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A STEP TOWARD UNIFORMITY: REVIEW OF LIFE SENTENCES IN CAPITAL CASES

RON BERGWERK

I. INTRODUCTION

A resurgence of interest in the existence and application of Florida's death penalty resulted from the United States Supreme Court's decision in *Furman v. Georgia*.¹ *Furman*, in effect, struck down Florida's existing capital punishment statute, thus prompting the 1973 Florida Legislature to enact the first post-*Furman* capital punishment law in the nation.² This did not, however, end the debate over the death penalty.

Capital punishment was the subject of intense discussion in the proceedings of the Constitution Revision Commission.³ The commission considered two proposals affecting the death penalty in Florida. Proposal No. 33 sought to prohibit capital punishment entirely. Proposal No. 248 was designed to provide review by the Florida Supreme Court of cases in which life sentences were given when the death penalty could have been imposed. Proposal No. 248 was accepted for submission to the electorate;⁴ Proposal No. 33 was not.⁵ This note will discuss these proposals, the commission's action on them, and the potential effect of Proposal No. 248 should it be adopted as an amendment to the Florida Constitution.

II. ATTEMPT AT ABOLITION

Eight hundred proposals were originally submitted to the Constitution Revision Commission.⁶ The list was narrowed to 232 by commission vote. These selected proposals were then referred to various committees within the commission for further deliberation. Proposal No. 33 was sent to the Declaration of Rights Committee and read as follows:

1. 408 U.S. 238 (1972).

2. FLA. STAT. § 921.141 (1977); see Erhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L.C. & P.S. 10 (1973). The United States Supreme Court upheld the new statute in *Proffitt v. Florida*, 428 U.S. 242 (1976).

3. At the time the commission convened in July, 1977, 93 persons were awaiting execution in Florida. They represented nearly one-quarter of the condemned prisoners in the entire country. Transcript of Fla. C.R.C. proceedings 6 (Dec. 8, 1977) (remarks of Commissioner Collins).

4. 25 Fla. C.R.C. Jour. 355 (Jan. 27, 1978).

5. 14 Fla. C.R.C. Jour. 229 (Dec. 8, 1978).

6. Fla. C.R.C., Summary of Proposed Revisions to the Florida Constitution (Sept. 27, 1977) (suggestions submitted by the public).

Excessive punishments.—Excessive fines, cruel or unusual punishment, *capital punishment*, attainder, forfeiture of estate, indefinite imprisonment and unreasonable detention of witnesses are forbidden. *However, the legislature may provide by law that crimes involving the heinous, atrocious or cruel killing of another shall be punished by life imprisonment without parole, subject to revocation or alteration only through the exercise of the clemency power of the state upon proof of innocence.*⁷

The Declaration of Rights Committee was composed of Chairman LeRoy Collins,⁸ Vice-Chairman Freddie Groomes,⁹ and Commissioners Dempsey Barron,¹⁰ Dexter Douglass,¹¹ Richard Moore,¹² and Jon Moyle.¹³ After some debate and a memorandum from Dennis Wall of the attorney general's office on the federal constitutionality of a nonparole provision,¹⁴ the proposal passed four to two. Commissioners Barron and Douglass voted against it.¹⁵

Proposal No. 33 came before the full commission on December 8, 1977. The debate on the proposed prohibition of the death penalty was limited to one hour for each side.

Former Governor Collins—a man with personal experience with the death penalty—was the first to speak.¹⁶ He saw the issue as “more than a matter of choice between life or death in the electric chair” and as “a series of questions of our state's character.”¹⁷ He argued that the death penalty is, at best, an unproven deterrent to crime and that its application has been “freakish.” He maintained that the taking of life by the state is inhuman and unworthy of the state. He pointed out too that the people of Florida have never had a chance to vote on the issue.¹⁸

Collins' impassioned and eloquent statement noted that of the 196 people executed at Raiford since 1924, all have been men, and almost all have been black. He said that of roughly one thousand

