted to present any relevant mitigating evidence at the separate sentencing hearing. See *Dobbert v. Florida*, 432 U.S. 282, 295 (1977). Although aggravating circumstances are limited to those specifically enumerated in the statute, the defendant may present both statutory and nonstatutory mitigating evidence. See *Miller v. State*, 373 So. 2d 882 (Fla. 1979).

43. *Dixon*, 283 So. 2d at 7.

44. *Id.* at 7. The *Dixon* court, interpreting *Furman*, rejected the argument that mere presence of discretion in the sentencing procedure rendered it unconstitutional. *Id.* at 6. The court noted that it is "the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman v. Georgia*." *Id.*

The United States Supreme Court also approved Florida's capital sentencing scheme in *Proffitt v. Florida*.<sup>45</sup> The Court upheld both the statute's facial constitutionality as well as its specific application to the instant case, noting that the jury's role is only advisory and the actual sentence is determined by the trial judge.<sup>46</sup> Thoroughly analyzing the procedural application of the statutory scheme's safeguards, the Court found that "[o]n their face . . . [they] appear to meet the constitutional deficiencies identified in *Furman*."<sup>47</sup> Furthermore, the court noted that while jury sentencing in capital cases served an important societal function, it was not constitutionally required.<sup>48</sup> Thus, the *Proffitt* Court tacitly approved of vesting the power to make the ultimate ethical judgment in the judiciary.<sup>49</sup>

### B. The Jury Override and the Tedder Standard

The importance of the jury override provision in Florida did not come into focus until the Florida Supreme Court's decision in *Tedder v. State*.<sup>50</sup> In *Tedder*, the defendant was convicted of first degree murder and the jury, after a second trial for sentencing, returned a recommended sentence of life imprisonment.<sup>51</sup> Based upon a finding of three aggravating circumstances, and none in mitigation, the trial judge overrode the jury's recommendation of life imprisonment and imposed a sentence of death.<sup>52</sup> Upon immediate appeal, the Florida Supreme Court reversed the trial court's decision and announced what has come to be known as the *Tedder* standard: under Florida's trifurcated death penalty statute, the trial judge must afford "great weight" to a jury's recommendation and cannot override a jury's recommendation of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ."<sup>53</sup>

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45. 428 U.S. 242 (1976).

46. *Id.* at 253-59.

47. *Id.* at 251.

48. *Id.* at 252.

49. In fact, the Court went on to state:

[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

*Id.*

50. 322 So. 2d 908 (Fla. 1975).

51. *Id.* at 909.

52. *Id.* at 910.

The three aggravating circumstances identified by the trial judge were (1) that the defendant knowingly created a great risk of death to many persons, (2) that the crime was committed while the defendant was engaged in the commission of kidnapping, and (3) that the crime was especially heinous, atrocious, and cruel.

*Id.*

53. *Id.*

In *Spaziano v. Florida*,<sup>54</sup> the United States Supreme Court finally addressed the issue of whether a state can vest capital sentencing authority in the judiciary. When Joseph “Crazy Joe” Spaziano was convicted of first degree murder in 1976, and the jury rendered an advisory sentence of life imprisonment.<sup>55</sup> The judge independently weighed the aggravating and mitigating circumstances, and found that “notwithstanding the recommendation of the jury . . . a sentence of death should be imposed in this case.”<sup>56</sup> Upon immediate appeal, the Florida Supreme Court reversed the sentence of death because of a sentencing error.<sup>57</sup>

Upon remand, the trial judge once again overrode the jury’s recommended sentence of life and sentenced the defendant to death.<sup>58</sup> The Florida Supreme Court affirmed Spaziano’s sentence, holding that a trial judge’s ability to sentence a defendant to death, despite a jury recommendation of life, was constitutionally valid.<sup>59</sup> Moreover, the court also held that the judge’s decision to override the jury’s recommendation met the “great weight” and “clear and convincing” facts standard enunciated in *Tedder*.<sup>60</sup>

The United States Supreme Court affirmed Spaziano’s death sentence, rejecting his argument that the jury override provision violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.<sup>61</sup> More importantly, however, the Court pronounced “the fundamental premise” that jury sentencing is not mandated in capital sentencing.<sup>62</sup> The Court reasoned that “the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the death penalty in individual cases is

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54. 468 U.S. 447 (1984).

55. *Id.* at 451.

56. *Id.* at 452. The trial judge found two aggravating circumstances and no mitigating circumstances “except, perhaps, the age [28] of the defendant.” *Id.* The aggravating circumstances were that the homicide was especially heinous and atrocious, and that the defendant had prior felony convictions involving the use or threat of violence to the person. *Id.*

57. *Spaziano v. State*, 393 So. 2d 1119 (1981). The Florida Supreme Court found that the trial judge had erred by relying on confidential information in a presentence investigation report without giving prior notice to the defendant and an opportunity to respond. *Id.* at 1122.57.

58. *Spaziano*, 468 U.S. at 453. Based upon a new presentence investigation report and hearing at which the defendant presented no evidence, the trial judge reaffirmed his previous findings as to the aggravating circumstances. *Id.*

59. *Spaziano v. Florida*, 433 So. 2d 508, 511-12 (Fla. 1983), *aff’d*, 468 U.S. 447 (1984). In addition, the Florida Supreme Court found that “allowing the jury recommendation to be binding would violate *Furman v. Georgia*.” *Id.* at 512.

60. *Spaziano*, 433 So. 2d at 511 (citing *Tedder v. State*, 322 So. 2d 908 (1975)). One justice dissented, finding “no compelling reason to override [the jury’s] recommendation.” *Id.* at 512 (McDonald, J., dissenting).

61. *Spaziano*, 468 U.S. at 457-67. The defendant argued that the jury override provision constituted cruel and unusual punishment in violation of the Eighth Amendment, and violated the Fifth Amendment’s Double Jeopardy Clause, the Sixth Amendment right to trial by jury, and the Due Process Clause of the Fourteenth Amendment. *Id.* at 457-58.

