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## Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court

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DEATH-TO-LIFE OVERRIDES:  
SAVING THE RESOURCES OF THE FLORIDA SUPREME COURT

*Michael L. Redelet & Michael Mello*

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MICHAEL L. RADELET & MICHAEL MELLO

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## DEATH-TO-LIFE OVERRIDES: SAVING THE RESOURCES OF THE FLORIDA SUPREME COURT

MICHAEL L. RADELET\* & MICHAEL MELLO\*\*

FLORIDA'S death penalty statute is unique in that it allows trial judges to reject juries' sentencing "recommendations" of life imprisonment.<sup>1</sup> This feature is shared only by the death penalty statutes of Indiana, Alabama, and, after statutory change in late 1991, Delaware.<sup>2</sup> Between the enactment of Florida's statute in 1972 and March 23, 1992, trial judges in 134 Florida cases rejected juries' recommendations of life imprisonment. The defendants in those cases were instead sentenced to death, and by mid-1992 three of them had been executed.<sup>3</sup>

In 1984 the United States Supreme Court held that this override provision did not facially violate traditional doctrines under the *U.S. Constitution*.<sup>4</sup> The Court held in 1991 that the override as applied could, in individual cases, violate the Eighth Amendment.<sup>5</sup>

Although researchers, including the authors, have examined the questions raised by the possibility and patterns of life-to-death over-

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1. FLA. STAT. § 921.141 (1991). In Florida, life imprisonment is defined as a minimum of 25 years in prison before parole eligibility. *Id.* § 775.082(1).

2. DEL. CODE ANN. tit. 11, § 4209 (Supp. 1991). In three states—Arizona, Idaho, and Montana—the court alone imposes sentence in capital cases. In 29 other states, judges can impose death only after a jury recommends death, unless the defendant waives jury sentencing. *See Spaziano v. Florida*, 468 U.S. 447, 463 n.9 (1984); Brief of the Office of the Capital Collateral Representative of the State of Florida, as *Amicus Curiae* in Support of Petitioner, at 12 n.7, *Sochor v. Florida*, 112 S. Ct. 2114 (1992) (collecting statutory citations).

3. Ernest Dobbert (executed Sept. 7, 1984), Beauford White (executed Aug. 28, 1987), and Bobby Francis (executed June 25, 1991).

4. *Spaziano v. Florida*, 468 U.S. 447 (1984). The Court has not yet decided whether certain aspects of the division of sentencing responsibility between judge and jury offends the *U.S. Constitution*. *See generally* Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283 (1989). Whether the override violates the state constitution is another matter altogether. *See Spaziano v. State*, 489 So. 2d 720, 721 (Fla.), *cert. denied*, 479 U.S. 995 (1986) (holding that override does not offend the *Florida Constitution*); *but see* Michael Mello, *The Jurisdiction To Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923 (1991).

5. *Parker v. Dugger*, 111 S. Ct. 731 (1991).

rides,<sup>6</sup> there has been little discussion of cases in which the jury recommends death but the judge instead imposes a sentence of life imprisonment. We are aware of no individual newspaper articles, scholarly research reports, or appellate decisions that discuss more than one such case.<sup>7</sup> This Article attempts to fill that void.

### I. THE OVERRIDE IN FLORIDA'S HISTORY

The bill that authorized Florida trial judges to override juries' sentence recommendations in capital cases was passed in December 1972. Before that, Florida had a century-old tradition of jury sentencing in capital cases. Between 1872 and 1972, a jury's verdict for mercy was final. By 1884 the Florida Supreme Court was able to state that "[t]he law is positive. If a majority of the jurors recommend mercy, by whatever motives they may be actuated (and these motives are not circumscribed), the court is bound to heed their verdict and pronounce sentence accordingly."<sup>8</sup>

Florida's statutory provision that a judge may override a jury's life recommendation is not based upon any legislative or judicial judgment that the life-to-death override serves a crucial state interest. Rather, the provision is a product of the Legislature's reasonable misunderstanding that such an override provision was required by the United States Supreme Court's decision in *Furman v. Georgia*.<sup>9</sup>

6. Mello, *The Jurisdiction To Do Justice*, *supra* note 4; Mello, *Taking Caldwell v. Mississippi Seriously*, *supra* note 4; Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice on Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31 (1985); Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409 (1985).

