

2001 Final Report
of the
Supreme Court
Workload Study Commission

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Supreme Court Workload Study Commission Final Report

Introduction

During the 2000 legislative session, Proposed Committee Bill (PCB) 14, from the House Committee on Judiciary, was filed and approved by the House Civil Justice Council. The bill sought to ease the ever-increasing workload of the Supreme Court of Florida by increasing the number of justices on the court from seven to nine. In addition, the bill allowed the Governor to appoint the Chief Justice for a six-year term instead of the court's current system of rotating the Chief Justice position among the justices every two years. The Florida Constitution would need to be amended by the voters to accomplish these changes, and that is why the bill was drafted as a Joint Resolution of the Legislature. To pass, joint resolutions must be approved by three-fifths of the members of each house and then approved by a majority of voters in the next general election.

The Legislature's Task Force on State Court Funding/Article V was looking at other state court funding and workload issues. To ensure that appointing additional justices to alleviate the workload of the Supreme Court of Florida would not become a divisive political issue, further study of the issue was suggested. Therefore, the Supreme Court Workload Study Commission was created as part of the bill relating to the funding of the State Courts System (SB 1212). The Commission's task, as set forth in this bill (now Chapter 2000-237, Laws of Florida) was to "develop recommendations for addressing workload issues, including, but not limited to, the need for additional justices on the supreme court."

Supreme Court Workload Issues

Currently, the Supreme Court of Florida consists of seven justices, all of whom are chosen through the merit selection process. Each justice then must stand for a merit retention election every six years. Art. V, s. 3(b), Fla. Const., sets forth the jurisdiction of the court to include:

The court must review:

- ◆ Death penalty cases;
- ◆ Decisions declaring invalid a state statute or provision of the state constitution;
- ◆ Advisory Opinions of the justices when requested by the Attorney General pursuant to the provisions of Art. IV, s. 10; and
- ◆ The admission and discipline of attorneys pursuant to Article V, s. 15, Fla. Const.

When provided by law, the court must review by proceedings and actions:

- ◆ Proceedings for the validation of bonds or certificates of indebtedness; and
- ◆ Action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

The court may review:

- ◆ Decisions that expressly declare valid a state statute;
- ◆ Decisions that expressly construe a provision of the state or federal constitution;
- ◆ Decisions that expressly affect a class of constitutional or state officers;
- ◆ A decision that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law;
- ◆ Any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal;
- ◆ Decisions certified by a district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court; and
- ◆ A question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of The Supreme Court of Florida.

The court may issue:

- ◆ Writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction;
- ◆ Writs of mandamus and quo warrant to state officers and state agencies; and
- ◆ Writs of habeas corpus.

In less than 100 years in the State of Florida, from 1848 to 1940, the number of justices on the court increased several times. In 1848, The Constitution of the State of Florida was amended to allow the supreme court to have its own justices, where previously the court consisted of circuit judges from around the state chosen to hear certain cases. The 1848 amendment allowed the Legislature to elect the three justices originally on the Court. In 1902, the 1885 Florida Constitution was amended to increase the number of justices to six. The amendment also allowed the Legislature discretion to provide for three to six justices on the court, beginning in 1905 and continuing indefinitely. In 1911, the Legislature exercised that discretion and decreased the number of justices to five. In 1923, the Legislature raised the number to six. Finally, in 1940, the number of justices was increased to seven by constitutional amendment. The number of justices serving on the court has remained at seven.

From 1980 to 1999, the number of filings in the Supreme Court of Florida has risen nearly 50%. For each year since 1990, the court has seen an average annual rise in filings of 5% from the previous year. This rise in filings has created more work for and more demand on the justices. For example, from January 1, 1999 through December 31, 1999, the court issued over 2,500 orders and opinions. The court has also seen an over 20%

increase in the number of pending cases in the past year, reflecting the delay experienced in the court due to the increased caseload. As further evidence of the effect of the increased caseload at all levels of state court, the Supreme Court of Florida has certified the need for 75 additional trial and appellate court judges since January 1999. Filings in the Supreme Court of Florida have increased over the past twenty years as follows:

SUPREME COURT OF FLORIDA FILINGS: 1980-1999

	FILINGS	% INCREASE
1980	1714	
1981	1456	-15%
1982	1465	1%
1983	1686	15%
1984	1643	-3%
1985	1763	7%
1986	1726	-2%
1987	1851	7%
1988	1826	-1%
1989	1753	-4%
1990	1920	10%
1991	1986	3%
1992	1844	-7%
1993	1954	6%
1994	1970	1%
1995	2175	10%
1996	2527	16%
1997	2494	-1%
1998	2502	.3%
1999	2746	10%
TOTAL	39001	53.3%

Workload Study Report

Chapter 2000-237, Laws of Florida, directed the Office of the State Courts Administrator to conduct a workload study on the supreme court. The Commission was directed to use the study and associated data delivered by the Office of the State Courts Administrator and any other relevant data in making its recommendations.

The Office of the State Courts Administrator presented its report to the Commission in November 2000. The report presents an overview of the history of the structure and jurisdiction of the supreme court, a summary of the resources of the court and a description of how they are utilized in addressing workload, a statistical profile of the court's caseload from 1990-1999, caseload forecasts through 2002, discussion of increases in the workload of the court and steps the court has taken to address these increases, and a review of the structure, caseload, and operations of the courts of last resort of the ten largest states.

Comparison With Other States

Other state court systems have implemented varying solutions in an attempt to deal with the increase in court filings across the country. Some have worked, some have not, and some are still being examined.

What follows is a brief description of other supreme courts from a sample of states:

The Arizona Supreme Court consists of five justices who serve six year terms. The Arizona Constitution, in article 6, s. 5, limits the jurisdiction of the court. The supreme court has original jurisdiction of habeas corpus, quo warranto, mandamus, injunction, extraordinary writs to state officers, and claims of one county against another. The court also has appellate jurisdiction in all actions and proceedings except those originating from courts of non-record. Finally, the court has power to issue injunctions and writs, and to promulgate rules in conjunction with the operation of all state courts.