62. *Id.* at 458-64.

determined by a judge.”<sup>63</sup> The Court thus specifically upheld the constitutionality of Florida’s jury override provision.<sup>64</sup>

Despite the Spaziano Court’s holding, the debate over the appropriateness of vesting the power of life or death in a single judge, rather than a jury, has not subsided. At the time of the Spaziano decision, only Florida, Alabama, and Indiana permitted a judge to override a jury’s recommended sentence; however, Delaware enacted a similar provision in 1991.<sup>65</sup> Furthermore, the Supreme Court recently upheld Alabama’s jury override provision in *Harris v. Alabama*.<sup>66</sup> In *Harris*, the defendant was convicted of capital murder for the solicited murder of her deputy sheriff husband.<sup>67</sup> By a vote of seven to five, the jury recommended a sentence of life imprisonment.<sup>68</sup> Under a sentencing scheme “much like that of Florida,” the trial judge independently weighed the aggravating and mitigating circumstances and imposed the death penalty.<sup>69</sup>

Although the Supreme Court found that Alabama’s capital sentencing scheme was substantially similar to Florida’s, it noted that the statute nonetheless differed in one major respect: Florida’s jury override provision is subject to the Tedder standard of deference to the jury’s recommendation, while Alabama law only requires the judge to “consider” the jury’s advisory sentence.<sup>70</sup> Moreover, Alabama courts had expressly declined to impose the Tedder standard upon Alabama’s capital sentencing scheme.<sup>71</sup>

Notwithstanding the absence of the Tedder standard from Alabama’s jury override provision, the Supreme Court held that the Alabama statute

63. *Id.* at 462-63. The Court reasoned that simply because a jury may sentence does not mean that they constitutionally must do so. *Id.* at 463 n.8. The Court also found unpersuasive the fact that thirty out of thirty-seven jurisdictions with a capital sentencing scheme vested capital sentencing power in the jury, while only three of the remaining seven permitted a judge to override a jury’s recommendation of life. *Id.* at 463.

64. *Id.* at 465.

65. See DEL. CODE ANN. tit. 11, § 4209(d) (1994). The Delaware Supreme Court held that under Delaware’s sentencing scheme the trial judge “bears the ultimate responsibility for imposition of the death sentence while the jury acts in an advisory capacity as the conscience of the community.” *Wright v. State*, 633 A.2d 329, 335 (Del. 1993) (citation omitted).

66. 115 S. Ct. 1031 (1995). “Alabama’s capital sentencing scheme is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death . . . .” *Id.* at 1037 (Stevens, J., concurring in part and dissenting in part).

67. *Id.* at 1033.

68. *Id.*

69. *Id.* The trial judge found that the single aggravating circumstance of murder committed for pecuniary gain outweighed the statutory mitigating factor of no prior criminal record and the nonstatutory mitigating factor of being a hardworking, respected member of the church and community. *Id.*

70. *Id.*

71. *Id.*; see also *Ex parte Jones*, 456 So. 2d 380, 382 (Ala. 1984), cert. denied, 470 U.S. 1062 (1985) (holding that Alabama is not constitutionally required to adopt the Tedder standard); *Harris v. Alabama*, 632 So. 2d 503, 538 (Ala. Crim. App. 1992), aff’d, 632 So. 2d 543 (Ala. 1993), aff’d, 115 S. Ct. 1031 (1995).

did not violate the Eighth Amendment.<sup>72</sup> The Court noted its past approval “of the deference a judge must accord the jury verdict under Florida law,” but it found that this approval did not “mean that the Tedder standard is constitutionally required.”<sup>73</sup> Reaffirming its holding in *Spaziano* that the trial judge alone may constitutionally impose the death sentence, the Court held that this legitimacy was not “offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.”<sup>74</sup> The Harris Court thus left little doubt that a trial judge was not constitutionally required to afford a jury’s advisory sentence of life “great weight” prior to imposing a sentence of death.

### C. *Caldwell v. Mississippi* and Divided Sentencing

Although the United States Supreme Court has repeatedly upheld the constitutionality of Florida’s capital sentencing scheme, the division of the sentencing role in capital cases between judge and jury is not wholly immune from constitutional scrutiny. In *Caldwell v. Mississippi*,<sup>75</sup> the defendant was convicted of capital murder for shooting and killing the owner of a small grocery store during a robbery.<sup>76</sup> The Mississippi jury, which—unlike Florida juries—retains capital sentencing authority, sentenced him to death.<sup>77</sup> However, in response to a defense effort to highlight the significance of the jury’s decision, the prosecution had attempted to minimize the jury’s sense of the importance of its role by indicating that its decision was not final; rather, it was reviewable on appeal.<sup>78</sup> The defendant’s death sentence was subsequently affirmed on direct appeal to the Mississippi Supreme Court.<sup>79</sup> The United States Supreme Court reversed, holding that the Eighth Amendment prohibited the imposition of the death penalty by a jury that is led to believe that responsibility for the appropriateness of the death sentence rests elsewhere.<sup>80</sup> While this prohibition does not directly implicate the ability of the trial judge to override a jury’s recommendation of life, it does directly apply to how the state characterizes a jury’s advisory role during the sentencing proceedings. In light of

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72. *Harris*, 115 S. Ct. at 1037.

73. *Id.* at 1035.

74. *Id.* at 1037.

75. 472 U.S. 320 (1985).

76. *Id.* at 323-24.

77. *Id.*

78. *Id.* at 325.

79. *Caldwell v. State*, 443 So. 2d 806, 812 (Miss. 1983), *rev’d*, 472 U.S. 320 (1985). Although the Mississippi Supreme Court unanimously affirmed the conviction, it upheld the validity of the sentence by a divided vote of four to four. *Id.* at 808.