7. The lack of death-to-life overrides compared to the relative frequency of life-to-death overrides means that the override, "as a practical matter," gives the prosecutor "two chances to obtain a death sentence." *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., concurring in part and dissenting in part).

8. *Newton v. State*, 21 Fla. 53, 101 (1884) (emphasis in original). See also *Garner v. State*, 9 So. 835, 847 (Fla. 1891); *Metzer v. State*, 18 Fla. 482, 483 (1881) (syllabus citing the "Act of February 27, 1872, ch. 1887" for the proposition that "in 'capital' cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life"); *Keech v. State*, 15 Fla. 591, 591 (1876) (same); Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263, 301 (1986) ("For one hundred years, a jury's majority vote for life in a capital case was binding[.]"); cf. WILLIAM J. BOWERS, *LEGAL HOMICIDE* 10-11 (1982) (identifying 1872 as the year Florida moved from mandatory to discretionary capital sentencing); Mello, *The Jurisdiction To Do Justice*, *supra* note 4 at 962-70 (discussing the status of Florida's capital sentencing law as of 1845, when the state's first constitution became effective). "It is no wonder, in light of the tradition of jury sentencing, that the [Florida] [S]upreme [C]ourt has proclaimed great deference to jury recommendations of life." Skene, *supra*, at 302.

9. 408 U.S. 238 (1972). On Florida's post-*Furman* statute, see generally, Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973); Mello & Robson, *supra* note 6.

It is not surprising that the Florida Legislature was baffled by *Furman*. The "opinion" of the Court consists of a terse per curiam order vacating the death sentences in the cases at bar, followed by nine separate opinions of the individual justices.<sup>10</sup> No Justice in the five-person majority joined in the opinion of any other. *Furman* continues to engender controversy and to provide grist for critics both on and off the Court.<sup>11</sup>

The capital statutes at issue in *Furman* were held unconstitutional because they lacked standards to distinguish who should live from who should not. The Court rejected capital sentencing systems that facilitated arbitrariness and discrimination. Justices Brennan and Marshall would have held the death penalty per se unconstitutional.<sup>12</sup> Justices Stewart and White reasoned that arbitrariness voided the capital punishment statutes then in place in the United States.<sup>13</sup> Justice Douglas stressed that the evil that inheres in a standardless system was that it encourages sentencers to give legal (and irremedial) effect to their race, class, and other prejudices.<sup>14</sup> Where the law grants unrestricted discretion, it creates the possibility that such discretion will be misused by the powerful against the less powerful, including the poor and minorities.

Florida's override statute was passed in direct response to the diverse concerns expressed in the various *Furman* opinions. *Furman* created much confusion in Florida, as elsewhere, and the two houses of the Florida Legislature divided sharply on the appropriate response to it.<sup>15</sup>

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10. See generally Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (analyzing the separate opinions in *Furman*).

11. E.g., Walton v. Arizona, 497 U.S. 639 (1990) (Scalia, J., concurring); Louis Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991); Scott Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 U.C.L.A. L. REV. 1147 (1991); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (*Furman* "is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."); *id.* at 317 ("In the manner of literary criticism, one can extract unifying 'themes' in the *Furman* opinions . . .").

12. *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

13. *Id.* at 309-10 (Stewart, J., concurring); *id.* at 312-14 (White, J., concurring).

14. *Id.* at 255-57 (Douglas, J., concurring).

15. The Florida Legislature responded to *Furman* by enacting its new statute in a matter of frenetic days at a special session in late November and early December 1972. The Act was signed by Governor Askew on December 8 and took effect immediately. Ch. 72-724, 1972 Fla. Laws 15. Florida thus became the first state to enact a post-*Furman* capital statute. See generally Ehrhardt & Levinson, *supra* note 9; Tim Thornton, Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U. L. REV. 108 (1974).

