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February 4, 2016

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Hon. Greg Evers, Chairman
Committee on Criminal Justice
Florida Senate
404 S. Monroe Street
Tallahassee, FL 32399-1100

Re: *Hurst v. Florida* Remedial Legislation and SPB 7068

Dear Senator Evers:

The Criminal Justice Legal Foundation, an organization representing the rights of victims of crime in our criminal justice system, submits these comments regarding legislation to correct the problems identified in the U.S. Supreme Court decision of *Hurst v. Florida* and on the bill proposed to the committee, SPB 7068. Our organization has supported the State of Florida as a “friend of the court” in a number of capital cases, including *Dugger v. Adams*, 489 U.S. 401 (1989), *Lambrix v. Singletary*, 520 U.S. 518 (1997), and *Florida v. Nixon*, 534 U.S. 175 (2004). We are very interested in seeing the State of Florida make the necessary adjustments to conform to the *Hurst* decision while maintaining an effective system to deliver justice in the worst murder cases.

Many people have said that juries in capital cases must be unanimous as to penalty as well as guilt, although this is not constitutionally required, but SPB 7068 is *not* a jury unanimity law. It is a single-juror-veto law. The bill would provide in §921.141(2)(c): “If a less than unanimous jury determines that the defendant should be sentenced to death, the jury’s recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.” That is preposterous. Consider a situation where eleven jurors are firmly convinced that death is appropriate punishment but one juror obstinately refuses to even consider the death penalty. This is not unheard of, despite the process of removing jurors who are unwilling to consider either alternative, because some people are not honest on voir dire. To say that this jury recommends a life sentence is absurd.

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In no other collective decision process do we allow a single person to impose his will over the judgment of all the others. If the jury in the trial on guilt deadlocks at eleven for guilt and one for acquittal, we do not declare that the jury has acquitted the defendant and let him walk. Yet that is exactly what is proposed for the penalty phase. If a legislative committee votes 4-1 to recommend a bill for passage, we do not say that it has recommended against passage.

Some jurisdictions do have single-juror-veto laws, and the result is that some defendants who clearly deserve the death penalty are arbitrarily spared from it. Zacarias Moussaoui, the "20th hijacker," and James Eagan Holmes, the Aurora theater mass murderer, are the best-known examples. Florida must not go down this benighted path.

A true unanimity law is the type found in Arizona and California. Just like in the guilt phase, the penalty jury must deliberate until it is unanimous one way or the other. If the jury is truly hung, that results in a mistrial and the empaneling of a second jury. The question then becomes what to do if the second jury is also hung. Although not common, that does happen on occasion, with the Jodi Arias case being the best-known example. Because jury sentencing is not constitutionally required, we suggest that a non-unanimous jury make its recommendation vote known to the court and that the trial judge independently determine the sentence as under current law.

A suggested bill is enclosed.

Sincerely,



Kent S. Scheidegger

KSS:iha

Enclosure

Suggested Legislation in Response to *Hurst v. Florida*

Added language is in italics. Deleted language is in strikethrough. Regular roman type is unchanged language. Statutory language is indented, and commentary is flush with the left margin.

§921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

Comment: No change needed here.

(2) ~~ADVISORY SENTENCE VERDICT BY THE JURY.—~~

After hearing all the evidence, the jury shall deliberate and render *a verdict* ~~an advisory sentence to the court~~, based upon the following matters:

Comment: What the jury returns is no longer an advisory sentence, it is a verdict, just like the guilt-phase verdict.

(a) Whether ~~sufficient~~ *one or more* aggravating circumstances ~~exist~~ as enumerated in subsection (5) *have been proved beyond a reasonable doubt*;

Comment: Aggravating circumstances serve two functions, and they are now explicitly broken out in separate paragraphs. Revised paragraph (a) refers to the objective fact-finding that goes into determining eligibility to be considered for the death penalty. For example, a person has either been previously convicted of another capital felony or he has not. This paragraph implements the key holding of *Apprendi-Ring-Hurst* that the finding of at least one aggravating circumstance must be made by the jury and must be made on proof beyond a reasonable doubt. This is what makes a case death eligible.

(b) *Whether sufficient aggravating circumstances exist to warrant a punishment of death*;

Comment: Once the hurdle of paragraph (a) has been cleared, the jury enters the area of making a value judgment, an individualized determination as to whether this defendant should be sentenced to death for this crime. The first question is whether the aggravating circumstances are sufficient, if not outweighed by mitigation, to warrant a punishment of death. For example, not every murder for pecuniary gain deserves a death sentence, even if there is no mitigation.

(~~b~~c) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

Comment: Continuing on with the process, the defendant is entitled to try to convince the jury that mitigating circumstances outweigh the aggravating, even if the crime would otherwise warrant a death sentence.

(~~c~~d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Comment: Here the jury comes to its final sentence verdict. As the Supreme Court recognized in *Kansas v. Carr* the week after *Hurst*, it no longer makes sense to speak of burdens of proof in this area. The Constitution does not require this decision to be made by the jury, but most states vest it there, and it is better to regard this decision as a verdict rather than the confusing “advisory sentence” of existing law.

~~(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH IN THE PENALTY PHASE.—~~

(a) The jury's decision regarding whether one or more aggravating circumstances have been proved beyond a reasonable doubt must be unanimous. The jury shall specify in writing which aggravating circumstances it unanimously finds have been proved beyond a reasonable doubt, which it unanimously finds have not been proved beyond a reasonable doubt, and which it cannot agree on.