7. The proposal would have amended FLA. CONST. art. I, § 7. Italicized portions represent suggested changes.

8. Former Governor, State of Florida.

9. University educator and administrator.

10. State senator, attorney.

11. Attorney.

12. Retired president of Bethune-Cookman College.

13. Attorney.

14. Memorandum from Dennis Wall, Attorney General's Office, to Chairman Collins (Oct. 19, 1977).

15. Fla. C.R.C., Declaration of Rights Committee Minutes 8 (Oct. 27, 1977).

16. Collins served as Governor of Florida from 1955 through 1960. During that time he signed 22 death warrants.

17. Transcript of Fla. C.R.C. proceedings 5 (Dec. 8, 1977).

18. *Id.* at 7.

murders annually in the state, only about twenty persons end up on death row. The burden, according to Collins, falls on the poor and the weak, on those who must rely on overworked public defenders to represent them.

Collins also said that the death penalty is imposed unevenly across the state. For instance, a superior State's attorney in Jacksonville was disproportionately successful in convicting defendants and having them sent to their deaths. Collins "admire[d] his efficiency and his competence," but the result for the defendant was "freakish."¹⁹ He spoke of one judge opposed to capital punishment who avoided trying first-degree murder cases. This resulted in an increased likelihood that these defendants would receive the ultimate penalty from a judge without such reservations. "This," said Collins, "is not normal and proper administration of a system of justice. It's freakish because of the circumstances and the conditions when the State is confronted with trying to administer an inhuman and very barbarous act of penalty."²⁰

Collins recounted the details of several crimes in recent Florida history to show that imposition of the death penalty has been freakish and arbitrary. He spoke of his own feelings as a former Governor who signed death warrants, about how he had performed a terrible duty that he hoped to spare future Governors. After pausing to allow the squeamish to leave the chamber, he read a grisly eyewitness account of an execution by electrocution. After citing the views of prominent Floridians who recommended abolition of capital punishment, Collins concluded:

There's so much we can do in the administration of our system of justice to make it more fair, to eliminate delays, to make it something that we can be proud of. . . . Let's don't try to cover up our failure to do that by reeking [*sic*] out vengeance on this poor group of 20 people a year that are down there waiting for death, down there because they happen to be the dregs of our society

. . . .
They deserve our understanding. They challenge our sense of moral responsibility. They challenge our sense of right and justice and our sense of love and care for seeing [that] this State does the right thing.²¹

Following a brief period of questioning, Attorney General Robert Shevin gave the principal speech in opposition to Proposal No. 33.

19. *Id.* at 15.

20. *Id.* at 16.

21. *Id.* at 35.

He focused on the death penalty from a different perspective: "I heard a great deal about the people on death row. But . . . I heard nothing about the innocent victims of violent crime."²² Shevin graphically described the heinous nature of some crimes the perpetrators of which are on death row. If the method of execution is cruel, he argued, then the method could be changed, as Texas has done, to allow a painless, lethal injection.

Shevin further maintained that it would be folly to put the proposal on the ballot. Polls consistently indicate, he said, that between 74 and 77% of Floridians favor the death penalty.²³ Should the people wish to change the law, they could and would do so through the legislature. But such a change does not belong in the constitution. Shevin noted that none of the sixteen states which prohibit capital punishment do so in the state constitution. All have banned the penalty by statute. In fact, in California, after the state supreme court struck down that state's death penalty, the people overwhelmingly approved a constitutional amendment to reinstate it.

The attorney general described the death penalty as society's expression of moral outrage at particularly heinous crimes. He argued that the death penalty is the only effective deterrent—to those who have already killed and to those who might kill alike. It is society's justifiable homicide, its collective self-defense.

As for Collins' charge of "freakishness," Shevin responded:

Unfortunately, the entire criminal justice system suffers from some freakishness. That's not a reason to throw out the entire criminal justice system, and it is not a reason to throw out the death penalty [Collins] says it's freakish because only 20 out of a hundred get it That means it's not freakish. . . . That means that the public defenders and the court-appointed counsel are doing a good job²⁴

Shevin said that it is not freakish to consider aggravating and mitigating circumstances when the jury reconvenes to recommend whether the defendant should live or die. The death penalty may have been inequitably applied in the past, but Florida's post-*Furman* law is fair.²⁵ "[T]he human capacity for evil, heinousness and depraved behaviour make[s] the death penalty necessary."²⁶

22. *Id.* at 40.