The California Supreme Court is experiencing drastic growth in the number of case filings. According to the court's web page, in 1970, the court had 3,179 filings. In the 1995-96 term, the court saw the number of filings more than double to 6,838. The court seats seven justices, each for twelve-year terms. The California Constitution gives the court original jurisdiction in proceedings for "extraordinary relief" and habeas corpus proceedings. The constitution requires the court to review all sentences of death through automatic appeal under the Penal Code. Also, the court may review state courts of appeal decisions and recommendations on the removal of judges and attorneys that originate from the appropriate regulating bodies.

The New York Court of Appeals, that state's highest court, has on average per year written opinions on 300 cases, decided 1,200 motions for leave to appeal for civil cases, and decided 3,000 criminal leave applications. The court has an extensive state court system that includes four levels of court (Florida currently has three levels). The court is

composed of seven justices who serve fourteen-year terms. The court has the final decisional power in the state of New York.

The state court system in Texas is unique. At the highest level of court, the system bifurcates to the Supreme Court of Texas and the Criminal Court of Appeals (CCA). The CCA decides criminal cases exclusively. The supreme court has statewide final appellate jurisdiction in all civil and juvenile cases. Texas seats nine justices on each court, totaling eighteen justices at the state's highest-level courts. In 1997, the supreme court indicates it dealt with 3,037 matters.

Oklahoma has two courts of last resort. The supreme court determines all issues of a civil nature, and the Oklahoma Court of Criminal Appeals decides all criminal matters. The Oklahoma Supreme Court consists of nine justices who serve six-year terms. The court of criminal appeals consists of five judges who serve six-year terms. If a conflict arises over the jurisdiction of the two courts, the supreme court determines which court has jurisdiction. Over the last ten years, the Oklahoma Supreme Court has reduced its backlog of cases from 3,331 in 1998 to 1,476 in 2000. In recent years, the backlog of the court of criminal appeals has been virtually extinguished.

The Supreme Court of Ohio consists of seven justices who serve six-year terms. The Ohio Constitution grants comprehensive jurisdiction and authority to the court. Most of the cases arise on appeal from the district courts of appeal, but the court may grant leave to felony cases and may direct a district court of appeal to certify its record in any case deemed to be of great public importance. The court hears all death penalty cases from the trial and appellate courts. The court has appellate jurisdiction on a number of issues, including questions concerning the state and federal constitutions, questions with conflicting opinions on the same question from two or more appeals courts, and review of administrative agency actions. As in Florida, the Ohio Supreme Court regulates the practice of law in Ohio and retains the ability to promulgate rules in accordance with regulation of the court system and the practice of law.

The Supreme Court of Michigan is made up of seven justices who serve eight year terms. The court has discretionary authority to hear cases. Of the cases it takes, a decision is made on every case, which means 2,400 to 3,000 decisions every year. In an effort to fulfill this goal, each justice is responsible for his or her share of the workload:

1. Review 200 to 300 cases a month to determine if the case is to be granted jurisdiction
2. Review 35 to 50 cases a month for conference each month
3. Prepare 12 to 18 cases a month for oral argument
4. Write majority, dissent, and concurring opinions

The court has original jurisdiction over some of the same issues as other courts and appellate jurisdiction of cases on appeal from the court of appeal.

Members

The Honorable Stephen H. Grimes, Chairman
Tallahassee, Florida

H. Scott Bates
Orlando, Florida

The Honorable Ralph Fisch
Palm Beach Gardens, Florida

Dr. Abraham S. Fischler
Ft. Lauderdale, Florida

John W. Frost, II
Bartow, Florida

Jerry Gardner
Daytona Beach, Florida

The Honorable Dudley Goodlette
Naples, Florida

W. Bruce O'Donoghue
Winter Park, Florida

The Honorable Robert L. Shevin
Miami, Florida

Meetings

The Commission met in Tallahassee, Florida on September 25, 2000; October 24, 2000; November 17, 2000; January 16, 2001; January 29, 2001; and February 23, 2001. The Commission heard testimony from the following:

September 25, 2000

Justice Charles Wells, Chief Justice of the Supreme Court of Florida
Herman Russamano, President of the Florida Bar
Ken Palmer, Office of the State Courts Administrator

October 24, 2000

John Anthony "Tony" Boggs, Director of the Legal Division of the Florida Bar, representing the Florida Bar disciplinary function.
Brooke S. Kennerly, Executive Director of the Judicial Qualifications Commission
Justice Tom Phillips, Chief Justice of the Texas Supreme Court
Chief Justice Wells, Chief Justice of the Supreme Court of Florida
All justices of the Supreme Court of Florida attended the meeting to provide information to the Commission.
Nancy Daniels, Public Defender of 2nd Judicial Circuit, representing the Florida Public Defender's Association
Greg Smith, Capital Collateral Regional Counsel for the Northern Region
Carolyn Snurkowski, Assistant Deputy of the Criminal Appellate Division for the Attorney General's Office, representing the Attorney General's Office
Buddy Jacobs, representing the State Attorneys

November 17, 2000

Judge Marguerite Davis, First District Court of Appeal
Kim Ashby, Appellate Attorney with Akerman, Senterfitt in Orlando, representing the Florida Bar's Certification Committee for Appellate Practice
Kenneth R. Palmer, State Courts Administrator
Thomas D. Hall, Clerk of the Supreme Court of Florida
Justice Richard P. Guy, Chief Justice of the Washington State Supreme Court

January 16, 2001

Judge Reta M. Strubhar, Presiding Judge of the Oklahoma Court of Criminal Appeals
Tom Warner, Solicitor General of Florida
Judge Sharon Keller, Texas Criminal Court of Appeals
Justice Hardy Summers, former Chief Justice, Oklahoma Supreme Court

On January 29, 2001, the Commission met to make recommendations for its final report. The Commission met on February 23, 2001 to adopt its final report.

Recommendations of the Commission

- 1. The Commission recommends that the Legislature support the court's request for additional staff and technology support at the supreme court to address the processing of death penalty cases and "tag" cases. The court has requested two attorneys for the central staff, paralegals in the Clerk of the Court's Office, and funding for upgrades to the case management system.**

Between 1996 and 1999 the ability of the court to keep up with the increased workload was enhanced by the Legislature when the filing rates in several of the growth categories accelerated. This was accomplished through the creation of the central legal research staff and the addition of a third law clerk to each justice's personal staff.

Based on its current review of case loads and case processing the court has determined that further improvements can be achieved in two major areas: the processing of death penalty cases and the processing of "tag" cases (a group of cases that will be decided based on the same single legal point). Death penalty cases are particularly complex and involve a lengthy record. Additionally, because the penalty is so serious the court gives careful consideration to each case.