Comment: The finding of an aggravating circumstance is a critical moment in the case. The thrust of *Ring-Hurst* is that this finding must be treated the same as a conviction of a higher degree of murder. The Supreme Court has gone back and forth on whether unanimity is required for a verdict of guilt, compare *Maxwell v. Dow*, 176 U.S. 581 (1900) with *Apodaca v. Oregon*, 406 U.S. 404 (1972), and it would not be wise to depend on *Apodaca* remaining the law. That precedent may be the next one thrown under the *Apprendi* bus. It is also prudent to require that the jury specify the aggravating circumstances found. If a problem is later found with one of them, that will be harmless error for the eligibility determination if one or more unimpaired findings still stand.

(b) If the jury unanimously finds that no aggravating circumstance has been proved beyond a reasonable doubt, the defendant shall be sentenced to life imprisonment.

Comment: A unanimous verdict that none of the alleged aggravated circumstances has been proved to the requisite level is the end of the penalty phase, and the jury need go no further.

(c) If the jury is unable to agree unanimously on whether one or more aggravating circumstances have been proved beyond a reasonable doubt, the court shall dismiss the jury and impanel a new jury to retry the penalty phase. If the jury agrees unanimously that at least one aggravating circumstance has been proved beyond a reasonable doubt but is unable to agree on others, the jury shall proceed to the determinations under paragraphs (b), (c), and (d) of subdivision (2).

Comment: Continuing with the principle that an aggravating circumstance is like guilt of a higher degree of murder, a hung jury results in a mistrial, and a new jury is impaneled. As long as they find one unanimously, though, the jury need not be considered hung. They can proceed with each juror considering the circumstances he or she believes has been proved.

(d) In making the determinations required by paragraphs (b), (c), and (d) of subsection (2), each juror may consider any aggravating or mitigating circumstance he or she has individually found to exist by a preponderance of the evidence and may assign it as much or as little weight as he or she believes is appropriate.

Comment: This individual juror consideration is required for mitigating circumstances. See *McKoy v. North Carolina*, 494 U.S. 433 (1990). This paragraph makes the *McKoy* rule reciprocal. Aggravating circumstances proved by a preponderance of the evidence but not beyond a reasonable doubt cannot be used for eligibility but can and should be considered in the weighing process. Having different standards for aggravating and mitigating places a thumb on the defendant's side of the scale. Such an imbalance is appropriate for guilt but not for sentencing.

(e) The jury's decision regarding whether the defendant should be sentenced to life imprisonment or death must be unanimous. If the jury agrees unanimously that one or more aggravating circumstances has been proved beyond a reasonable doubt but is unable to agree unanimously on the penalty, the court shall receive the verdict as to aggravating circumstances, dismiss the jury, and impanel a new jury to hear evidence and make determinations according to paragraphs (b), (c), and (d) of subsection (2). If a second jury is unable to unanimously agree on the penalty, the jury shall report to the court how many jurors recommend a sentence of death and how many recommend a sentence of life imprisonment, and the court shall independently make the determinations required by paragraphs (b), (c), and (d) of subsection (2).

Comment: Here we come to a critical point. There are two kinds of death sentencing procedures that are loosely called "unanimity requirements," but only one really is. A true unanimity requirement is a requirement that the jury be unanimous one way or the other. Some states say the jury must be unanimous but then say that if it is not the defendant gets a life sentence. This is a single-juror veto, not a unanimity requirement. There are numerous cases where a murderer clearly deserves death and most of the jurors so vote, but a small minority (sometimes even a single juror) impose their will on the others through a single-juror veto law. The gross miscarriage of justice in the case of Aurora, Colorado theater mass murderer is the best-known example, although reports vary as to whether it was one holdout or as many as three.

This proposal adopts the method of California and Arizona, that a hung jury in the penalty phase results in a retrial of only the portion on which the jury is hung. In Arizona, if a second jury is also hung, the state gives up and sentences the defendant to life in prison. The Jodi Arias case is the best-known example. This proposal

provides that the second jury report its results and that the trial judge make the final decision. *Apprendi-Ring* does not apply to the final sentencing decision, only to the finding of an aggravating circumstance. Although there is some sloppy language in the *Hurst* opinion that has been cited to argue that the final decision is included as well, that would be such a massive overthrow of well-established law that it is nearly inconceivable the Supreme Court would actually embrace it. If the inconceivable happens, this proposal would effectively be same as the Arizona system.

(f) Except as provided in paragraph (b) of this subdivision, the court may overturn the jury's verdict in the penalty phase if the facts suggesting a contrary verdict are so clear and convincing that virtually no reasonable person may differ. This standard applies equally whether the jury's final penalty determination was death or life imprisonment.

Comment: As is generally true in criminal law, there needs to be some latitude to override extreme jury verdicts. The standard in this paragraph is the standard in existing law for a judge to override a jury verdict of life and impose death instead, the rule of *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). This proposal would make the standard reciprocal as to the jury's final sentencing determination. It is not reciprocal, however, for a jury finding of no aggravating circumstances. Although the Supreme Court's jurisprudence on the Double Jeopardy Clause as applied to capital punishment has been confused and inconsistent, the plurality portion of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) indicates that a finding of no aggravating circumstances "would operate as an acquittal," precluding an override. Given the *Apprendi-Ring* basis of this portion of *Sattazahn*, a viewpoint that has triumphed in *Hurst*, it would be prudent to regard this as a Double Jeopardy bar and not attempt an override in this situation, no matter how clearly wrong the jury may be.

~~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.~~

Comment: The existing subdivision (3) is completely replaced. The remainder of the section is unchanged.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

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

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

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

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

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

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

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

- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- (l) The victim of the capital felony was a person less than 12 years of age.
- (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
- (n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.
- (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.
- (p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.