Florida's Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?

LaTour Rey Lafferty

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

LATOUR REY LAFFERTY**

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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.1 Only three other states permit jury overrides in capital

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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. PETERSBURG TIMES, Apr. 22, 1995, at A16.


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.
sentencing;\(^2\) for the most part, their statutes are modeled after Florida’s trifurcated capital sentencing scheme.\(^3\) For more than a decade, legal critics have asserted that the jury override violates the United States Constitution, the Florida Constitution, and public policy.\(^4\) However, the United States Supreme Court continues to uphold the validity of the jury override.\(^5\)

To understand the importance of the jury override, consider the Raleigh Porter case. On March 1, 1995, Florida Governor Lawton Chiles 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.\(^6\) Despite the jury’s unanimous recommendation of life imprisonment, the trial judge imposed a sentence of death.\(^7\) 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.\(^8\) 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.\(^9\) Whatever Raleigh Porter’s

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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).


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. Remarks the trial judge allegedly made to the clerk of the court during trial, as well as more recent remarks to the media, suggest 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.
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.¹⁰

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."¹¹ A sentence of death, Justice William J. Brennan has said, is "truly an awesome punishment ... [involving], by its very nature, a denial of the executed person's humanity."¹² 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.'"¹³ 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.¹⁴ However, under Florida's capital sentencing scheme, the

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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.


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").
ultimate power to impose this awesome punishment is vested in a single judge, not a twelve-member jury. 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." 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. Part II also illustrates the procedural application of the jury override and reviews 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. Finally, this Article concludes that the Governor's veto was appropriate because Florida's jury override provision represents a valuable balance between the judge and the jury; the provision thus ensures 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. The Supreme Court has since engaged in the systematic practice of "deregulating death" by essentially leaving "it to the states to administer their capital statutes as they see fit." In 1976, the Court laid the framework for this deregulation by holding that the

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).
19. See 408 U.S. at 239-40.
21. Mello, Jurisdiction To Do Justice, supra note 4, at 932.
newly created capital sentencing schemes of Florida, Georgia, and Texas complied with the dictates of *Furman* and thus passed constitutional muster.\(^\text{22}\) In 1984, the Supreme Court "made [it] clear" that there is no single right way to set up a state capital sentencing scheme.\(^\text{23}\) 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.\(^\text{24}\) Accordingly, the Supreme Court chose, within the parameters of *Furman*, to defer to the states in regard to regulation of capital sentencing.

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

The *Furman* Court in striking down the death penalty statutes of Georgia and Texas, held that they constituted cruel and unusual punishment in violation of the Eighth Amendment.\(^\text{25}\) Although subsequent decisions have held that capital punishment is not per se violative of either the United States Constitution\(^\text{26}\) or the Florida Constitution,\(^\text{27}\) courts have interpreted *Furman* as requiring all capital sentencing schemes to be "reasonable and controlled, rather than capricious and discriminatory."\(^\text{28}\) 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 and thus affording a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."\(^\text{29}\)


\(^\text{25}\) Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (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 has said that "[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).


\(^\text{27}\) See Raulerson v. State, 358 So. 2d 826, 829 (Fla.), cert. denied, 439 U.S. 959 (1978).

\(^\text{28}\) 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.").

\(^\text{29}\) *Furman*, 408 U.S. at 313 (White, J., concurring).
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," under which a death sentence was mandatory upon conviction of a capital felony unless the jury specifically voted for mercy. 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. 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." Because of the procedure's arbitrary and unbridled nature, Furman effectively invalidated Florida's mercy statute.

The Florida Legislature enacted the current capital sentencing scheme in 1972, complying with Furman by providing capital defendants with more judicial protection. Upon conviction or adjudication of guilt of a capital offense, the trial court conducts a separate sentencing hearing before the jury to determine whether the defendant should be sentenced to death or life imprisonment. 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. The jury must then consider the aggravating and mitigating circumstances and provide the trial judge with an advisory sentence. Irrespective of the jury's recommended sentence, the trial

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31. See State v. Dixon, 283 So. 2d 1, 6 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). 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 6 n.2.
32. Id. at 13.
33. Id.
34. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).
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
judge must independently weigh the aggravating and mitigating circumstances and determine the appropriate sentence.\(^{40}\)

Immediately after the Florida Legislature enacted the new sentencing scheme, the Florida Supreme Court upheld its constitutionality in *State v. Dixon*.\(^{41}\) 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.\(^{42}\) The court found that these steps provided "concrete safeguards beyond those of the trial system to protect [the defendant] from death where a less harsh punishment might be sufficient."\(^{43}\) 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."\(^{44}\)

The United States Supreme Court also approved Florida's capital sentencing scheme in *Proffitt v. Florida*.\(^{45}\) Upholding both the statute's facial constitutionality as well as its specific application to the instant case, the Court noted that the jury's role is only advisory and that the actual sentence is determined by the trial judge.\(^{46}\) Thoroughly analyzing the procedural application of the statutory scheme's safeguards, it found that "[o]n their face [they] appear to meet the 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), *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 non-statutory mitigating evidence. See *Miller v. State*, 373 So. 2d 882 (Fla. 1979).