A "tag" case has its inception when a district court of appeal decides an issue and the supreme court accepts jurisdiction to review that decision. When faced with other cases involving the same issue, the district court of appeal decides them by making a reference to its earlier decision. Because this gives the supreme court jurisdiction to also review these cases, they also come to the supreme court pending the decision in the earlier case. These cases pile up and create additional work by the lawyers and the courts.

One of the biggest challenges is identifying "tag" cases as the appeals are filed in the supreme court. The Clerk's Office currently performs this function. When "tag" cases are identified, they may be consolidated or one case may be selected for resolution with the remaining cases held until an opinion is issued in the lead case. Once the single case or the consolidated case is decided, other similar cases may be decided or remanded by the court in accordance with the opinion of the lead case. The impact of the cases on the court's workload is demonstrated by the fact that in 1999, the court released only 216 opinions, whereas in 2000, the court released approximately 500 opinions with much of the increase resulting from decisions in three major "tag" cases.

To address these two major areas, the court has included in its 2001-2002 budget proposal a request for six additional staff and funding for upgrades to the case management system. Two additional attorney positions are requested for the central staff to provide increased expertise on complex cases and to free the justices' personal law clerks to focus on death penalty issues and collateral appeals. For "tag" cases, the court has requested one position to be filled by either a paralegal or attorney for the Clerk of the Court's Office.

In processing death penalty cases, the court has developed a specialized extension of the automated case management system. This system allows the court to monitor cases even when they have been returned to the trial court or are pending in a federal appellate court. This system performs a number of functions that were previously done by hand and at times made tracking difficult.

The court has requested funding in its 2001-02 Legislative Budget Request for one administrative position in the court clerk's office and for upgrades to the case management system. The administrative assistant position would manage the computer systems within the clerk's office, including overseeing the case management system. One upgrade to the case reporting system would allow quarterly reports on death penalty cases pending in the trial courts to be filed electronically and to be immediately used to electronically update the case management system. The other major upgrade currently being developed will assist the court in identifying and tracking "tag" cases that present similar issues.

2. The Commission recommends that the court develop a plan for the efficient and expeditious of handling of "tag" cases.

"Tag" cases can present an administrative problem, because the supreme court clerk's office, which assigns the case to a particular justice, may not realize that similar issues in other cases are before the court or before the district courts of appeal. It is important to find out, as soon as possible, when a particular issue before the supreme court is likely to be followed by other cases involving the same issue. The reason why this is important is because the decision involving that issue can be accelerated, so as to provide an earlier resolution to the many "tag" cases in the pipeline.

The Commission heard testimony that the court is aware of the "tag" case issue and is attempting to deal with it. It would be more efficient to devise a manner in which all "tag" cases could be held in the district courts of appeal until the supreme court decides the lead case. If this were done, statistical reports of case activity in the district courts of appeal would have to separate this type of case to avoid the appearance that these courts are backlogged. However, the losing party in a "tag" case decision of a district court of appeal would like to be able to immediately seek review in the supreme court, because once the supreme court takes jurisdiction of the case, it may also review any other issues that are in the case. Arguably, this practice is inconsistent with the spirit of Article V, because if the opinion of the district court of appeal refers only to the "tag" case issue, the losing party would otherwise have no vehicle to seek further review in the supreme court.

In any event, the Commission is hopeful that the Legislature will provide the staffing necessary to assist the supreme court in resolving this troublesome issue in an expeditious and efficient manner.

To deal with the "tag" case problem, the Commission recommends that the Legislature approve the court's request for additional clerk's office staff to track "tag" cases and recommends that the court implement procedures to more efficiently and expeditiously handle "tag" cases.

- 3. The Commission recommends that the court request from the Legislature, sufficient law clerk staff at the trial court level to address the quality of decisions in death penalty cases.**

When death penalty cases are aggregated from 1990 through 1999, of the 763 cases 307 appeals were reversed, remanded or granted. In an effort to reduce the number of cases in this figure that are the result of trial error, the court has taken several steps. First, the court has increased the training and experience requirements for a trial judge hearing a death penalty case and second, the court has announced rules relating to the experience and qualifications of attorneys who represent defendants at trial. Finally, the court has just begun providing specialized training for law clerks working with judges hearing death penalty cases.

The number of law clerks assigned to the trial courts is based on the number of new judges approved by the Legislature. When the supreme court certifies the need for additional judges, law clerks and judicial assistants are requested and appropriated on a formula basis. Currently, for every three judges requested at the circuit court level the budget includes funding and positions for one law clerk and two judicial assistants. Each new judge is allocated a judicial assistant and each circuit allocates the law clerk positions.

Commission members expressed concern that there may be insufficient law clerk support for the trial judges assigned to the complex death penalty cases and that by providing additional legal research support with specific knowledge of the legal issues related to death penalty cases, the error rate for these cases could be further reduced.

- 4. The Commission recommends that the selection of the Chief Justice remain with the court but that efficiency could be effected by the election of the Chief Justice being based on the person's background and experience; the option of re-election for a Chief Judge; expanding the duties of the Administrative Justice; and the extension of the term which the Chief Justice serves.**

The President of the United States appoints the Chief Justice of the United States Supreme Court for a life term. In the U.S. District Courts and the intermediate appellate courts in the federal judicial system, the courts of appeals, the judges who sit on the courts of appeals are appointed for life by the President with the advice and consent of the Senate and it is the judge who has served on the court the longest and who is under 65 years of age who is designated as the chief judge. The chief judge has administrative duties in addition to a caseload. On the courts of appeals, the chief judge serves for a maximum term of seven years. The Florida Constitution would need to be amended by the voters to make Florida's system similar to the federal system.

Currently, the Chief Justice of the Supreme Court of Florida is the most senior justice who has not previously served as Chief Justice. The Chief Justice serves a two-year term. This is purely by tradition and not based in rule or law. However, the rules governing the organization of the court do provide for the appointment of an administrative justice presumably to handle such administrative matters as the justices may determine. The commission was advised that the court was using an administrative

justice for certain purposes. There was agreement among the members that determining how the Chief Justice is selected and what his or her role is for now should remain within the province of the court. The members expressed various ideas related to the ultimate language of the recommendation, including the efficacy advantage of having continuity in leadership, particularly in dealing with the Legislature on matters that exceed two years such as Revision Seven to Article V; maximizing leadership by considering whose experience or background is best suited to administration; maintaining good leadership by considering the re-election of an effective Chief Justice; and the potential for improving management of the state's courts expanding duties of the administrative justice.