The Florida Senate interpreted *Furman* as requiring jury consideration of statutorily enumerated aggravating and mitigating circumstances, followed by jury rendition of an advisory opinion reached by majority vote. Under the Senate's scheme, a verdict for life imprisonment would be binding, but a vote for death would be subject to the judge's override.<sup>16</sup> However, the Governor, the Attorney General, and the Florida House of Representatives interpreted *Furman* differently. According to the House bill, the jury would be entirely excluded from the penalty phase.<sup>17</sup>

Faced with such opposing views, a conference committee formulated a compromise.<sup>18</sup> This final version, which eventually became the law, included aggravating and mitigating circumstances and the jury's rendition of an advisory sentence that the judge could override in favor of either life or death.<sup>19</sup>

The Florida Supreme Court perpetuated the legislative misunderstanding of *Furman* by expressing the opinion that "allowing the jury's recommendation to be binding would violate *Furman*["<sup>20</sup> Later, however, the United States Supreme Court made it clear that "sentencing by the trial judge certainly is not required by *Furman*"<sup>21</sup> and that "[n]othing in any of [the Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution."<sup>22</sup>

16. Ehrhardt & Levinson, *supra* note 9, at 15.

17. Ehrhardt & Levinson, *supra* note 9, at 14.

18. Ehrhardt & Levinson, *supra* note 9, at 15. State Senator Ed Dunn, one of the drafters of the resulting statute, described the conference committee:

We went to Conference Committee and I can remember to this day that Conference Committee going to about one-thirty or two o'clock in the morning. I remember talking to some of the members of the Senate whom I respect today and did then, and some of them are still in the Senate. And going out in the hall and I remember one of them asking me, do you really think it is better to go to judges as opposed to the jury. No, we don't. We think we have to because *Furman* requires it. What we sat down or really at that point stood there and worked out was a compromise, a cross if you will, a hybrid between what was done in the Senate version and the House version. And that cross was the utilization of the jury as a recommending authority on the question of the ultimate sentence. . . . The question to me from the [S]enator was, well how do we try to make . . . the role of the jury consistent with the tradition in this state? And frankly, we found no way to do it. At that time, we were of the opinion that we had to have symmetry in the system, that we had to have [a] consistent role of the judge and the jury, that we had to therefore permit a judge to overturn a recommended sentence of mercy by the jury.

Mello & Robson, *supra* note 6, at 70, n.187.

19. See FLA. STAT. § 921.141 (1991).

20. Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983), *aff'd on other grounds*, 468 U.S. 447 (1984); see also Johnson v. State, 393 So. 2d 1069, 1074 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981); Douglas v. State, 373 So. 2d 895, 897 (Fla. 1979).

21. Spaziano v. Florida, 468 U.S. 447, 463 n.8 (1984).

22. Gregg v. Georgia, 428 U.S. 153, 199 (1976).

*Furman* invalidated prior sentencing schemes because they allowed the sentencer unbridled discretion to impose death, not because they allowed the jury the opportunity to extend mercy.

Nonetheless, this clarification was not sufficient to overcome the inertia created by an existing—and constitutional—statute. So the override is still permissible. Before critiquing the override, we will describe its theory and practice.

## II. THE OVERRIDE IN PRACTICE

### A. *Tedder v. State*

The language of Florida's capital statute provides that the jury's sentencing recommendation is not binding: "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances" enters a sentence of life or death.<sup>23</sup> If a majority<sup>24</sup> of the jury recommends death, regardless of whether the judge sentences the defendant to life, the court must set forth in writing its findings as to aggravating and mitigating circumstances.<sup>25</sup> Death sentences are subject to automatic review by the Florida Supreme Court.<sup>26</sup>

The statute does not specify what degree of judicial deference, if any, is owed to a jury's sentencing recommendation, so the question was left to the Florida judiciary to resolve. The Florida Supreme Court did so, at least as to instances where jury recommendations of life are overridden, in *Tedder v. State*.<sup>27</sup> The *Tedder* court held that jury recommendations of life imprisonment may be overridden by the judge only in those rare instances where "virtually no reasonable person could differ" that death should be imposed in the case.<sup>28</sup> The United States Supreme Court in *Proffitt v. Florida*<sup>29</sup> relied upon and

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23. FLA. STAT. § 921.141(3) (1991).