43. *Dixon*, 283 So. 2d 1.7.

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.*


46. *Id.* at 253-59.
constitutional deficiencies identified in Furman.\textsuperscript{47} Furthermore, the Court noted that, while jury sentencing in capital cases served an important societal function, it was not constitutionally required.\textsuperscript{48} Thus, the \textit{Proffitt} Court tacitly approved of vesting the power to make the ultimate ethical judgment in the judiciary.\textsuperscript{49}

\textbf{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 \textit{Tedder v. State}.\textsuperscript{50} In \textit{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.\textsuperscript{51} 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.\textsuperscript{52} Upon immediate appeal, the Florida Supreme Court reversed the trial court's decision and announced what has come to be known as the \textit{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."\textsuperscript{53}

In \textit{Spaziano v. Florida},\textsuperscript{54} 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, the jury rendered an

\begin{itemize}
  \item \textsuperscript{47} Id. at 251.
  \item \textsuperscript{48} Id. at 252.
  \item \textsuperscript{49} In fact, the Court went on to state:
    \begin{quote}
      [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.\textsuperscript{51}
    \end{quote}
  \item \textsuperscript{50} 322 So. 2d 908 (Fla. 1975).
  \item \textsuperscript{51} Id. at 909.
  \item \textsuperscript{52} Id. at 910.
  \item 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.\textsuperscript{52}
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} 468 U.S. 447 (1984).
\end{itemize}
advisory sentence of life imprisonment. 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." Upon immediate appeal, the Florida Supreme Court reversed the sentence of death because of a sentencing error.\footnote{55} 

Upon remand, the trial judge once again overrode the jury’s recommended sentence of life and sentenced the defendant to death.\footnote{56} Affirming Spaziano’s sentence, the Florida Supreme Court held that a trial judge’s authority to sentence a defendant to death, despite a jury’s recommendation of life, was constitutionally valid.\footnote{57} 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.\footnote{58}

The United States Supreme Court affirmed Spaziano’s death sentence and rejected his argument that the jury override provision violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.\footnote{59} More importantly, however, the Court pronounced “the fundamental premise” that jury sentencing is not mandated in capital sentencing.\footnote{60} 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 determined by a judge.”\footnote{61} The
Court thus specifically upheld the constitutionality of Florida’s jury override provision.64

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 1991.65 Furthermore, the Supreme Court recently upheld Alabama’s jury override provision in Harris v. Alabama.66 In Harris, the defendant was convicted of capital murder for the solicited murder of her deputy sheriff husband.67 By a vote of seven to five, the jury recommended a sentence of life imprisonment.68 Under a sentencing scheme “much like that of Florida,” the trial judge independently weighed the aggravating and mitigating circumstances and imposed the death penalty.69

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.70 Moreover, Alabama courts had expressly declined to impose the Tedder standard upon Alabama’s capital sentencing scheme.71

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

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 church and community. Id.
70. Id.
Alabama statute did not violate the Eighth Amendment. 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." 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." 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, the defendant was convicted of capital murder for shooting and killing the owner of a small grocery store during a robbery. The Mississippi jury, which—unlike Florida juries—retains capital sentencing authority, sentenced him to death. 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 the jury's decision was not final; rather, it was reviewable on appeal. The defendant's death sentence was subsequently affirmed on direct appeal to the Mississippi Supreme Court. 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. While this prohibition does not directly implicate the ability of the trial judge to override a jury's recommendation of life "great weight" prior to imposing a sentence of death.

72. Harris, 115 S. Ct. at 1037.
73. Id. at 1035.
74. Id. at 1037.
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 state characterizes a jury's advisory role during the sentencing proceedings. In light of the advisory role of juries in the Florida scheme, *Caldwell* prescribes how the state may characterize this dual role to a jury.\(^8\)

Nevertheless, the Florida Supreme Court has found *Caldwell* inapplicable to Florida's capital sentencing scheme; it reasoned that *Caldwell* did not take into consideration an explicit statutory reference to the advisory nature of the jury's role.\(^8\) 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*.\(^8\) 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.\(^8\)