5A. The Commission recommends that the Legislature further study the potential to reduce the supreme court's workload by requiring a super majority vote of the jury (of no less than 9 to 3) before a trial judge could impose the death penalty.

5B. The Commission recommends that the Legislature further study the potential to reduce the supreme court's workload by passing a law preventing the trial judge from overriding a jury recommendation of life imprisonment.

The death penalty in Florida is created pursuant to s. 921.141, Florida Statutes. After a defendant is convicted in a death penalty case, the trial court holds a separate proceeding to determine whether imposition of the death penalty is appropriate. The proceeding is held before a jury, typically the jury that determined guilt, as soon as practicable after the guilt phase of the trial is completed. After presentation of evidence, argument by counsel, and instruction by the court, the jury retires and renders an "advisory sentence". After hearing the jury's advisory sentence, the trial court imposes sentence. The trial court is not required to follow the jury's recommendation. However, the trial court is required by case law to give the jury's recommendation "great weight". In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Chief Justice Wells estimated that he spent 30 to 40 percent of his time on death penalty cases.

The Commission heard testimony that advocated requiring either a supermajority or unanimous jury recommendation in favor of the death penalty before the trial judge could impose the death penalty. Those witnesses argued that if the number of death sentences were reduced, the Court's workload would be appreciably reduced. The Commission also heard conflicting testimony of Carolyn Snurkowsky of the Attorney General's Office that argued that changing the voting requirement would not alter the number of death cases. She argued that if the jury were told it had to have nine votes or some other number in order to permit imposition of the death penalty, it would find those votes where the jurors believed the death penalty was appropriate. Upon inquiry, the Chief Justice said that requiring a supermajority jury verdict for imposition of the death penalty would appreciably reduce his workload. The Commission heard conflicting testimony about whether there is a correlation between the vote on the advisory sentence and whether the death sentence is ultimately affirmed or reversed. The Commission heard testimony that trial judges do not often override jury recommendations and imposes the death penalty

when the jury has recommended a life sentence. Witnesses speculated that overrides are becoming rare, because the reversal rate by the Supreme Court of Florida is high.

Recognizing that there are other policy issues involved, the Commission declined to recommend that the Legislature approve either a supermajority or elimination of the override. However, the Commission approved a finding that requiring a supermajority vote of the jury before a trial judge could impose the death penalty would reduce the workload of the court. The Commission also found that a law preventing the trial judge from overriding a jury recommendation of life imprisonment would reduce the caseload of the supreme court. Therefore, the Commission voted to recommend that the Legislature further study the effect that such changes may have on the court's workload with the understanding that if any such changes are made they should be prospective in nature.

Proposals before the Commission that were not Adopted

The legislation creating the Commission specifically directed the Commission to study the need for additional justices on the Supreme Court of Florida. Additionally, the Commission specifically addressed other proposals that were not adopted. The Commission decided to include the following significant issues in its report to demonstrate careful consideration was given to all issues.

1. The Commission recommends that the number of justices on the Supreme Court of Florida not be increased.

Most states presently have a supreme court consisting of seven justices. The other states have either five justices or nine justices. The specific state-to-state supreme court membership is as follows:

States Employing Five Supreme Court Justices (18 States)

Alaska, Arizona, Delaware, Hawaii, Idaho, Indiana, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wyoming.

States Employing Seven Supreme Court Justices (26 States)

Arkansas, California, Colorado, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Virginia, Wisconsin.

States Employing Nine Supreme Court Justices (6 States)

Alabama, Connecticut, Georgia, Mississippi, Oklahoma, Texas.

The Commission unanimously decided not to recommend increasing the number of justices on the Supreme Court of Florida to nine justices. Theoretically, increasing the number of justices on the court would reduce the workload on the members of the court by spreading the justices' existing individual duties among more people. The Commission heard testimony that the expansion of the court may actually increase the

workload of the court by slowing down those court processes requiring a consensus of the justices. For example, the Honorable Tom Phillips, Chief Justice of the Texas Supreme Court, and the Honorable Richard P. Guy, Chief Justice of the Washington State Supreme Court, testified that a seven-member supreme court is more efficient than a nine-member court. (The Texas and Washington State Supreme Courts both have nine members). After considering the testimony, the Commission was persuaded that an increase in the number of justices would slow down the court by requiring more justices to resolve each case.

2. The Commission recommends that a separate court of criminal appeals not be created at this time.

The Commission decided not to recommend creating a Florida Court of Criminal Appeals. This proposed court would function as the “court of last resort” for all criminal appeals, and would be modeled on similar courts in Texas and Oklahoma.

The Texas Court of Criminal Appeals was created in 1891 to ease some of the jurisdictional burden on the Texas Supreme Court. The Texas Court of Criminal Appeals is the state’s court of last resort on all criminal legal issues. The court’s jurisdiction is limited solely to matters of criminal law. The court is composed of nine members, the election and necessary qualifications of who are the equal to those of Texas Supreme Court justices.

The Oklahoma Court of Criminal Appeals was created with Oklahoma’s statehood in 1907 as a specialized appellate court below the State Supreme Court. Shortly thereafter in 1918, the jurisdiction of the Oklahoma Court of Criminal Appeals was expanded to its present form to ease the jurisdictional burden on the Oklahoma Supreme Court. The Oklahoma Court of Criminal Appeals is the state’s court of last resort on all criminal legal issues. The court’s jurisdiction is limited solely to matters of criminal law, and is not subject to review by any other state court, including the Oklahoma Supreme Court. The court of criminal appeals is composed of five members, the election and necessary qualifications of whom are equal to those of Oklahoma Supreme Court justices.

The creation of a court of criminal appeals would remove from the Supreme Court of Florida much of its jurisdiction in criminal matters, vesting this authority in the new court. The Supreme Court of Florida’s workload would be reduced in that it would no longer have criminal appeals.