24. Although Florida's capital statute speaks in terms of a recommendation by a "majority" of the jury, see *id.* § 921.141(2), a split vote of 6-6 is treated as a recommendation of life imprisonment. See *Patten v. State*, 467 So. 2d 975, 980 (Fla. 1985); *Rose v. State*, 425 So. 2d 521, 525 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983).

25. Section 921.141(3) requires written findings if the judge imposes death, regardless of whether the jury recommended life or death. The Florida Supreme Court has required, pursuant to its power to regulate practice and procedure, that judges imposing life sentences where the jury has recommended death must also support the sentence by written findings. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). However, according to our research, courts seldom provide such findings.

26. FLA. STAT. § 921.141(4) (1991).

27. 322 So. 2d 908 (Fla. 1975).

28. *Id.* at 910; see also *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989).

29. 428 U.S. 242, 249 (1976).



quoted from *Tedder* in upholding the facial constitutionality of Florida's capital statute as a whole (including the jury override). The Court also stressed the *Tedder* standard in *Spaziano v. Florida*,<sup>30</sup> by specifically upholding the facial constitutionality of the override itself.<sup>31</sup> In *Parker v. Dugger*,<sup>32</sup> in invalidating the override as applied in that single case, the Court reaffirmed its understanding that "under Florida law, a sentencing judge is to override a jury's recommendation of life imprisonment only when 'virtually no reasonable person could differ.'" <sup>33</sup> Most recently, in *Espinosa v. Florida*,<sup>34</sup> the Supreme Court noted that its examination of Florida law indicated "that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give 'great weight' to the jury's recommendation, whether that recommendation be life . . . or death[.]"<sup>35</sup>

Jury recommendations of death are likewise accorded weight, although the applicability of the stringent *Tedder* standard to death recommendations is not entirely clear. That is, may a judge override a jury's recommendation of death only when "virtually no reasonable person could differ"? The Florida Supreme Court recently observed in dicta that "a jury recommendation of death should be given great weight," just like a jury recommendation of life.<sup>36</sup> For example, the Florida Supreme Court applied the *Tedder* standard to a death recom-

30. 468 U.S. 447 (1984).

31. A year after *Spaziano* was decided, the Court held in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that capital sentencers may not be misled about the importance of their decisions. Florida's capital jury instructions as applied may well fall afoul of *Caldwell*. See *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989); *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), modified sub nom. on other grounds, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), rev'd on other grounds, 489 U.S. 401 (1989); compare *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1000 (1989); see also Mello, *Taking Caldwell v. Mississippi Seriously*, supra note 4; Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 908-910 (1990-91). Some analogous studies were summarized in Section V of Mello, *Taking Caldwell v. Mississippi Seriously*, supra note 4. This section was based on an interactive research project that Robert Taylor completed when he was working as a law clerk with Mello on *Harich*.

32. 111 S. Ct. 731 (1991).

33. *Id.* at 735 (1991) (quoting *Tedder*). "We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial protection' afforded by such review in jury override cases." *Id.* at 739 (quoting *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) and citing *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) and *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)). Cf. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3103 (1990) (state court's finding of an aggravating circumstance "is arbitrary or capricious if and only if no reasonable sentencer could have so concluded").

34. 112 S. Ct. 2926 (1992).

35. *Id.* (citations omitted).

36. *Grossman v. State*, 525 So. 2d 833, 839 n.1 (Fla. 1988).

mentation in *LeDuc v. State*.<sup>37</sup> LeDuc had pleaded guilty to a murder, and the prosecutor, carrying out his end of a plea bargain, argued for a life sentence. Nonetheless, the jury was unanimous in recommending death, and the trial judge agreed. The supreme court, citing *Tedder*, noted the recommendation of a jury "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation."<sup>38</sup>

The same indirect application of *Tedder* occurred in *Stone v. State*,<sup>39</sup> when the court performed a proportionality review by comparing Stone's case with *Swan v. State*.<sup>40</sup> In conducting this review the jury's recommendation seemed to be outcome-determinative: "Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight."<sup>41</sup> The death sentence in *Swan* was reversed; in *Stone* it was affirmed. *Tedder* appears to explain the difference.