However, in *Mann v. Dugger*,\(^8\) the Eleventh Circuit Court of Appeals held that *Caldwell* was indeed applicable to capital sentencing in Florida.\(^8\) 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."\(^8\) 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."\(^8\) The court held that such a sentence violates the Eighth Amendment's requirement of reliability in capital sentencing.\(^8\) 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.\(^8\) Moreover, the court did not read the Florida Supreme Court's cases

\(^{81}\) 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.
as necessarily holding that a *Caldwell* violation could never occur in Florida.\(^9\) 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.\(^9\)

The application of *Caldwell* is a two-step process.\(^9\) 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.”\(^9\) The court measures this effect by specific reference to the role assigned to the jury under state law.\(^9\) 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.”\(^9\) 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.\(^9\) 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.”\(^9\) 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

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


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”).
recommendation of death. In reality, however, jury recommendations of life comprise the vast majority of override cases. Between 1972 and 1988, one of every five death sentences in Florida involved an override of a jury's life recommendation. This seems all the more astounding when one realizes that Florida juries are considered to be "among the most death-prone."

Yet this statistic is considerably 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." The study, known as the Capital Jury Project (CJP), is an attempt to analyze how capital juries decide between life or death sentences. The intent of the 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.

Although the 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.

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 requires only 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).
105. Id.
decisions."106 According to the researchers, the results showed that, "[u]nmistakably, jurors placed responsibility for the defendant's punishment elsewhere."107 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.108 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.109 In 1991, the reversal rate for jury overrides was an astonishing ninety-one percent.110 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.111 This argument appears logical from an administrative perspective if only because the court almost always reverses override cases.112 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."113 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

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.
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.
widely considered an "authority on the law of capital punishment." Professor Mello argues that, notwithstanding express rulings to the contrary, the Florida jury override violates both federal and state constitutions. Professor Mello asserts that Eighth Amendment concerns of substantial unreliability in capital sentencing, concerns identified by the Supreme Court in \textit{Caldwell}, are equally applicable to Florida's dual sentencing role involving trial level, rather than appellate level, judicial review of the jury's recommendation. Under this view, capital sentencing schemes that divide sentencing responsibility between a judge and jury are inherently unconstitutional.

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. Such downplaying of the jury's role creates substantial unreliability in capital sentencing and thus implicates Eighth Amendment concerns. 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 \textit{Caldwell}. Furthermore, Professor Mello argues, it makes no difference whether 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. 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."

\begin{itemize}
  \item 114. See Kilpatrick, \textit{supra} note 10, at A17.
  \item 115. See Mello, \textit{Jurisdiction To Do Justice}, \textit{supra} note 4, at 927-38; Mello, \textit{Taking Caldwell Seriously}, \textit{supra} note 4, at 286-90.
  \item 116. Mello, \textit{Taking Caldwell Seriously}, \textit{supra} note 4, at 299-300. In \textit{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 its 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 reversibility 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. \textit{Id.} at 299 (citing \textit{Caldwell} v. Mississippi, 472 U.S. 320, 330-33 (1985)).
  \item 117. See \textit{id.} at 286.
  \item 118. \textit{Caldwell}, 472 U.S. at 330.
  \item 119. \textit{ld.}
  \item 120. Mello, \textit{Taking Caldwell Seriously}, \textit{supra} note 4, at 303.
  \item 121. \textit{ld.}
  \item 122. \textit{ld.} at 310.
\end{itemize}
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. Caldwell prohibits the imposition of a death sentence by a jury which was misled by the state as to its role in capital sentencing. 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. In Florida, this means simply that the jury should be informed of both the divided sentencing role and the "great weight" the judge must afford the jury's recommendation.

Professor Mello also asserts 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." 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. Accordingly, a judge could not "increase" or override a jury's "recommendation" of a lesser sentence through a "lesser conviction."

Ironically, this tenet also meant that the death penalty could only be avoided through an acquittal. To remedy this problem, the Florida Legislature amended its capital sentencing scheme to make the imposition of death discretionary through a recommendation of "mercy." Thus, for the century prior to Furman, "Florida law required the jury to make the capital sentencing decision." "[F]or the purposes of state constitutional doctrine," Professor Mello concludes that this process was the "functional equivalent of jury sentencing for capital offenses." Prior to Furman, then, "a Florida jury's verdict for life
was clearly and explicitly and unquestionably final."\textsuperscript{134} 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.\textsuperscript{135} Furthermore, the Florida Constitution has never mandated that capital sentencing be vested in a jury.\textsuperscript{136} Therefore, although Professor Mello posits that Florida's death penalty system prior to \textit{Furman} utilized the "functional equivalent of jury sentencing in capital offenses,"\textsuperscript{137} there is simply no basis for this assertion in the state constitution.