80. *Id.* at 328-29.

the advisory role of juries in the Florida scheme, Caldwell prescribes how the state may characterize this dual role to a jury.<sup>81</sup>

Nevertheless, the Florida Supreme Court has found Caldwell inapplicable to Florida's capital sentencing scheme; reasoning that Caldwell did not take into consideration an explicit statutory reference to the advisory nature of the jury's role.<sup>82</sup> Moreover, the court noted that under the Mississippi statute, the Mississippi Supreme Court reviews the jury's sentence, while under the Florida statute, the trial judge immediately reviews the jury's recommendation.<sup>83</sup> Thus, the Florida Supreme Court views the Mississippi capital sentencing scheme at issue in Caldwell as unlike the one utilized in Florida because capital sentencing authority in Mississippi is vested in the jury, not the trial judge.<sup>84</sup>

However, in *Mann v. Dugger*,<sup>85</sup> the Eleventh Circuit Court of Appeals held that Caldwell was indeed applicable to capital sentencing in Florida.<sup>86</sup> The Mann court found that despite the advisory nature of the jury's role, Florida case law interpreting the death penalty statute required a trial judge to give a jury's sentencing recommendation "significant weight."<sup>87</sup> Consequently, the court reasoned that when a Florida jury is misled into believing its role is unimportant, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility."<sup>88</sup> The court held that such a sentence violates the Eighth Amendment requirement of reliability in capital sentencing.<sup>89</sup> Furthermore, the Mann court, addressing the Florida Supreme Court's refusal to grant Caldwell claims, stated that it was not bound by a state court's application of federal constitutional principles; rather, it looked to the state courts only for the nature of the sentencing process, and then independently decided how the United States Constitution applied to claims under that process.<sup>90</sup> Moreover, the court did not read the Florida Supreme Court's cases as necessarily holding that a Caldwell violation could never occur in Florida.<sup>91</sup> In effect, then, Caldwell requires Florida judges to emphasize both the seriousness which the jury should attach to its advisory sentence and the great weight the judge will afford the jury's recommendation.<sup>92</sup>

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81. See *id.*

82. *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1988).

83. *Id.*

84. *Id.*

85. 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989).

86. *Id.* at 1454.

87. *Id.* at 1453-54.

88. *Id.* at 1455.

89. *Id.*

90. *Id.* at 1454 n.10.

91. *Id.*

92. See *Garcia v. State*, 492 So. 2d 360, 367 (Fla.), cert. denied, 479 U.S. 1022 (1986) ("It is appropriate to stress to the jury the seriousness which it should attach to its recommen-

The application of Caldwell is a two-step process.<sup>93</sup> First, the reviewing court “must determine whether a prosecutor’s comments to the jury were such that they minimized the jury’s sense of responsibility for determining the appropriateness of death.”<sup>94</sup> The court measures this effect by specific reference to the role assigned to the jury under state law.<sup>95</sup> Second, if the comments produce such an effect, the court must then “determine whether the trial judge sufficiently corrected the impression left by the prosecutor’s comments.”<sup>96</sup> The prosecutor’s comments and the court’s action or inaction violate the Eighth Amendment only if the overall effect diminishes the jury’s sense of responsibility regarding its sentencing role.<sup>97</sup> In Florida, a trial judge may preclude a Caldwell violation by accurately explaining the respective functions of the judge and jury under Florida law “as long as the significance of [the jury’s] recommendation is adequately stressed.”<sup>98</sup> Thus, while the ultimate ethical judgment may be vested in the judiciary, the Eighth Amendment prohibits downplaying the importance of the advisory sentence to the jury.

### III. ANALYSIS OF JURY OVERRIDE CRITICISM

#### A. Judicial Efficiency

The Florida Legislature created the jury override with the intention of permitting the trial judge to override an “inflamed” jury’s recommendation of death.<sup>99</sup> In reality, however, jury recommendations of life comprise the vast majority of override cases.<sup>100</sup> Between 1972 and 1988, one of every five death sentences in Florida involved an override of a jury’s

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ation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to *Caldwell v. Mississippi*.”).

93. See *Mann*, 844 F.2d at 1456; *Davis v. Singletary*, 853 F. Supp. 1492, 1556 (M.D. Fla. 1994).

94. *Mann*, 844 F.2d at 1456.

95. See *Dugger v. Adams*, 489 U.S. 401, 407 (1989) (“To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.”).

96. *Mann*, 844 F.2d at 1456.

97. *Id.*

98. *Harich v. Dugger*, 844 F.2d 1464, 1475 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989). See also *Stewart v. Dugger*, 877 F.2d 851 (11th Cir. 1989), cert. denied, 495 U.S. 962 (1990) (finding no Caldwell violation where the defendant alleged the trial judge had instructed the jury “that the appropriateness of his execution had already been decided by the state legislature”).

99. See Sue Carlton, *Juries Could Lose Court Clout*, ST. PETERSBURG TIMES, May 22, 1995, at B9.

100. See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida’s System With Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 99 (1993).

life recommendation.<sup>101</sup> This seems all the more astounding when one realizes that Florida juries are considered to be “among the most death-prone.”<sup>102</sup>

Yet this statistic is considerably less startling if one considers that some capital juries might well be timid about accepting responsibility for making the ultimate ethical judgment. A recent study involving three- to four-hour interviews with capital jurors in fourteen states—including the jury override jurisdictions of Florida, Alabama, and Indiana—indicated that capital juries “are confused about when the death penalty is warranted and are reluctant to take personal responsibility for their sentencing choices.”<sup>103</sup> The study, known as the Capital Jury Project (“CJP”), is an attempt to analyze how capital juries decide between life or death sentences.<sup>104</sup> The intent of CJP is to examine

the extent to which jurors’ exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*, and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making—as the Court said they would in *Gregg v. Georgia* and its companion cases.<sup>105</sup>

Although CJP is not complete, the researchers’ preliminary examination of the responses indicated that many capital jurors were “unwilling to accept primary responsibility for their punishment decisions.”<sup>106</sup> According to the researchers, the results showed that, “[u]nmistakably, jurors placed responsibility for the defendant’s punishment elsewhere.”<sup>107</sup> More specifically, in the jury override states of Florida and Alabama, the preliminary results revealed that even fewer jurors viewed themselves as primarily responsible for the capital defendant’s punishment.<sup>108</sup>

101. Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 926. During this period, 113 of 526 death sentences were overrides of life recommendations. *Id.* However, in 1994, only 4 of the 47 death sentences were overrides of life recommendations. See Bill Tramples On Morality, *supra* note 16, at A14.