The importance of the jury's sentence recommendation is further underscored by the behavior of the Florida Supreme Court when it finds error in jury proceedings that result in death recommendations. As the Eleventh Circuit en banc court observed:

[T]he [Florida] [S]upreme [C]ourt will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, or was subject to improper argument by the prosecutor. The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation . . . . Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of *Witherspoon v. Illinois*.<sup>42</sup>

The state supreme court in one of the three other jury override jurisdictions—Indiana—has gone further than the Florida Supreme

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37. 365 So. 2d 149 (Fla. 1978).

38. *Id.* at 151.

39. 378 So. 2d 765 (Fla. 1979).

40. 322 So. 2d 485 (Fla. 1975).

41. *Stone*, 378 So. 2d at 772.

42. *Mann v. Dugger*, 844 F.2d 1446, 1452-53 (11th Cir. 1988) (en banc) (footnotes and citations omitted), *cert. denied*, 489 U.S. 1071 (1989).

Court in clarifying the importance of jury recommendations of death. Indiana requires more when judges override life recommendations than when judges override death recommendations.

The Indiana Supreme Court began its recent work in override cases by adopting a *Tedder*-like standard for life-to-death overrides in *Martinez Chavez v. State*.<sup>43</sup> The court pointed out that only once before, in *Schiro v. State*,<sup>44</sup> had it affirmed a death sentence where the jury had recommended life.<sup>45</sup> The standard adopted by the *Martinez Chavez* court echoed *Tedder*: "In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime."<sup>46</sup>

*Kennedy v. State* also plows new ground in giving a standard for trial courts to use in overriding death recommendations given by juries.<sup>47</sup> It is a less stringent standard than the *Martinez Chavez/Tedder* standard that governs life-to-death overrides.

[T]he trial court as trier of fact must independently determine the existence of aggravators and mitigators, weigh them, consider the recommendation of the jury, and come to a separate conclusion as to whether or not to impose the death penalty. However, when the jury's recommendation is [life], it is to be given a *special—but not controlling—role* in the judge's process . . . .<sup>48</sup>

43. 534 N.E.2d 731, 734 (Ind. 1989).

44. 451 N.E.2d 1047 (Ind. 1983), *cert. denied*, 464 U.S. 1003 (1987).

45. *Martinez Chavez*, 534 N.E.2d at 733.

46. *Id.* at 735. Other Indiana cases defer to the *Martinez Chavez/Tedder* standard. In *Minnick v. State*, 544 N.E.2d 471, 482 (Ind. 1989), the state supreme court upheld a judge override of a life recommendation on the *Martinez Chavez* rule that "no reasonable person would find a death sentence inappropriate here." In *Minnick*, the Indiana Supreme Court concluded that in *Martinez Chavez* there were two men, one of whom could be viewed by reasonable people as less culpable in the murder. *Id.* The court then reasoned that because *Minnick* was acting alone, there was no basis for comparison. *Id.* This distinction was weak and may indicate a dissatisfaction with the *Martinez Chavez* test. The sweeping assertion that no reasonable person could find death to be inappropriate in *Minnick's* case indicates a willingness to allow the overriding of jury recommendations. Further, despite the apparent high standard for override, the Indiana court did not find it improper for a judge to tell a capital jury that their sentence was "a recommendation to the trial judge who would make the final determination." *Evans v. State*, 563 N.E.2d 1251, 1256 (Ind. 1990).

In another case, the same standard was used to order resentencing in an inappropriate override. *Kennedy v. State*, 578 N.E.2d 633, 637 (Ind. 1991), *cert. denied*, 112 S. Ct. 1299 (1992). In *Kennedy*, the court remanded a case in which the judge overrode a jury's recommendation of life imprisonment, directing the trial court to reconsider the sentence in light of the *Martinez Chavez* standard. *Id.*

47. 578 N.E.2d 633 (Ind. 1991), *cert. denied*, 112 S. Ct. 1299 (1992).

48. *Id.* at 637 (emphasis added).