The Commission heard testimony about the negative and positive implications of having a separate criminal court of appeals. For example, the Honorable Tom Phillips, Chief Justice of the Texas Supreme Court, believed that the “split system” of high court jurisdiction between a supreme court and a court of criminal appeals was inefficient. The Honorable Reta M. Strubhar, Presiding Judge of the Oklahoma Court of Criminal Appeals recommended the Oklahoma system to Florida. She stated the advantages of the Oklahoma system is that judges with specific expertise decide cases. The disadvantages are that the system is more costly and there are duplicate administrative functions.

A majority of the members of the Commission were not convinced that the present workload of the Supreme Court of Florida was great enough to create a separate criminal

court of appeals at this time. Members did acknowledge that there is a workload problem at the Supreme Court of Florida and that some civil cases are not being heard in a timely fashion, because of the work devoted to criminal cases. Some members thought the idea should be a subject of further study and if the caseloads continued to increase, creation of a new court might be necessary. However, a majority of the members did not wish to recommend further study of the proposal.

3. The Commission did not recommend any changes in the jurisdiction of the supreme court.

None of the Commission members suggested changes in supreme court jurisdiction. All Commission members believe that it is important for the supreme court to continue to have exclusive jurisdiction to regulate the admission and discipline of lawyers. Some members thought the supreme court might wish to delegate its review of cases involving lawyer suspensions of 90 days or less to a panel of district court of appeal judges or a commission under the jurisdiction of the supreme court. However, a majority of the Commission felt that the supreme court should continue to review all disciplinary cases.

Closing

The Commission wishes to thank the Supreme Court of Florida for its assistance and cooperation. The Commission also thanks all the individuals who provided testimony and other information to the Commission. The Commission wishes to express its appreciation to the legislative staff members who so ably assisted the Commission in conducting its meetings and preparing this report.

Specially Concurring Opinion by Judge Robert L. Shevin

I fully support the Final Report of the Florida Supreme Court Workload Study Commission. I write separately because, while I believe that all of the recommendations, if implemented, will expedite the workload of the Florida Supreme Court, only two of the recommendations will significantly reduce the court's workload, and, when closely analyzed, do not reduce the importance of meaningful and deserved punishment for crimes that are particularly heinous, atrocious and cruel.

Those two recommendations are 5A and 5B that require a super majority vote of the jury of no less than 9-3 recommending for the death penalty, after a bifurcated trial, before a trial judge can impose the death sentence and the elimination of the trial judge's present right to override a jury recommendation of life imprisonment. These recommendations can be accomplished by amendment to the present death penalty statute and they would apply only prospectively to crimes committed after the date of the passage of the new statute. They would not apply to anyone on death row or anyone whose case is presently in the pipeline.

In the early seventies, as Attorney General of Florida, I worked closely with the Legislature in the drafting of the present statute, and I defended Florida's death penalty statute against constitutional challenges in the United States Supreme Court and in the Supreme Court of Florida.¹ Thus, my active involvement in these issues relates back approximately 28 years.

Most or all of the states in our nation require a unanimous vote both on conviction and on the sentence of death. All of the states' justices with whom we spoke during our public hearings and many others we have identified (Texas, Oklahoma, Ohio, Washington, Arizona, New York, California), advocate this approach as well. Recommendation 5A only suggests that the Legislature reduce the supreme court's workload by requiring a super majority vote of no less than 9-3 to impose the death penalty since the judge makes the ultimate sentencing decision and the jury's recommendation is advisory only.

I am convinced that because of the unanimous vote required in other states to impose the death penalty, none of those states have the huge number of people warehoused on their death rows that we have on Florida's death row.

Chief Justice Wells, in addressing the Commission, specifically stated that a super majority vote by the jury would "definitely decrease" the workload of the supreme court and have an "appreciable" impact. He testified that 30% to 40% of the present supreme court's workload is death cases.

¹ Proffitt v. State of Florida, 428 U.S. 242 (1976); Proffitt v. State, 315 So. 2d 461 (1975).

The information received by the Commission from Ken Palmer, State Court Administrator, and Tom Hall, Clerk of the Supreme Court of Florida, gathered over the last ten years on cases decided by the Supreme Court of Florida, indicated that only 28% of jury recommendations for death sentences fell in the range of 8-4 or 7-5 recommendations, and 7% involved a judge override of a jury's recommendation of life. A January 31, 2000, Department of Corrections, Bureau of Research and Data Analysis Report that was only able to analyze the jury vote on 50% of the total death sentences, showed, again, that 28% were in the less than 9-3 jury vote category. (Thirteen percent had a jury count of 8-4 and 15% were 7-5.) There are approximately 450 sentences of death amongst the approximately 350 Florida death row inmates since some death row inmates have multiple death sentences.

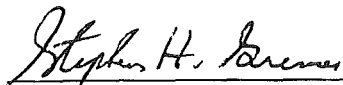
If the Legislature follows our Commission's recommendations to seriously consider and study 5A and 5B, I am convinced it will find that all the judges' overrides and most of the cases involving jury recommendations of less than 9-3 for death have been reversed and remanded for new trials on punishment - some more than once! Please review pages 267-270 of Ken Driggs, "The Most Aggravated and Least Mitigated Murders": Capital Proportionality Review in Florida, 11 St. Thomas L. Rev. 209 (Spring 1999). [See Appendix] The article specifically discusses the large number of death penalty sentences reduced to life on 7-5 and 8-4 jury recommendations and/or remanded for new trials on punishment. These pages are attached with footnotes included. There are far fewer death sentences reversed and reduced to life in 9-3, 10-2, 11-1, or 12-0 jury recommendation cases. This means approximately one-third less cases would reach the Supreme Court of Florida to begin with, and it means less cases would be reversed and remanded for new trial - - - all of which will significantly reduce the workload of not only the Supreme Court of Florida, but the trial courts as well.

I remain steadfast in my views as expressed to the United States Supreme Court in oral argument on March 31, 1976, but I strongly support Recommendations 5A and 5B of this Final Report because while all of the other recommendations will be very helpful, these two recommendations are the only ones, in my view, that will significantly decrease the workload of the Supreme Court of Florida and the trial courts. In addition, these recommendations, if implemented, will assure that the death penalty will be imposed for only those crimes that are truly heinous, atrocious and cruel.