102. See Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 925-26. For example, a sentence of death in Florida only requires a majority vote of the jury. FLA. STAT. § 921.141(3) (1995). An evenly divided jury vote is considered to be a recommendation of life imprisonment. See *Patten v. State*, 467 So. 2d 975, 980 (Fla. 1985).

103. Study Finds Jurors Confused In Capital Trials, ST. LOUIS POST-DISPATCH, Mar. 26, 1995, at D11.

104. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995).

105. *Id.*

106. *Id.* at 1044.

107. *Id.* at 1094. The study concluded that eight out of ten jurors placed the most responsibility on the defendant or the law itself. *Id.*

108. *Id.* at 1095 n.233. Most capital jurors in jury override states viewed the judge as more responsible than the jury for the defendant’s sentence, but still less responsible than the defendant and the law. *Id.* In contrast, virtually none of the capital jurors in the non-jury override states viewed the judge as the most responsible for the defendant’s sentence. *Id.*

Such findings suggest that an experienced trial judge, rather than a reluctant jury, is better equipped to reflect community sentiment. However, the Florida Supreme Court usually reverses judicial overrides of jury recommendations of life.<sup>109</sup> In 1991, the reversal rate for jury overrides was an astonishing ninety-one percent.<sup>110</sup> Consequently, one critic argues that because the death penalty workload consumes so much of the court's time, eliminating override cases would reduce the death penalty workload by twenty-one percent and the court's overall workload by six to eight percent.<sup>111</sup> This argument appears logical from an administrative perspective if only because the court almost always reverses override cases.<sup>112</sup> According to this view, then, the simple interest of efficiency mandates abrogation of the jury override.

Yet assuming for the moment that the statistics are correct, and that Florida's capital scheme is inefficient, the question arises whether the reliability and integrity of the system should be criticized on the basis of administrative efficiency. The value of the override system rests in what Governor Chiles describes as "a unique and delicate balance of a jury's expression of community values and a judge's expertise regarding application of the law."<sup>113</sup> From this perspective, an overall workload savings of six to eight percent becomes meaningless.

### B. Federal and State Constitutionality

The leading opponent of the jury override on constitutional grounds is Vermont Law School Professor Michael Mello, who is widely considered an "authority on the law of capital punishment."<sup>114</sup> Professor Mello argues that, notwithstanding express rulings to the contrary, the Florida jury override violates both federal and state constitutions.<sup>115</sup> Professor Mello asserts that Eighth Amendment concerns of substantial unreliability in capital sentencing, identified by the Supreme Court in *Caldwell*, are equally applicable to Florida's dual sentencing role involving trial level, rather than appellate level, judicial review of the jury's recommenda-

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109. Cope, *supra* note 100, at 100. From 1986 through 1992, the Florida Supreme Court upheld only seven override sentences. See Gary Caldwell, *Capital Crime Decisions: 1992 Survey of Florida Law*, 17 *NOVA L. REV.* 31, 64 n.261 (1992).

110. Cope, *supra* note 100, at 100.

111. *Id.* at 101.

112. *Id.* at 100. Cope argues that "[i]n reality the override cases have little actual effect on the ultimate imposition of the death penalty, because the cases are so frequently reversed. As a practical matter, most such defendants wind up with a life sentence." *Id.*

113. See *Governor's Veto*, *supra* note 18, at 1-2.

114. See James Kilpatrick, *Is Florida About to Execute an Innocent Man?*, *FLA. TIMES-UNION*, June 8, 1995, at A17.

115. See Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 927-38; Mello, *Taking Caldwell Seriously*, *supra* note 4, at 286-90.

tion.<sup>116</sup> Under this view, capital sentencing schemes that divide sentencing responsibility between a judge and jury are inherently unconstitutional.<sup>117</sup>

The Supreme Court has indeed warned that juries may be more prone to render death sentences upon realizing that they are not the final decisionmakers.<sup>118</sup> Such downplaying of the jury's role creates substantial unreliability in capital sentencing, thus implicating Eighth Amendment concerns.<sup>119</sup> Professor Mello reasons that when a jury is instructed of its advisory nature, it must necessarily face a diminished sentencing role in which it "is prone toward the same death-bias" warned against in *Caldwell*.<sup>120</sup> Furthermore, Professor Mello argues, it makes no difference if the jury is told the judge will accord its advisory sentence "great weight" because the jury is left with the impression that its recommendation will simply not be followed.<sup>121</sup> This dual capital sentencing role is inherently unconstitutional, Professor Mello reasons, because juries are likely to render a recommendation of death; in reality, he writes, "[i]t is chimerical to suppose that, under this regime, the jury's recommendation is 'merely' advisory."<sup>122</sup>

Divided responsibility in capital sentencing, however, does not inherently violate the Eighth Amendment. As applied in *Caldwell*, the Eighth Amendment merely prescribes how the state may inform the jury of its role in capital sentencing.<sup>123</sup> *Caldwell* prohibits the imposition of a death sentence by a jury which was misled by the state as to its role in capital sentencing.<sup>124</sup> In other words, the trial judge or prosecutor cannot mislead a capital jury with respect to the responsibility for determining the appropriateness of the sentence under state law.<sup>125</sup> In Florida, this simply means that the jury should be informed of both the divided sentencing role and the "great weight" the judge must afford the jury's recommendation.<sup>126</sup>