This suggests that the *Tedder*-type standard does not apply in cases where the jury recommends death. To override a death recommendation the trial judge does not determine if any reasonable person could disagree; the judge simply makes his or her own assessment of the aggravating and mitigating circumstances. This suggestion is confirmed by *Daniels v. State*.<sup>49</sup> "We do not require any trial court adherence to a jury decision recommending imposition of the death penalty. When the jury recommends the death sentence, a judge is in no way bound by such recommendation."<sup>50</sup> Hence, at least in Indiana, it is less of a burden for the trial judge to reject a death recommendation than to reject a life recommendation. The Florida Supreme Court has yet to address the issue directly.

### B. Problems with Life-to-Death Overrides

Two principal criticisms have been levied against the wisdom of permitting trial judges to override juries' recommendations of life imprisonment. The first centers on the historical role of the jury as the voice of the community. The second suggests that the override provision is not cost efficient because it results in so few affirmed death sentences.

Juries in death penalty cases are not genuinely representative of the entirety of their communities because those citizens whose opposition to or support for the death penalty may prevent or substantially impair the performance of their duties may be excluded for cause from service on capital juries.<sup>51</sup>

More votes for life imprisonment in first-degree murder cases would result if anti-death penalty citizens were permitted to sit on those juries and vice versa. Nonetheless, jurors are more representative of their communities than are judges, who tend to be disproportionately wealthy, white, and male.<sup>52</sup>

Making jury recommendations of life imprisonment binding would therefore increase the element of democracy in Florida death penalty decisions. Under *Tedder*, if a judge overrides a jury's recommendation of life imprisonment, the judge is not-so-implicitly stating that the jury is not composed of "reasonable people." This message may not be well-received by jurors, who may resent judicial disregard of their sentencing recommendation and regret their participation in what turns out to be a case where a death sentence that they believe is morally unjustified is imposed.

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49. 561 N.E.2d 487 (Ind. 1990).

50. *Id.* at 491.

51. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

52. *Mello & Robson*, *supra* note 6, at 45-51; *Radelet*, *supra* note 6, at 1425.

A second reason for making jury recommendations of life binding is predicated upon interests of efficiency. The vast majority of death penalty cases in which the jury recommends life imprisonment but the judge imposes a death sentence are eventually reduced to life imprisonment by a state supreme court, but only at the end of an arduous (and costly) process of direct appeal to that court. "That the [Florida Supreme Court] meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life."<sup>53</sup> The Florida Supreme Court, in *Cochran v. State*,<sup>54</sup> reiterated its earlier statements that "[d]uring 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent."<sup>55</sup> Overall, in the two decades since Florida's current capital statute was enacted in 1972, death penalty cases in which the jury recommended life have been reversed in seventy-five percent of the cases, usually based entirely on the override issue itself.<sup>56</sup>

Hence, according to the Florida Supreme Court, the overwhelming majority of death sentences that are imposed after a jury's recommendation of life imprisonment are erroneous. The override cases levy huge financial costs to both defendants and the state in correcting these trial-level mistakes, and they burden the state supreme court with death sentences that have little likelihood of being affirmed. In short, life-to-death overrides hamper the efficiency of the appellate courts, and they do so in a way particularly noxious to Florida's traditions of jury sentencing in capital cases.

### III. DEATH-TO-LIFE OVERRIDES

In contrast to life-to-death overrides, procedures allowing for death-to-life overrides have a logic that is firmly rooted in Anglo-

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53. *Mann v. Dugger*, 844 F.2d 1446, 1451 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989).

54. 547 So. 2d 928 (Fla. 1989).

55. *Id.* at 933 (Shaw, J., specially concurring) (quoting *Grossman v. State*, 525 So. 2d 833, 851 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989)). "This current reversal rate of over eighty percent is a strong indicator to [trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation." *Id.*; see also Radelet, *supra* note 6, at 1412; Michael L. Radelet & Margaret Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 923 (1983); Mello, *The Jurisdiction To Do Justice*, *supra* note 4, at 937.