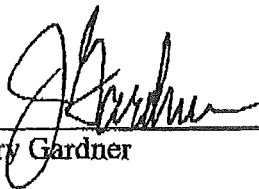
H. Scott Bates concurring in the opinion of Judge Shevin

I write to join fully with Judge Shevin's opinion. The evidence before the committee satisfied me that, without question, a substantial reduction in the workload of the supreme court would result from the adoption of recommendations 5A and 5B by the Florida Legislature.

Respectfully submitted,



Stephen H. Grimes, Chair



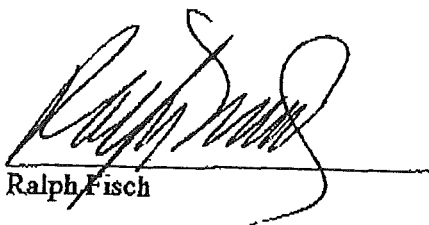
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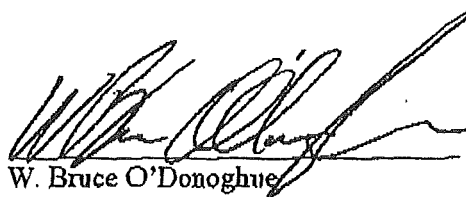
H. Scott Bates



J. Dudley Goodlette



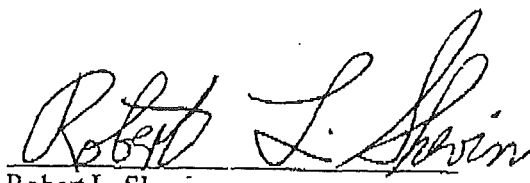
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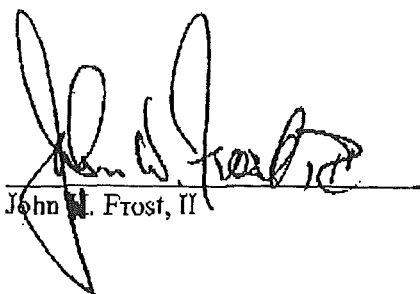
W. Bruce O'Donoghue



Abraham S. Fischler



Robert I. Shevin



John W. Frost, II

Appendix

Saint Thomas Law Review
Spring, 1999

***207 "THE MOST AGGRAVATED AND LEAST MITIGATED MURDERS": CAPITAL
PROPORTIONALITY REVIEW IN FLORIDA**

Ken Driggs [FNa1]

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VIII. THE SIZE OF THE JURY VOTE

Jury death recommendations on close votes are more likely to see their death sentences reduced to life by the Florida Supreme Court. [FN477] The court has often reduced death sentences to life where they were imposed on a 7-5 jury recommendation. [FN478] Death sentences are more commonly *268 imposed on an 8-4 jury recommendation. [FN479] A 9-3 jury death recommendation still represents a significant sentiment for life and often comes to the Florida Supreme Court on proportionality review. [FN480] Not *269 surprisingly, when a jury recommends death by a 10-2, [FN481] 11-1, [FN482] or 12-0 [FN483] *270 vote the sentence is very likely to withstand proportionality review. Lopsided jury votes often, but not always, reflect considerable aggravation and a lack of mitigation. It was not until the 1990s that the Florida Supreme Court consistently recited the jury vote in death penalty decisions but still sometimes neglects to set it out. [FN484]

[FN477]. A 6-6 jury vote is a recommendation of mercy. See *Rose v. State*, 461 So. 2d 84, 85 (Fla. 1984); *Rose v. State*, 425 So. 2d 521, 524-25 (Fla. 1982) (reversing a death sentence and remanding for a new punishment phase because of the use of an "Allen charge" when the punishment phase jury reported they were deadlocked 6-6).

[FN478]. The Florida Supreme Court reduced death sentences to life on proportionality review after 7-5 jury death recommendations at: *Jones v. State*, 705 So. 2d 1364, 1365-67 (Fla. 1998), where a nineteen-year-old defendant's death sentence reduced to life with a single aggravating circumstance and substantial nonstatutory mitigation; *Hazen v. State*, 700 So. 2d 1207, 1208, 1214 (Fla. 1997), with a twenty-one-year-old's death sentence reduced to life because of a co-defendant's life sentence; *Mendoza v. State*, 700 So. 2d 670, 673 (Fla. 1997); *Sliney v. State*, 699 So. 2d 662, 667 (Fla. 1997); *Mungin v. State*, 689 So. 2d 1026, 1028 (Fla. 1997); *Besaraba v. State*, 656 So. 2d 441, 443 (Fla. 1995), where the death sentence of a mentally ill, alcoholic, homeless man was reduced to life; *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1991); also note *Nibert v. State*, 508 So. 2d 1, 2 (Fla. 1987), where one alcoholic man stabs another for no discernable reason; and *Lloyd v. State*, 524 So. 2d 396, 403 (Fla. 1988), only one aggravating circumstance approved to weigh against one statutory mitigating circumstance. But proportionality relief was denied with 7-5 death recommendations at: *Zarkrewski v. State*, 716 So. 2d 488, 491, 495 (Fla. 1998), cert. denied, 119 S. Ct. 911 (1999), as to two of the three murder victims; *Johnson v. State*, 696 So. 2d 317, 320, 326 (Fla. 1997), a murder for hire; *Spencer v. State*, 691 So. 2d 1062, 1066 (Fla. 1996), cert. denied, 118 S. Ct. 213 (1997), facts set out at *Spencer v. State*, 645 So. 2d 377, 380, 385 (Fla. 1994); *Ferrell v. State*, 686 So. 2d 1324, 1327, 1331 (Fla. 1996), where the main issue was the sentences of two co-defendants; *Orme v. State*, 677 So. 2d 258, 261 (Fla. 1996); *Larzalere v. State*, 676 So. 2d 394, 399 (Fla.), cert. denied, 117 S. Ct. 615 (1996); *Watts v. State*, 593 So. 2d 198, 201 (Fla. 1992), a botched robbery by a 22-year-old man with a 65 IQ; *Shere v. State*, 579 So. 2d 86, 89 (Fla. 1991), a 21-year-old with almost no mitigation; *Cave v. State*, 476 So. 2d 180, 186 (Fla. 1985). Note also the 7-5 jury vote in *Allen v. State*, 636 So. 2d 494, 496 (Fla. 1994), death reduced to life on grounds other than proportionality. And finally, note the objectionable use of an "Allen" charge in punishment phases where a jury is "hung" at 6-6 then returns a 7-5 death recommendation. See *Patton v. State*, 467 So. 2d 975, 979-80 (Fla. 1985).