23. *Id.* at 42.

24. *Id.* at 50.

25. The Supreme Court in *Proffitt v. Florida* said that the present Florida system "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." 428 U.S. 242, 259 (1976).

26. Transcript of Fla. C.R.C. proceedings 56 (Dec. 8, 1977).

The death penalty, Shevin concluded, is a tragic necessity.

The debate continued, with Richard Moore speaking briefly about the racial aspect of past application of the death penalty and asking that the commission give the people an opportunity to decide. William James responded by commenting on the lack of due process accorded to murder victims and the failure to consider their suffering.²⁷ Yvonne Burkholz stated that she had opposed capital punishment until she witnessed a murder in the school in which she taught.²⁸ Edward Annis, a physician, described the condition of some murder victims' bodies. Commissioner Barron displayed an organized crime "textbook" on murder techniques and spoke of sociopaths and thrill killers, such as Utah's Gary Gilmore, comparing them to "rattlesnakes" that must be eliminated.²⁹ John Ryals also spoke in favor of capital punishment,³⁰ while Commissioners Moyle and Groomes expressed their support of the proposal.³¹

A former chief justice of the Florida Supreme Court, B.K. Roberts, discussed the elaborate procedural protections afforded the accused between the time he is convicted and the time the death warrant is signed by the Governor.³² He pointed out that in death penalty cases, the supreme court does not just examine the record for error in the trial court but provides a complete review.³³ Roberts also expressed fear that the clemency provision of the proposal would preclude absolute assurance that "gangsters" would be kept locked up permanently.

Commissioner Jesse J. McCrary, Jr.³⁴ observed that the issue before the commission was whether the people would be allowed to decide the fate of the death penalty. Barron agreed that the question should go to the people. He added that, although opposed to the proposal in theory, he would vote to reconsider if his negative vote was decisive in defeating Proposal No. 33.³⁵

27. *Id.* at 62-65. Mr. James is a state representative from Delray Beach.

28. *Id.* at 66-69. Ms. Burkholz is a teachers' union official from Miami.

29. *Id.* at 80-85.

30. *Id.* at 74. Mr. Ryals is a state representative from Brandon.

31. *Id.* at 70, 74-80.

32. Transcript of Fla. C.R.C. proceedings 90-91 (Dec. 8, 1977).

33. FLA. APP. R. 6.16 provides that where the death penalty has been imposed by the trial court, "the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." Under FLA. CONST. art. V, § 3(a), appeals from a conviction resulting in the death penalty go directly to the supreme court. *See also* Delap v. State, 350 So. 2d 462 (Fla. 1977).

34. A black attorney and former member of the Industrial Relations Commission, Miami. Governor Askew appointed Mr. McCrary secretary of state in July, 1978, to fill the vacancy created by Bruce Smathers' resignation.

35. Transcript of Fla. C.R.C. proceedings 105 (Dec. 8, 1977).

After the debate ended, though, the proposal was put to a roll-call vote and it failed twenty-six to ten.³⁶

III. REVIEW OF LIFE SENTENCES

Undaunted, the proponents of Proposal No. 33, led by McCrary, offered an alternative proposal to the commission. In its original format, Proposal No. 248 sought to amend article V, section 3 of the Florida Constitution as follows:

SECTION 3. Supreme court.—

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts *where the death penalty is imposed or could have been imposed* ~~imposing the death penalty~~ and from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.³⁷

McCrary's proposal came before the commission on January 26, 1978. The author explained that it was an attempt to ensure a semblance of uniformity in the imposition of the death penalty so that persons who commit similar crimes will receive similar sentences. McCrary felt that the best way to accomplish this was to require that the same court review all convictions of first-degree murder.³⁸ Under the present scheme, direct appeals from a life sentence go to the direct courts of appeal while death penalty cases go directly to the Florida Supreme Court.³⁹

Chief Justice Ben Overton, head of the Judiciary Committee, pointed out that the desired change could already be accomplished by statute under article V, section 3(b)(2) and that the supreme

36. 14 Fla. C.R.C. Jour. 229 (Dec. 8, 1977).