56. The vast majority of these cases were reversed and life sentences mandated, pursuant to application of *Tedder*. By the end of 1991, of the 136 override cases decided on direct appeal (in some override cases there is more than one direct appeal decision), the Florida Supreme Court reversed in 101 cases (case citations on file with authors).

American jurisprudence. Furthermore, and also in contrast to life-to-death overrides, allowing trial judges to reject juries' death recommendations permits trial courts to conserve appellate resources by effectively restricting the death penalty to only the most aggravated cases.

*A. Their Consistency with Anglo-American Legal Traditions*

If, for the reasons specified above, a jury's recommendation of life should be binding, why should a jury's recommendation of death not be binding? The answer is that Anglo-American legal traditions do not treat the prosecution and defense equally: the traditions give the benefit of any sizeable doubt to the defendant. For this reason, the American Law Institute's Model Penal Code suggests that a jury's "recommendation" of life, but not of death, be binding.<sup>57</sup> This is so for the reason expressed by the fifteenth-century jurist, Sir John Fortescue: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally."<sup>58</sup> The United States' criminal justice system is one which presumes the defendant is innocent until proven guilty, and not one in which a person possesses no presumptions and must be proven either guilty or innocent.

We recognize, of course, that abolishing the Florida judge's power to override a jury's life recommendation, but not the power to override a death recommendation, would create an asymmetry. But it would be "an asymmetry weighted on the side of mercy."<sup>59</sup> Such an "asymmetry is offensive . . . only if one assumes that the grant of mercy to some, based on their particularized circumstances, somehow abridges the constitutional rights of others whose particular circumstances do not inspire mercy."<sup>60</sup> Asymmetry in death sentencing has been declared constitutionally viable in the context of limiting aggravating circumstances to those enumerated in the statute while allowing

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57. MODEL PENAL CODE § 210.6 (1980); see also Mello & Robson, *supra* note 6, at 57.

58. JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 94 (F. Gregor trans., 1874); see generally Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

59. *Stanley v. Zant*, 697 F.2d 955, 960 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). On mercy, see generally Paul W. Cobb, Jr., *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989).

60. *Washington v. Watkins*, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

mitigating circumstances to include any circumstance, whether listed by the statute or not.<sup>61</sup>

An analogy can be drawn by examining guilt decisions. In the guilt phase of both capital and noncapital cases, a judge may reject a jury's verdict of guilt of the maximum possible charge and instead find the defendant guilty of a lesser included offense.<sup>62</sup> Or, the judge may enter a judgment of acquittal despite the jury's rendition of a guilty verdict.<sup>63</sup> However, trial judges are not permitted to adjudicate a defendant guilty in cases where the jury has rendered a verdict of not guilty.<sup>64</sup> By analogy, a jury's recommendation of life in a capital murder case can be interpreted as reflecting the jury's decision that the defendant, while guilty of first-degree murder, is *not* guilty of a capital (i.e., death-deserving) offense. Hence, allowing the judge to override death recommendations—but not life recommendations—is not only constitutionally permissible, but is in accordance with basic tenets of Anglo-American jurisprudence. It is the ability to override life recommendations that is the historical and normative anomaly.

Allowing judges to override death recommendations is also in accordance with Florida's historical and jurisprudential traditions. As discussed above, Florida's jury override was enacted in a reasonable attempt to comply with the ethereal commands of *Furman v. Georgia*.<sup>65</sup> For the century before *Furman*—1872 to 1972—a Florida jury's verdict for mercy was final.<sup>66</sup>

Further, the logic supporting the override, as articulated by the Legislature in enacting the override and by the Florida Supreme Court in upholding its constitutionality, is effective only when applied to cases in which judges override death recommendations, not vice versa. When the Florida Supreme Court first considered Florida's post-*Furman* statute, the court focused on the override provision solely in

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61. The Florida Supreme Court has held that "aggravating circumstances enumerated in the statute . . . are exclusive; no others may be used for that purpose." *Purdy v. State*, 343 So. 2d 4, 6 (Fla.), *cert. denied*, 434 U.S. 847 (1977); *see also* *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979); *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977), *cert. denied*, 459 U.S. 981 (1982). Though this principle is not required by the *United States Constitution*, *Barclay v. Florida*, 463 U.S. 939, 949-51 (1983), it appears to be firmly established law in Florida.