[FN479]. Death sentences were reduced to life on proportionality grounds in the following 8-4 cases: *Woods v. State*, 24 Fla. L. Weekly S183 (Fla. Apr. 15, 1999); *Williams v. State*, 707 So. 2d 683, 684 (Fla. 1998), where death was reduced to life for an eighteen-year-old defendant with only one valid aggravating circumstance; *Puccio v. State*, 701 So. 2d 858, 859 (Fla. 1997), where death was reduced to life on a co-defendant analysis; *Sager v. State*, 699 So. 2d 619, 621 (Fla. 1997), an apparently unplanned murder by a drunk; *Wright v. State*, 688 So. 2d 298, 299 (Fla. 1996); *Terry v. State*, 668 So. 2d 954, 958 (Fla. 1996); *Morgan v. State*, 639 So. 2d 6, 9 (Fla. 1994); *McKinney v. State*, 579 So. 2d 80, 82 (Fla. 1991); *Tillman v. State*, 591 So. 2d 167, 168 (Fla. 1992). Proportionality relief was denied following 8-4 jury death recommendations in: *Cummings-El v. State*, 684 So. 2d 729, 731 (Fla. 1996); *Pietri v. State*, 644 So. 2d 1347, 1349 (Fla. 1994); *Brown v. State*, 644 So. 2d 52, 53 (Fla. 1994), two aggravating factors

and where the court was divided as to what mitigation was established; *Smith v. State*, 641 So. 2d 1319, 1320 (Fla. 1994); *Green v. State*, 641 So. 2d 391, 393 (Fla. 1994), where no mitigation was found; *Cardona v. State*, 641 So. 2d 361, 363 (Fla. 1994); *Melton v. State*, 638 So. 2d 927, 928 (Fla. 1994), where Antonio Melton had a previous first degree murder conviction; *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990), murder during a burglary with a dissent from Justice Parker Lee McDonald on proportionality; *Pardo v. State*, 563 So. 2d 77, 78 (Fla. 1990), where a Miami police officer murdered nine "drug dealers" and the jury recommended death sentences by votes ranging from 8-4 to 10-2; *Deaton v. State*, 480 So. 2d 1279, 1281 (Fla. 1986), where Jason Deaton was eighteen and his co-defendant got life; *Parker v. State*, 476 So. 2d 134, 136 (Fla. 1985), where three men kidnap and kill an eighteen-year-old female convenience store clerk; and *Herring v. State*, 446 So. 2d 1049, 1053 (Fla. 1984). See remands to the trial court at: *Mahn v. State*, 714 So. 2d 391 (Fla. 1998), one murder reversed under Tedder and a new punishment phase ordered on the other after an 8-4 jury death recommendation; *Reese v. State*, 694 So. 2d 678 (Fla. 1997); *Crump v. State*, 622 So. 2d 963 (Fla. 1993); *Harvard v. State*, 375 So. 2d 833 (Fla. 1977), cert. denied, 441 U.S. 956 (1979), but see the death sentence ultimately affirmed at *Harvard v. State*, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983).

[FN480]. See death sentences reduced to life in the following 9-3 cases: *Johnson v. State*, 720 So. 2d 232, 235, 239 (Fla. 1998); *Hardy v. State*, 716 So. 2d 761 (Fla. 1998), the murder of a deputy sheriff by a youth who later shot himself in the head; *Voorhees v. State*, 699 So. 2d 602, 606 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234, 1235 (Fla. 1996); *Chaky v. State*, 651 So. 2d 1169, 1171 (Fla. 1994), a domestic case; *Thompson v. State*, 647 So. 2d 824, 825-26 (Fla. 1994), a botched robbery case where death was reduced to life after all but one aggravating circumstance was struck on appeal; *Kramer v. State*, 619 So. 2d 274, 276 (Fla. 1993); *Farinas v. State*, 569 So. 2d 425, 432 (Fla. 1990), where Farinas killed his live-in companion of two years after she had moved in with her parents, and where one of three aggravating circumstances was struck on appeal to balance against one statutory mitigating circumstance. See also 9-3 cases where a death sentence was affirmed on proportionality review: *Pooler v. State*, 704 So. 2d 1375, 1377 (Fla. 1997), a domestic murder; *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997); *Banks v. State*, 700 So. 2d 363, 365 (Fla. 1997); *Jones v. State*, 690 So. 2d 568, 569 (Fla. 1996); *Finney v. State*, 660 So. 2d 674, 679 (Fla. 1995), cert. denied, 516 U.S. 1096 (1995); *Lowe v. State*, 650 So. 2d 969, 972 (Fla. 1994), a botched convenience store robbery; *Armstrong v. State*, 642 So. 2d 730, 734 (Fla. 1994), a botched robbery with no express but an implied discussion of proportionality; *Trepal v. State*, 621 So. 2d 1361, 1363 (Fla. 1993), a murder by poison case; *Dougan v. State*, 595 So. 2d 1, 3, 6-8 (Fla. 1992), with a strong Justice McDonald dissent arguing for life; *Gunsby v. State*, 574 So. 2d 1085, 1088 (Fla. 1991); *Freeman v. State*, 563 So. 2d 73, 75 (Fla. 1990), murder in a burglary with a prior murder; *Jennings v. State*, 453 So. 2d 1109, 1113 (Fla. 1984), vacated on other grounds, 470 U.S. 1002 (1985); *Harich v. State*, 437 So. 2d 1082, 1085 (Fla. 1983). See also remands at: *Franqui v. State*, 699 So. 2d 1312, 1316 (Fla. 1997), and *Franqui v. State*, 699 So. 2d 1332, 1334 (Fla. 1997).