37. Italicized language represents proposed additions; struck-through language represents proposed deletions. A similar provision providing for mandatory supreme court review of cases in which the death penalty could have been, but was not, imposed had been one of the 800 original proposals considered by the commission. It did not advance to the narrowed list of 232 and so was not sent to the Judiciary Committee, which considered all initial proposals to amend article V. McCrary was the only member of the Judiciary Committee who voted in favor of Proposal No. 33.

38. First-degree murder is the only capital felony in Florida.

39. Justice Ervin's dissent in *State v. Dixon*, 283 So. 2d 1, 18 (Fla. 1973), pointed out that since the supreme court did not review life cases as well, it was therefore unable to monitor uneven sentencing. However, in a footnote to *Proffitt v. Florida*, the question of an unbalanced view by the reviewing court was addressed by the United States Supreme Court: "[T]his problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty." 428 U.S. 242, 259 (1976).

court already looks at cases in which one codefendant is sentenced to death while another receives life imprisonment.⁴⁰

Two particularly vexing problems with the proposal were raised by Collins and Barron. Collins observed that the proposal did not remedy the situation in which a person, sentenced to life, appeals his conviction, and on retrial is again convicted but then is sentenced to die.⁴¹ Barron's objection was to the plain meaning of the proposal, which was that the supreme court would automatically review any trial in which the state had asked for the death penalty, regardless of whether the defendant was convicted of first-degree murder.⁴²

In addition, Barron thought that an automatic appeal might expose a defendant to greater jeopardy. For instance, someone tried for first-degree murder but found guilty of only manslaughter might have his conviction involuntarily reviewed and possibly overturned. He then would have to face a new trial that threatened a death sentence.⁴³

To answer these objections, McCrary and Collins offered amendments to the proposal which would give the convicted person the *right* to appeal to the supreme court. Appeal would not be automatic. They also suggested limiting the potential sentence on retrial. The proposal in its final form read as follows:

SECTION 3. Supreme court.—

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and, *upon application of the defendant, shall hear appeals from final judgments of convictions where the death penalty could have been imposed, from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution. If an appeal from a conviction in which a life sentence was imposed*

40. Transcript of Fla. C.R.C. proceedings 219 (Jan. 26, 1978). Article V, § 3(b)(2) provides that the supreme court, "[w]hen provided by general law, shall hear appeals from final judgments and orders of trial courts imposing life imprisonment or final judgments entered in proceedings for the validation of bonds or certificates of indebtedness."

In contrast to Chief Justice Overton, Supreme Court Justice Joseph Hatchett has long been a supporter of the theory that all potential death cases should be reviewed. He reinforced his position at a recent seminar held at Florida State University College of Law on May 17, 1978. Justice Hatchett stated that he supported Proposal No. 248. He said that despite the possible increase in workload, this was the only equitable way to review the uniformity of the application of the death penalty in Florida.

41. Transcript of Fla. C.R.C. proceedings 223 (Jan. 26, 1978).

42. *Id.* at 225-26.

43. *Id.*

results in retrial, the life sentence shall be the maximum penalty imposed on retrial. [Italicized portions represent suggested changes.]

Shevin criticized Proposal No. 248 as a broad expansion of supreme court jurisdiction. He said he did not see how a life sentence for first-degree murder so differed from a life sentence for armed robbery that they should lead to divergent avenues of appeal.⁴⁴ In any event, he felt that the legislature should be the one to make this change.

W.O. Birchfield reacted sharply to Shevin's response and, in support of the proposal, stated that the supreme court should "get the flavor of some of the factors people considered in not imposing the death penalty. . . . I think we just outsmarted ourselves by not making them [the supreme court] look at both sides. If that means more work, let them come to work earlier and leave later."⁴⁵

Chief Justice Overton, who also felt that it was in the legislature's domain to make such a change, responded that he would not argue against the proposal on the basis that it would generate an increased workload for the supreme court. Rather, in his opinion, the proposal was just too inflexible. For instance, Governor Collins' amendment on resentencing was already part of federal protection against double jeopardy. There was no need to put "black letter law" into the Florida Constitution.⁴⁶ As for looking at both sides, Overton said the supreme court sometimes looks at cases in the district courts of appeal in which the death penalty could have been imposed but was not. Shortly after Overton's remarks, a roll-call vote was taken, and Proposal No. 248 was passed.⁴⁷