\section*{C. Public Policy}

A final argument maintains that the Florida Legislature should repeal the override provision as a matter of public policy.\textsuperscript{138} It is widely accepted that retribution is the primary, if not the sole, justification for the death penalty.\textsuperscript{139} 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."\textsuperscript{140} 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";\textsuperscript{141} it is a reflection of the community's conscience.\textsuperscript{142}

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 \textit{Harris} and \textit{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

\begin{thebibliography}{99}
\bibitem{134} \textit{Id.} at 969.
\bibitem{135} \textit{See} Bütch v. Buchanan, 131 So. 151, 157 (Fla. 1930) ("Capital punishment . . . is prescribed by statute [and] adjudged by the court.").
\bibitem{136} \textit{See} id.
\bibitem{137} \textit{See} Mello, \textit{Jurisdiction To Do Justice}, supra note 4, at 968.
\bibitem{138} \textit{See} Mello & Robson, \textit{Judge Over Jury}, supra note 4, at 75.
\bibitem{139} \textit{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. \textit{See} Gregg v. Georgia, 428 U.S. 153, 186 (1976).
\bibitem{140} \textit{Harris}, 115 S. Ct. at 1038 (Stevens, J., dissenting) (citations omitted).
\bibitem{141} \textit{Id.} at 1039.
\bibitem{142} \textit{Id.}
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. 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." 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." 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." The Court reasoned that a trial judge is better able to impose capital sentences similar to those imposed in analogous cases and thus provide substantial reliability in capital sentencing, because the trial judge is simply more experienced than a jury.

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. 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. 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. 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.

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. 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. 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, would have abrogated the requirement that the judge give the jury’s recommendation “great weight.” If the legislation had been signed into law, it would have rendered the jury’s recommendation “largely symbolic”; no longer would it have been “chimerical” to suppose that a jury’s recommendation is only advisory under Florida law.

149. Id.
150. See supra text accompanying notes 41-49, 54-74.
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 Carlton, supra note 99.
155. Governor’s Veto, supra note 18, at 2.
156. See Mello, Taking Caldwell Seriously, supra note 4, at 310.
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. 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.

Most importantly, however, this package of legislation provided for a nonbinding advisory sentence by the jury. 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 that the jury's advisory recommendation is nonbinding. 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." The amendment would have authorized the trial judge to "overrule the jury in almost any circumstance" because, as Governor Chiles noted in his veto, the advisory sentence "would carry virtually no weight at all." It appears that the Florida Legislature interpreted the Supreme Court's recent decision in *Harris v. Alabama* 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 mandatory in order to bring a capital sentencing scheme into conformity with Eighth


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.

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


Amendment dictates. Committee Substitute for 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." Critics of the jury override certainly must have been appalled at the Legislature's nearly successful attempt to relegate the jury's advisory sentence 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. 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." 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. 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

Perhaps the answer can be found by analyzing the impact this legislation would have had on the previously identified criticisms of the jury override. From an administrative perspective, the legislation might well have achieved the desired result of judicial efficiency. 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. Despite the fact that the United States Supreme Court has already upheld the validity of jury override schemes without the

165. Id. at 1035.
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 (emphasis added).
169. See supra text accompanying notes 138-44.
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.
Tedder "'great weight'" and "'clear and convincing'" facts standard of deference, the bill represented such a basic change in Florida's capital sentencing scheme that it would surely have engendered some constitutional litigation. 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." However, the Governor also indicated that he supported the bill's other provisions, which he said would help "streamline" Florida's death penalty process. 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. 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. Nevertheless, this argument, although certainly viable, would not likely have been adopted by the Florida Supreme Court.

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. These critics suggest repealing the override. Governor Chiles, The Florida Bar, Florida's 1991 Criminal Justice Task Force

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.
178. See supra text accompanying notes 135-37.
179. See, e.g., Mello & Robson, Judge Over Jury, supra note 4, at 47-51.
on Sentencing, and, it would seem, twenty-nine of the thirty-seven states with the death penalty agree. 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." 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. 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. 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 impasioned or misguided jurors and overzealous trial judges. Governor Chiles' assessment bears repeating: "The present law represents a unique and delicate balance of a jury's expression of community values and a judge's expertise regarding application of the law."

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." 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

181. *Bill Tramples on Morality*, supra note 16, 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.
184. Governor's Veto, supra note 18, at 1-2.
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";\(^{186}\) 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*.\(^{187}\) 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.\(^{188}\)

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.\(^{189}\) 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.

In making the decision to veto Committee Substitute for House Bill 1319, Governor Lawton Chiles said that he "trusts jurors."\(^ {190}\) 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.

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\(^{186}\) 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.

\(^{190}\) Governor's Veto, *supra* note 18, at 2.
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 is both.