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116. Mello, *Taking Caldwell Seriously*, *supra* note 4, at 299-300. In *Caldwell*, the Supreme Court identified four ways in which a Florida jury could be biased in favor of a death sentence: (1) the jury may not understand the nature of appellate level review, where their recommended sentence and the judge's ultimate sentence are reviewed under a presumption of correctness; (2) the jury may render a death sentence despite being unconvinced that death is appropriate merely "in order to send a message of extreme disapproval"; (3) the jury may attempt to ensure reviewability by rendering a death sentence under the mistaken assumption that a life sentence is not subject to reversal; and (4) jurors reluctant to impose death might minimize the importance of their decision when told that the alternative decisionmaker is the state supreme court. *Id.* at 299 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 330-33 (1985)).

117. See *id.* at 286.

118. *Caldwell*, 472 U.S. at 330.

119. *Id.*

120. Mello, *Taking Caldwell Seriously*, *supra* note 4, at 303.

121. *Id.* at 303.

122. *Id.* at 310.

123. See *supra* text accompanying notes 75-98.

124. *Caldwell*, 472 U.S. at 328-29.

125. See *Dugger v. Adams*, 489 U.S. 401, 407 (1989).

126. See *Harich v. Dugger*, 844 F.2d 1464, 1475 (11th Cir. 1988).

Professor Mello also advances the position that the jury override violates the Florida Constitution. He reasons that because there was a state constitutional right to jury sentencing in capital cases in 1845—the year in which Florida adopted its first constitution—“it remains inviolate today.”<sup>127</sup> In support of this contention, Professor Mello explains that in 1845 the imposition of death was mandatory upon the conviction of a capital offense; therefore, “capital sentencing was the jury’s exclusive domain” because the jury’s consent, through a verdict of guilt, “was a condition precedent” to a sentence of death.<sup>128</sup> Accordingly, a judge could not “increase” or override a jury’s “recommendation” of a lesser sentence through a “lesser conviction.”<sup>129</sup>

Ironically, this tenet also meant that the death penalty could only be avoided through an acquittal.<sup>130</sup> To remedy this problem, the Florida Legislature amended its capital sentencing scheme to make the imposition of death discretionary through a recommendation of “mercy.”<sup>131</sup> Thus, for the century prior to Furman, “Florida law required the jury to make the capital sentencing decision.”<sup>132</sup> “[F]or the purposes of state constitutional doctrine,” Professor Mello concludes that this process was the “functional equivalent of jury sentencing for capital offenses.”<sup>133</sup> Prior to Furman, then, “a Florida jury’s verdict for life was clearly and explicitly and unquestionably final.”<sup>134</sup> In other words, a statute authorizing the trial judge to override a jury’s capital sentence today, presumably a life recommendation, violates the state constitution.

However, this argument is more creative theory than legal substance. Florida law did not place capital sentencing in the hands of the jury in 1845; rather, a sentence of death by the trial judge was mandatory upon the conviction of a capital crime.<sup>135</sup> Furthermore, the Florida Constitution has never mandated that capital sentencing be vested in a jury.<sup>136</sup> Therefore, although Professor Mello posits that Florida’s death penalty system prior to Furman utilized the “functional equivalent of jury sentencing in capital offenses,”<sup>137</sup> there is simply no basis for this assertion in the state constitution.

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127. Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 964-70.

128. *Id.* at 964.

129. *Id.*

130. *Id.* at 969.

131. *Id.*; see also *supra* text accompanying notes 30-34.

132. *Spaziano v. Florida*, 468 U.S. 447, 473 (1984) (Stevens, J., concurring in part and dissenting in part).

133. Mello, *Jurisdiction to Do Justice*, *supra* note 4, at 968.

134. *Id.* at 969.

135. See *Blicht v. Buchanan*, 131 So. 151, 157 (Fla. 1930) (“Capital punishment . . . is prescribed by statute [and] adjudged by the court.”).

136. See *id.*

137. See Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 968.

## C. Public Policy

A final argument maintains that the Florida Legislature should repeal the override provision as a matter of public policy.<sup>138</sup> It is widely accepted that retribution is the primary, if not the sole, justification for the death penalty.<sup>139</sup> The death penalty is the “community’s judgment that no lesser sanction will provide an adequate response to the defendant’s outrageous affront to humanity.”<sup>140</sup> A jury verdict of death, representing a cross section of the community, reflects the “considered view of the community” on the “ultimate question of life or death”;<sup>141</sup> it is a reflection of the community’s conscience.<sup>142</sup>

Thus, it would seem debatable whether the judge’s experience or expertise is a substitute for the ability of a jury to reflect community sentiment when deciding whether to impose the death penalty. Justice Stevens, who dissented in both *Harris* and *Spaziano*, has argued that, in the same fashion the Constitution prohibits judges from determining the guilt or innocence of an accused absent the defendant’s consent, twelve individual jurors are in a better position to represent the judgment of the community as to whether a sentence of death or life is appropriate in a particular case.<sup>143</sup> Professor Mello surmises that, “[i]n sum, experience or expertise is no substitute for the ability of a jury to reflect community sentiment in its decision whether to impose the death penalty.”<sup>144</sup>

However, both the United States Supreme Court and the Florida Supreme Court have recognized the ability of an individual judge to make this judgment. The Florida Supreme Court noted that “a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants.”<sup>145</sup> The United States Supreme Court observed “that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment.”<sup>146</sup> The Court reasoned that a trial judge is better able to impose capital sentences similar to those

138. See Mello & Robson, *Judge Over Jury*, supra note 4, at 75.

139. See *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 477-78 (1984) (Stevens, J. concurring in part and dissenting in part). The Supreme Court has concluded that deterrence cannot be used to support judicial as opposed to jury discretion in capital cases because it is within the legislature’s domain to establish on which offenses the death penalty has a deterrent effect. See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

140. *Harris*, 115 S. Ct. at 1038 (Stevens, J., dissenting) (citations omitted).