Several months later, as the commission was concluding its business, Overton introduced an amendment to change the word "shall"

44. See generally FLA. STAT. § 812.13 (1977).

45. Transcript of Fla. C.R.C. proceedings 47-48 (Jan. 27, 1978).

46. *Id.* at 48. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court held that a judge could, after a retrial, impose a sentence greater than that imposed the first time. His reasons for doing so must "affirmatively appear" in the record, however, to prevent "judicial vindictiveness" exerting a chilling effect on a defendant's rights to appeal. In *Roberson v. State*, 258 So. 2d 257 (Fla. 1971), the Florida Supreme Court interpreted *Pearce* to apply even when a different judge sentences the second time. Further, a defendant who was sentenced to life imprisonment at his first trial cannot at a second trial be sentenced to death unless the record shows that he has committed a more severe act or unless the evidence is more persuasive. Since death is reserved under Florida law for those who commit particularly cruel or heinous crimes, this requirement sets a high standard for imposition of a harsher punishment than life imprisonment. Nonetheless, even though the current Florida Supreme Court might rule differently on the question, Chief Justice Overton does not appear to be entirely accurate.

47. The proposal passed 20-6. 25 Fla. C.R.C. Jour. 355 (Jan. 27, 1978).

in the proposal to "may," in effect granting only discretionary jurisdiction to the supreme court.⁴⁸ He estimated that Proposal No. 248 as formulated would create at least 150-200 merit appeals per year. Because there is a limit to how many merit cases the supreme court can handle, Overton anticipated that the court would be taking many of the appeals without oral argument. He claimed that the result for many petitioners would be a hearing inferior to that currently available in the district courts of appeal. In addition, Overton pointed out that should the United States Supreme Court abolish the death penalty, the Florida Supreme Court would be left with all the life cases. Thus the effects of the proposal would linger after its rationale had gone.⁴⁹

McCrary was the only one to speak in opposition. He dismissed the claim of case overload and insisted that "the court cannot understand what is a bad murder or what is a less than bad murder unless it reviews each and every case."⁵⁰ McCrary prevailed, and the amendment failed twenty-four to nine.⁵¹

IV. ANALYSIS

Had Proposal No. 248 not been introduced directly to the commission but been considered initially as one of the 232 selected proposals, it most likely would have been defeated since it would have been referred to the Judiciary Committee for further study.⁵² The only members of the Judiciary Committee who voted in favor of Proposal No. 248 before the full commission were McCrary, Groomes, and J.B. Spence.⁵³ Voting against it were Chairman Overton, Roberts, and Moore. (William Clark did not vote.⁵⁴) Minutes of the Judiciary Committee meetings reveal that virtually all the votes taken were unanimous.⁵⁵ It is therefore unlikely that the strong opposition of the chairman, as evidenced by the floor debate, would have been overcome by the supporters of the proposal. This conclusion is buttressed by the committee's apparent concern over the jurisdiction of the supreme court—not surprising since the commit-

48. Transcript of Fla. C.R.C. proceedings 247 (Mar. 7, 1978).

49. *Id.* at 247-49.

50. *Id.* at 250.

51. 27 Fla. C.R.C. Jour. 533 (Mar. 7, 1978).

52. See note 37 *supra*.

53. Attorney, Miami.

54. Insurance executive, West Palm Beach; vice-chairman, Judicial Qualifications Commission.

55. See, e.g., Fla. C.R.C. Judiciary Committee Minutes 2-4 (Oct. 17, 1977); Fla. C.R.C. Judiciary Committee Minutes 2-4 (Oct. 25, 1977).

tee was chaired by the current chief justice and had a retired chief justice as a member.

Should Proposal No. 248 be passed by the electorate, what will be its burden on the supreme court? McCrary said before the commission that in a year's period during 1976-77, 274 people were tried in the state for capital crimes. Were they all to appeal to the supreme court, the increase in the number of filings before the court would be but 12%.⁵⁶

This analysis, however, is somewhat misleading, for it looks only at the number of filings without taking into account their relative weight. Petitions for certiorari can be summarily denied, while many original petitions are dismissed for lack of jurisdiction. In contrast, a first-degree murder trial almost invariably produces a lengthy record. Because of the penalty involved, the court must examine the record diligently.⁵⁷ While the court may not feel the same obligation to examine the life cases as closely as the death sentence cases, the records those cases produce will be no less voluminous since the trial will have gone to the second stage of sentence determination.