[FN481]. See proportionality relief denied with 10-2 votes at: *Howell v. State*, 707 So. 2d 674, 677 (Fla. 1998); *Blanco v. State*, 706 So. 2d 7 (Fla. 1997); *Johnson v. State*, 660 So. 2d 648, 652 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996); *Jones v. State*, 652 So. 2d 346, 348 (Fla. 1995), 10-2 vote on one murder, 12-0 on the second victim; *Heath v. State*, 648 So. 2d 660 (Fla.), cert. denied, 515 U.S. 1162 (1994); *Sochor v. State*, 580 So. 2d 595, 599 (Fla. 1991), rev'd on other grounds, 504 U.S. 527 (1992), a no-body case; *Pardo v. State*, 563 So. 2d 77, 78 (Fla. 1990), where a Miami police officer murdered nine "drug dealers" and the jury recommended death sentences by votes ranging from 8-4 to 10-2; *Marek v. State*, 492 So. 2d 1055, 1057 (Fla. 1986). See also remands for reweighing in 10-2 cases: *Ferrell v. State*, 653 So. 2d 367, 369 (Fla. 1995).

[FN482]. For death sentences reduced to life after 11-1 jury votes see: *Snipes v. State*, 24 Fla. L. Weekly S191 (Fla. Apr. 22, 1999); *Jorgenson v. State*, 714 So. 2d 423, 425 (Fla. 1998), a domestic murder; *Robertson v. State*, 699 So. 2d 1343, 1345 (Fla. 1997); *Sinclair v. State*, 657 So. 2d 1138, 1139 (Fla. 1995). Also see *Urbin v. State*, 714 So. 2d 411, 422 (Fla. 1998), where the 11-1 vote is not reflected in the opinion. For 11-1 jury votes and death sentences affirmed after proportionality review see: *Consalvo v. State*, 697 So. 2d 805, 811 (Fla. 1996); *Willacy v. State*, 696 So. 2d 693, 694 (Fla. 1997); *Williamson v. State*, 681 So. 2d 688, 694 (Fla. 1996), with one dead victim and three other shot in the head who survive; *Henry v. State*, 649 So. 2d 1361, 1363-64 (Fla. 1994), a two victim domestic case and a five-year-old child victim, with an 12-0 jury vote in the other murder; *Mordenti v. State*, 630 So. 2d 1080, 1083, 1085 (Fla. 1994), a death sentence affirmed in proportionality review in a contract killing of Mordenti's wife; *White v. State*, 616 So. 2d 21, 25-26 (Fla. 1993), reducing a death sentence to life after concluding there was only

one valid aggravating circumstance against "substantial mitigating evidence in the record"; *Hayes v. State*, 581 So. 2d 121, 123 (Fla.), cert. denied, 502 U.S. 972 (1991); *Puiatti v. State*, 495 So. 2d 128, 130 (Fla. 1986). In *Richardson v. State*, 604 So. 2d 1107, 1108 (Fla. 1992), where the Florida Supreme Court found neither aggravating factor supported by the record dictating a life sentence.

[FN483]. The norm is to see death sentences affirmed on proportionality review with 12-0 jury recommendations: *Brown v. State*, 23 Fla. L. Weekly S514 (Fla. Oct. 1, 1998), a stabbing murder and robbery where the co-defendant plead to second degree murder and testified against Brown; *Wainwright v. State*, 704 So. 2d 511, 512 (Fla. 1998), six aggravating circumstances and no statutory mitigation; *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Burns v. State*, 699 So. 2d 646, 648 (Fla. 1997); *Lott v. State*, 695 So. 2d 1239, 1241 (Fla. 1997); *Meyers v. State*, 704 So. 2d 1368, 1369 (Fla. 1997); *Jones v. State*, 690 So. 2d 568-69 (Fla. 1996), with two victims; *Henyard v. State*, 689 So. 2d 239, 244 (Fla. 1996), with three victims; *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997); *Hill v. State*, 688 So. 2d 901, 903 (Fla. 1996), the 1994 Pensacola abortion clinic murders; *Cole v. State*, 701 So. 2d 845 (Fla. 1997), with two murder victims and a less involved co-defendant; *Geralds v. State*, 674 So. 2d 96, 98 (Fla.), cert. denied, 117 S. Ct. 230 (1996), where an earlier jury had also recommended death 12-0 at 601 So. 2d 1157 (Fla. 1992); *Barwick v. State*, 660 So. 2d 685, 688-90 (Fla. 1995), with six valid aggravating circumstances and very little mitigation; *Finney v. State*, 660 So. 2d 674, 679 (Fla. 1995); *Windom v. State*, 656 So. 2d 432, 435 (Fla. 1995), a case with three murder victims; *Jones v. State*, 652 So. 2d 346, 348 (Fla. 1995), 10-2 vote on one murder, 12-0 a second; *Henry v. State*, 649 So. 2d 1361, 1363 (Fla. 1994), domestic cases with two victims in different counties, two aggravating circumstances, and little mitigation, and a 12-0 jury vote in this case; *Whitton v. State*, 649 So. 2d 861, 864 (Fla. 1994), a case where both the victim and perpetrator were alcoholics; *Duncan v. State*, 619 So. 2d 279, 281 (Fla. 1993); *Rodriguez v. State*, 609 So. 2d 493, 497 (Fla. 1992); *Watts v. State*, 593 So. 2d 198, 201, 203-04 (Fla. 1992); *Jackson v. State*, 502 So. 2d 409, 410 (Fla. 1986), a non-shooter in a robbery; *Foster v. State*, 369 So. 2d 928, 929 (Fla. 1979), the murder of a prostitute's customer; *LeDuc v. State*, 365 So. 2d 149, 150 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). There are a few exceptions where life resulted from proportionality review in 12-0 cases: *Blakely v. State*, 561 So. 2d 560, 560 (Fla. 1990), a domestic case; *Thompson v. State*, 328 So. 2d 1, 2 (Fla. 1976), reducing the death sentence of a 17-year-old. See remands to the trial court at: *Jackson v. State*, 704 So. 2d 500, 503 (Fla. 1998), a Campbell remand on a female cop killer.

[FN484]. See *Urbin v. State*, 714 So. 2d 411, 416, 422 (Fla. 1998) (reducing a Duval County death sentence to life on proportionality review); *Pope v. State*, 679 So. 2d 710, 716 (Fla. 1996) (affirming a Polk County death sentence on proportionality); *Knowles v. State*, 632 So. 2d 62, 63, 67 (Fla. 1994) (reducing death to life even with two victims); *Hall v. State*, 614 So. 2d 473, 475, 481-82 (Fla. 1993). Also note *Hudson v. State*, 708 So. 2d 256 (Fla. 1998) and *Hudson v. State*, 538 So. 2d 829 (Fla. 1989), where the author has personal knowledge that both juries recommended death 9-3.