141. *Id.* at 1039.

142. *Id.*

143. See *id.* at 1037-43; *Spaziano*, 468 U.S. at 481-90 (Stevens, J., concurring in part and dissenting in part); see also Mello & Robson, *Judge Over Jury*, supra note 4, at 47-51.

144. Mello & Robson, *Judge Over Jury*, supra note 4, at 51.

145. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

146. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976).

imposed in analogous cases, and thus provide substantial reliability in capital sentencing, because the trial judge is simply more experienced than a jury.<sup>147</sup>

#### D. A Likely Rationale for Jury Override Criticism

If the jury override can withstand scrutiny on constitutional grounds, as well as those of judicial efficiency and public policy, why do opponents continue to criticize and question the utility of Florida's capital sentencing scheme? Perhaps it is not the jury override that disturbs critics, but the sentence itself.

Ultimately, the United States Supreme Court protects individuals against the imposition of cruel and unusual punishment in violation of the Eighth Amendment. However, it appears that the Court no longer wants to regulate the implementation of capital punishment.<sup>148</sup> As long as a statutory scheme remains within the purview of *Furman*, the Court is willing to give states a wide berth in capital sentencing methodology.<sup>149</sup> The result in Florida effectively balances the jury's reflection of the community conscience with the trial judge's ability to provide consistent application of the death penalty. Rather than criticize the ability of a trial judge to override a jury's recommendation of life imprisonment, critics should recognize that Florida's scheme ensures substantial reliability in the imposition of death sentences.

Nonetheless, attacks on the constitutional legitimacy of the jury override, as well as the morality of capital punishment, have proven to be futile.<sup>150</sup> Thus, opponents of capital punishment can do little else but attack the method through which a capital sentence is imposed. The jury override is a perfect target for critics of the death penalty, because it presents the possibility of the judicial arbitrariness warned against in *Furman*. However, analysis of jury override criticism reveals that the override is a valuable tool in any capital sentencing scheme because it, in fact, ensures reliability in capital sentencing. Hence, jury override opponents simply use the override as a means of attacking capital punishment in an attempt to limit its enforcement.

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147. *Id.*

148. See Capital Jury Project, *supra* note 104, at 1050-52. After *Gregg v. Georgia*, the Court began to discount statutory guidelines and relax judicial scrutiny of capital sentencing discretion by (1) removing statutory mitigation from the jury's consideration, (2) relaxing the guidance of statutory aggravating considerations, (3) extending the scope of nonstatutory aggravating circumstances, and (4) no longer requiring that the jury's sentencing decision be monitored for compliance with state statutory guidelines through a proportionality review. *Id.*

149. *Id.*

150. See *supra* text accompanying notes 41-49, 54-74.

## IV. JURY OVERRIDE LEGISLATION

Despite the legitimacy of the jury override, critics nonetheless argue that the Florida Legislature should simply do away with the override provision.<sup>151</sup> Proposed solutions have included repealing the override, mandating a unanimous verdict of death, and simply making a jury's recommendation of life binding upon the trial judge.<sup>152</sup> Recent legislation affecting the jury override has come not from opponents of the death penalty but from legislators seeking to streamline the death penalty process. A bill recently passed by both the Florida House of Representatives and Senate, but vetoed by Governor Chiles,<sup>153</sup> would have abrogated the requirement that the judge provide the jury's recommendation "great weight."<sup>154</sup> If the legislation had been signed into law, it would have rendered the jury's recommendation "largely symbolic";<sup>155</sup> no longer would it have been "chimerical" to suppose that a jury's recommendation is only advisory under Florida law.<sup>156</sup>

## A. Committee Substitute for House Bill 1319

Committee Substitute for House Bill 1319 was a "train bill" containing a package of legislation dealing with capital sentencing and collateral representation. The legislation was sponsored by Senator Robert Wexler and Representative Ron Klein, allegedly at the urging of Florida Attorney General Bob Butterworth.<sup>157</sup> It combined the original House Bill 1319 with a portion of House Bill 2078, which dealt with the scope of collateral representation in capital cases by placing a two-year limit on filing for collateral representation, and with House Bill 89, which authorized additional aggravating circumstances.<sup>158</sup>

Most importantly, however, this package of legislation provided for a nonbinding advisory sentence by the jury.<sup>159</sup> Committee Substitute for House Bill 1319 would have deleted the statutory reference to the "advisory sentence" offered by the jury and instead would have specified

151. Mello & Robson, *Judge Over Jury*, supra note 4, at 44-45.

152. *Id.*; see also Cope, supra note 100, at 101 (suggesting that the "[a]doption of a unanimous jury requirement would automatically eliminate the override cases").

153. See Governor's Veto, supra note 18, at 1.

154. See Fla. CS for HB 1319, § 3 (1995); see also Sue Carlton, *Juries Could Lose Court Clout*, ST. PETE. TIMES, May 22, 1995, at B9.

155. Governor's Veto, supra note 18, at 2.

156. See Mello, *Taking Caldwell Seriously*, supra note 4, at 310.

157. See Exec. Office of the Gov., Office of Planning and Budgeting, *Legislative Bill Analysis*, CS for HB 1319 (May 16, 1995) (on file with Exec. Office of the Gov., Office of Legis. Aff.) [hereinafter *Legislative Bill Analysis*]; Fla. H.R. Comm. on Crim. Just., CS for HB 1319 (1995) *Staff Analysis 6* (final Apr. 11, 1995) (on file with comm.) [hereinafter *Staff Analysis*]; see also *Bill Tramples On Morality*, supra note 15, at A14.