It is probably more helpful to look at the speed with which the court has been able to process the death sentence cases. In the first forty-five months of Florida's new death penalty statute, there were approximately 400 convictions of first-degree murder. Of these, 101, about one-quarter, resulted in a death sentence.⁵⁸ As of fall, 1977, the court had processed forty-two of these cases.⁵⁹ This is an average of roughly one per month, or about half the current rate of filing.⁶⁰

56. Transcript of Fla. C.R.C. proceedings 217 (Jan. 26, 1978). In the fiscal year 1977, there were 2,193 filings in the supreme court. This figure includes appeals, petitions for writs of certiorari, and original petitions, but not requests for rehearings. Twenty-third Annual Report of the Judicial Council of Florida at 18 (Feb. 1, 1978).

57. The Supreme Court noted approvingly in *Proffitt v. Florida* that the Florida Supreme Court was reducing to life approximately one-third of the death cases it heard. 428 U.S. 242, 253 (1976). The ratio has remained substantially unchanged, with 17 of 42 dispositions ordering a sentence reduction. Interview with Raymond L. Marky, Jr., assistant attorney general, in Tallahassee. (Mr. Marky handles most of the state's death cases.)

58. Interview with Raymond L. Marky, Jr., assistant attorney general, in Tallahassee. There were approximately 1,600 indictments for capital felonies during that time. Fully three-quarters of these ended in acquittal, conviction on a lesser charge, or were nolle prossed. *Id.* These figures suggest that if one wishes to accuse the system of arbitrariness or freakishness, the problem is as much with those who are not convicted at all as with those who are sentenced to die. However, the Supreme Court in *Proffitt v. Florida* said that prosecutorial discretion, jury consideration of lesser offenses, and clemency and commutation procedures are an acceptable part of the criminal justice system. Erring on the side of mercy and giving the defendant a break is not unconstitutional. 428 U.S. 242, 254 (1976).

59. Interview with Raymond L. Marky, Jr., assistant attorney general, in Tallahassee.

60. Since it can take up to four months for the record to be completed, the briefs filed, and oral arguments completed, some of the undisposed-of cases have not matured. Some of

In light of the staggering backlog of cases of all types before the court,⁶¹ it is hard to see how the court could handle a capital felony caseload that may multiply fourfold.

Pertinent to this analysis is an article written last year by the new chief justice, Arthur England, entitled *Quantity Discounts in Appellate Justice*.⁶² England assumes a theoretical work year of 1,920 hours, based on an eight-hour day for five days, times forty-eight weeks. However, he calculates that "the absolute minimum time required for performance of the duties of a Florida Supreme Court Justice each year appears to be 3,321 hours." This works out to 240 work days, each fourteen hours long, 365 days at nine hours, or 415 eight-hour days.⁶³ "Nonetheless," England concluded,

it appears beyond dispute that an unlimited consideration of each cause by each justice is more an historical fiction than a current fact. Whatever people expect from their high court justices, they should carefully assess whether the quantity of work they now assign their justices does not cause a quantity "discount" in the end product they receive.⁶⁴

"[I]t is apparent," said the Supreme Court in *Proffitt v. Florida*, "that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency."⁶⁵ Whatever the court's workload, one hopes that the justices will continue in this vein. However, it is apparent that, should the proposal pass, the time necessary to review life sentences will have to come from somewhere. There is a real danger that, as time goes on and the number of convictions increases, the function of the Florida Supreme Court increasingly will become that of a court of criminal appeals.

A presently unestimable factor is the number of persons who

the other cases involve common questions and could conceivably be disposed of simultaneously.

Also, it should be noted that the number of dispositions would be higher but for the effect of *Gardner v. Florida*, 430 U.S. 349 (1976), which granted a convicted capital defendant the right to examine and rebut the contents of his previously confidential presentence investigation report. All death sentences had to be reexamined in light of *Gardner* to determine whether confidential information had been used in sentence imposition, and some cases had to be sent back to the trial court to give the defendant a chance to rebut.

61. For example, in April, 1978, there were 207 filings and 139 dispositions, leaving a backlog on May 1 of 1,279 cases. In the first few days of May, there were 10 to 20 filings per day. (Statistics obtained from the Clerk of the Florida Supreme Court.)

62. 60 JUD. 442 (1977).

63. *Id.* at 450.

64. *Id.*

65. 248 U.S. 242, 258-59 (1976).

would choose to make the election the proposal provides. A serious question presents itself: Why would anyone apply for supreme court review? Under the present system, a person convicted of a capital felony and sentenced to life imprisonment is afforded a right to appeal to the district court of appeal. If he loses there, he can still petition the supreme court for certiorari.⁶⁶ Exercising one's right of election under the proposed provision cuts off that chance at a second appeal. Unless he thought that the higher court might be more sympathetic to his case than the district court of appeal, one would have little incentive to apply for supreme court review. In any case, having that option available could not possibly prejudice the rights of the individual defendant.

Presently, the justices hear all the death cases while virtually all the life cases never get beyond the district courts of appeal. There is little doubt that some persons will exercise their election, so the supreme court will "get the flavor" of those cases.⁶⁷ But there might not be an even distribution. It is conceivable that rather than go before what is considered a "tough" district court of appeal, defendants from a particular judicial district may apply for high court review in disproportionate numbers.⁶⁸ Or perhaps only certain types of convicted murderers may make application. Will the supreme court be getting the balanced look the proposal was intended to provide? While these possibilities may be remote, they present

66. FLA. CONST. art. V, § 3(b) grants the supreme court jurisdiction to review, by writ of certiorari, district court of appeals' decisions that are in "direct conflict." The writ has been somewhat in disfavor of late as the case backlog has grown and may be the means by which the court deals with its caseload. See generally *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976). Section 3(b) gives jurisdiction only to review district court of appeal precedent rather than adjudications of rights of particular litigants. District court of appeal denial of certiorari does not create precedent in the sense of conflict. *Lawyers Title Ins. Corp. v. Little River Bank & Trust Co.*, 243 So. 2d 417 (Fla. 1970) (certiorari is not to be employed indiscriminately as an added escape route to reach the objective of a second appeal); *Kyle v. Kyle*, 139 So. 2d 885 (Fla. 1962) (jurisdiction not based on view of correctness of district court of appeal's decision). For a recent consideration of the overall issue, see Comment, *Conflict Certiorari: Is the Supreme Court of Florida Following Its Constitutional Mandate?*, 32 U. MIAMI L. REV. 435 (1978).

67. FLA. STAT. § 921.141 (1977) requires that the trial judge, before sentencing a defendant to die, must make a written finding that there are sufficient aggravating circumstances and insufficient mitigating circumstances to justify the penalty. The Florida Supreme Court has extended this requirement to all cases in which the defendant has been found guilty of a capital felony. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). Thus, the circumstances of all capital crimes are available for appellate review.

68. This may be even a harder choice than it appears. Each district court of appeal now has seven judges, but an individual appeal will only be heard by the three that happen to be on the panel. In addition, to win, one would need to sway two of the district court of appeal judges, but only four of the seven supreme court justices.

questions that only implementation and subsequent experience can answer.⁶⁹

V. CONCLUSION

The effect this proposal would have on the workload of the supreme court is at present incalculable. There may be a crippling effect on the court's ability to function effectively, or the result could be a more uniform and careful application of the death penalty across the state. The constitution, however, is not the appropriate vehicle with which to initiate this change. Should it prove unmanageable, a change could only be effected through subsequent constitutional revision. If supreme court review of life sentences is beneficial, it should be implemented by statute. With the potential for harmful consequences so great, a system that many feel is working well should not be altered through the most inflexible of means.

69. One possibility which would implement the idea behind the proposal and even ease the burden on the supreme court would be to create a statewide court of criminal appeals. Although this suggestion was rejected in the defeat of Proposal No. 125, such a court could hear appeals from both life and death cases. In cases that do not raise novel legal questions, there is no reason why it would be any less "uniform" in its supervision than the state supreme court.