158. *Legislative Bill Analysis*, supra note 157.

159. Fla. CS for HB 1319, § 3 (1995); see also *Legislative Bill Analysis*, supra note 157, at 2; *Staff Analysis*, supra note 157, at 7.

that the jury's advisory recommendation is nonbinding.<sup>160</sup> Thus, the legislation would have effectively abrogated the Tedder standard, recasting the role of the jury's advisory recommendation as "solely for the purpose of apprising the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information."<sup>161</sup> The amendment would have authorized the trial judge to "overrule the jury in almost any circumstance"<sup>162</sup> because, as Governor Chiles noted in his veto, the advisory sentence "would carry virtually no weight at all."<sup>163</sup>

It appears that the Florida Legislature interpreted the Supreme Court's recent decision in *Harris v. Alabama*<sup>164</sup> as a license to get tough on crime. In *Harris*, the Supreme Court noted Florida's Tedder standard with approval, but held that it was not required to bring a capital sentencing scheme into conformity with Eighth Amendment dictates.<sup>165</sup> Florida House Bill 1319 was intended to eradicate Tedder because, as Deputy Attorney General Peter Antonacci argued, "[t]he [Florida] Supreme Court in *Tedder* completely redid the [1972] legislative intent to say that the jury's role was central as opposed to advisory."<sup>166</sup>

Critics of the jury override certainly must have been appalled at the legislature's nearly successful attempt to relegate the jury's recommendation to the status of a nonbinding advisory recommendation. According to senate testimony, Governor Chiles' office received suggestions from trial judges that the jury override should be abolished.<sup>167</sup> The Governor himself noted that he "would support a law which held that a jury recommendation of imprisonment would not be subject to override by the judge."<sup>168</sup>

The strongest argument against the jury override is that twelve individual jurors are better suited to reflect the community's sentiment because the decision is simply too important to be left in the hands of a single government official.<sup>169</sup> This begs the question: Why would the Florida Legislature want to make jurors wrangle with a life or death decision if it would count for nothing at all?

## B. The Potential Impact of Committee Substitute for House Bill 1319

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160. Fla. CS for HB 1319, § 3 (1995); see also Staff Analysis, *supra* note 157, at 7.

161. Fla. CS for HB 1319, § 3 (1995) (emphasis added).

162. Michael Griffin, Chiles Lets Prison Bill Become Law; The Next Fight: How To Pay for the New Prisons and Guards—Through Bonds or Tax Revenues, *ORLANDO SENT.*, June 15, 1995, at C1.

163. Governor's Veto, *supra* note 18, at 2.

164. 115 S. Ct. 1031 (1995).

165. *Id.* at 1035.

166. *Eroding the Role of Juries*, *ST. PETE. TIMES*, Apr. 22, 1995, at A16 [hereinafter *Eroding the Role of Juries*].

167. Legislative Bill Analysis, *supra* note 157, at 4. Ironically, Committee Substitute for House Bill 1319 was inconsistent with these suggestions. *Id.*

168. Governor's Veto, *supra* note 18, at 2.

169. See *supra* text accompanying notes 138-44.

Perhaps the answer can be found by analyzing the impact this legislation would have had on the previously identified criticisms of the jury override.<sup>170</sup> From an administrative perspective, the legislation might well have achieved the desired result of judicial efficiency.<sup>171</sup> However, while Committee Substitute for House Bill 1319 would have streamlined the appellate process, it would have almost certainly created immediate short term constitutional litigation regarding its legitimacy.<sup>172</sup> Despite the fact that the United States Supreme Court has already upheld the validity of jury override schemes without the Tedder “great weight” and “clear and convincing” facts standard of deference,<sup>173</sup> the bill represented such a basic change in Florida’s capital sentencing scheme that it would surely have engendered some constitutional litigation.<sup>174</sup> As Governor Chiles said in his veto, “Simply put, Florida’s entire death penalty process would be subject to constitutional attack due to these fundamental changes and years of uncertainty would be the result.”<sup>175</sup> However, the Governor also indicated that he supported the bill’s other provisions, which he said would help “streamline” Florida’s death penalty process.<sup>176</sup> Thus, while not eliminating override litigation, it would appear that the proposed legislation would have achieved some positive impact on judicial efficiency.

From a constitutional standpoint, however, Committee Substitute for House Bill 1319 would apparently have had little impact. The proposed capital sentencing scheme would have withstood Eighth Amendment scrutiny mandated by Caldwell, provided that the jury was not led to believe that it possessed a diminished role in accordance with local law.<sup>177</sup> Hence, the potential impact of Caldwell claims arising in capital sentencing in Florida would have been negligible if the jury’s role were truly reduced to being only advisory. Judges and prosecutors would no longer have had to tread the fine line between the dual sentencing function of the judge and jury in Florida’s capital sentencing scheme. However, the argument that a statute vesting the trial judge with the power to impose capital sentencing violates the Florida Constitution would have persisted.

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170. See supra text accompanying notes 99-147.

171. The Florida Attorney General’s Office believed that the bill would have significantly reduced the number of death row appeal cases; however, the Capital Collateral Representative disagreed. See Legislative Bill Analysis, supra note 157, at 5.

172. Governor Chiles declared that the bill would increase “the already untenable time that death cases languish in court.” Governor’s Veto, supra note 18, at 1.

173. See *Harris v. Alabama*, 115 S. Ct. 1031, 1035-37 (1995).

174. See Governor’s Veto, supra note 18, at 1. Both proponents and opponents of the bill agreed that the provision would have “create[d] initial litigation for that offender to whom it first applie[d],” because the Florida Supreme Court would “need to reevaluate the ‘great weight’ standard it has assigned to the jury’s ‘advisory sentence.’” Legislative Bill Analysis, supra note 157, at 4.

175. Governor’s Veto, supra note 18, at 1.

176. Id. at 2.

177. See supra text accompanying notes 93-98.

Nevertheless, this argument, although certainly viable, would not likely have been adopted by the Florida Supreme Court.<sup>178</sup>

Finally, the strongest argument against the jury override, public policy, would also have persisted despite the legislation. In fact, such criticism would have intensified. Public policy opponents of the override repeatedly argue that twelve jurors, not a single judge, are better suited to reflect the community conscience and make the ultimate ethical judgment.<sup>179</sup> These critics suggest repealing the override. Governor Chiles, The Florida Bar, Florida's 1991 Criminal Justice Task Force on Sentencing, and, it would seem, twenty-nine of the thirty-seven states with the death penalty agree.<sup>180</sup> However, instead of following this lead, Florida legislators would have made it easier for the trial judge to ignore the jury's recommendation rather than afford it "great weight." As one editorial writer pointed out, in their "haste to 'get tough' on death penalty cases, Florida lawmakers went overboard."<sup>181</sup> Thus, it is readily apparent that the strongest argument against both the jury override and Committee Substitute for House Bill 1319 is that it is not wise public policy to vest the power to make the ultimate ethical judgment in a trial judge rather than the jury.

Yet in one sense Florida does indeed trust the jury to assess a capital defendant's moral guilt. For more than two decades, via the Tedder "great weight" and "clear and convincing" facts standard, the Florida Supreme Court has required trial judges to afford deference to the jury's reflection of community values for over two decades.<sup>182</sup> Governor Chiles bolstered the Tedder standard when he vetoed Committee Substitute for House Bill 1319. Moreover, the United States Supreme Court has repeatedly noted that Florida's capital sentencing scheme, with its Tedder standard, offers the substantial reliability mandated by the Eighth Amendment.<sup>183</sup> Thus, Florida's trifurcated sentencing scheme provides capital defendants, as well as the community, substantial reliability in the capital sentencing process by acting as a check against impassioned or misguided jurors and overzealous trial judges. Governor Chiles' assessment bears repeating: "The present law represents a unique and delicate balance of a

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178. See *supra* text accompanying notes 135-37.2218

179. See, e.g., Mello & Robson, *Judge Over Jury*, *supra* note 4, at 47-51.

180. *Bill Diminishes Juries' Influence*, FT. LAUD. SUN SENT., June 7, 1995, at 10A.

181. *Bill Tramples On Morality*, *supra* note 17, at A14. In his veto, Governor Chiles remarked that the bill's sponsors "have made a good faith effort to address the most difficult and complex problem of deciding which convicted criminal should be put to death. However, the problems I have noted outweigh any improvements they, or I, might find in the bill." Governor's Veto, *supra* note 18, at 2.

182. See *supra* text accompanying notes 50-53.

183. See *supra* text accompanying notes 54-74.

jury's expression of community values and a judge's expertise regarding application of the law."<sup>184</sup>

Critics of Governor Chiles' veto are perhaps missing a vital point. As one commentator suggested, the 1972 Florida Legislature gave the trial judge, rather than the jury, the duty to see that the death penalty is imposed fairly, and the Tedder standard "remains an essential tool to that end."<sup>185</sup> This statement at once recognizes both the trial judge's ability as an experienced jurist to fulfill this duty, and the deference the trial judge should afford the jury's recommendation as a matter of public policy. The Tedder standard is, in Florida, an essential part of the reasonableness and control the Supreme Court found missing in *Furman*.

## V. CONCLUSION

The United States Supreme Court has, in effect, "deregulated death";<sup>186</sup> in other words, it is no longer inclined to regulate how and when a capital defendant is executed. Thus, the Court affords the sovereign states wide latitude in dictating this methodology, provided that the statutory schemes comply with the mandates of *Furman*.<sup>187</sup> Florida took the lead in this area by adopting a trifurcated sentencing scheme that constitutes a delicate balance between the jury's reflection of the community's conscience and the trial judge's ability to ensure consistent application of the death penalty. Despite constant criticism of the jury override provision, it is an effective method of making this judgment and has repeatedly been approved by the United States Supreme Court as ensuring substantial reliability in capital sentencing.<sup>188</sup>

The Florida Legislature, however, recently attempted to abrogate the Tedder "great weight" and "clear and convincing" facts standard by making the jury's recommendation truly advisory.<sup>189</sup> Fortunately, Governor Chiles recognized the value of Florida's present sentencing scheme insofar as it assures capital defendants, as well as the community, that the death penalty will not be imposed arbitrarily or in a discriminatory manner. Although Committee Substitute for House Bill 1319 contained several provisions which might indeed have streamlined the death penalty process, the Florida Supreme Court's Tedder standard is an integral and necessary part of Florida's death penalty law.

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184. Governor's Veto, *supra* note 18, at 1-2.

185. *Eroding the Role of Juries*, *supra* note 166.

186. See *supra* text accompanying notes 19-24.

187. See Mello, *Jurisdiction To Do Justice*, *supra* note 4, at 932.

188. Viewed in this light, and notwithstanding the Supreme Court's decision in *Harris v. Alabama*, perhaps the Alabama Supreme Court should reconsider its refusal to adopt the Tedder standard in its capital sentencing scheme.

189. See *supra* text accompanying notes 157-66.

In making the decision to veto Committee Substitute for House Bill 1319, Governor Lawton Chiles said that he “trusts jurors.”<sup>190</sup> One should trust jurors, as community representatives, to make the ultimate ethical judgment. Rather than being burdensome, however, it is a genuine benefit to have a system in which the jury’s assessment of the community’s conscience is not only afforded “great weight” but is also held in check by the trial judge—an expert in applying the law. Ultimately, even the trial judge’s decision is subject to review for arbitrariness and discrimination by the Florida Supreme Court. As to the question of whether we should trust either a single trial judge or twelve individual jurors to make the ultimate ethical judgment, the answer, of course, is both.

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190. Governor’s Veto, *supra* note 18, at 2.