By contrast, the *U.S. Constitution* mandates that the capital sentencer be permitted to consider and give independent mitigating weight to any relevant mitigating circumstance, even if not enumerated in the capital statute. *See* *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

62. *See* *Spaziano v. Florida*, 468 U.S. 447, 454 n.5 (1984).

63. FLA. R. CRIM. P. 3.380(c).

64. FLA. R. CRIM. P. 3.690.

65. 408 U.S. 238 (1972).

66. *See supra* note 8 and accompanying text.

terms of the judge overriding a jury's recommendation of death. The court concluded that "the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."<sup>67</sup> As one commentator, apparently generally in favor of the death penalty, has noted: "[P]ermitting the judge to reject death and grant life is justified. The community sometimes becomes inflamed on debatable facts, and raises the hue and cry for vengeance. The judge should be permitted to act as a detached overseer to restrain passion-numbed judgments."<sup>68</sup>

This reasoning is particularly true when support for the death penalty is as strong as it is today. In a 1992 Gallup Poll, sixty-five percent of the respondents said they would be more likely to vote for a political candidate who backs a mandatory death penalty for murder.<sup>69</sup> Many of these supporters would therefore be inclined to vote for a death sentence for any murderer, and not simply for the most aggravated cases that the death penalty is intended to address.<sup>70</sup> The ability of trial judges to reject a jury's recommendation of death is necessary to guard against any unrestricted zeal for capital punishment that may find voice in the jurors' penalty votes.

### B. *Their Pragmatic Benefits*

Another reason Florida trial judges are permitted to override death recommendations is appellate efficiency. The rendering of life sentences by conscientious trial judges in cases that are not appropriate for death conserves the resources of the appellate courts and clemency authorities for more aggravated cases. This is a quasi-proportionality point: The override allows immediate judicial intervention to sidetrack less aggravated cases before the defendant is sent to death row. Frequently, death penalty cases with *death* recommendations are reduced to life by the Florida Supreme Court on grounds of proportionality,<sup>71</sup> especially in recent years.<sup>72</sup> Permitting trial judges to reject death re-

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

68. Joseph W. Little, *Another View*, 36 U. FLA. L. REV. 200, 204 (1984).

69. Richard Benedetto, *Economy Shakes American Dream*, U.S.A. TODAY, Jan. 16, 1992, at A5; see also James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499 (1990-91).

70. Only about 1/60 of the criminal homicides in the United States result in a death sentence. See Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 714 n.11 (1990-91).

71. For a review of these cases, see Craig S. Barnard, *Death Penalty*, 13 NOVA L. REV. 907, 974-76 (1989).

72. See, e.g., *Tillman v. State*, 591 So. 2d 167 (Fla. 1991); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988); *Livingston v. State*, 565 So. 2d 1288



commendations allows an early and efficient means to filter out cases for which the death penalty is inappropriate.

The recent decision in *Tillman v. State*<sup>73</sup> underscores the vigor of proportionality review of death sentences in Florida. In *Tillman*, no record had been developed that outlined the actual facts of the crime. On appeal, the state supreme court discussed the importance of proportionality review in capital cases, listing three justifications for it.<sup>74</sup> First, the "requirement that death be administered proportionately has a variety of sources in Florida law, including the *Florida Constitution's* express prohibition against unusual punishments."<sup>75</sup> Second, proportionality review in death cases "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties."<sup>76</sup> Third, proportionality review

arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law . . . . [P]roportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.<sup>77</sup>

Because the *Tillman* court could not resolve the proportionality issue on the record, the court reduced the death sentence to life: "all doubts must be resolved in favor of *Tillman*, since his state constitutional right is to receive a proper proportionality review[.]"<sup>78</sup>

This sidetracking of less aggravated cases is functional, however, only if the cases in which death-to-life overrides occur are relatively less aggravated than other capital cases and therefore have a small probability of affirmation by appellate courts. Alternatively, it could be argued that the death-to-life override provision gives less conscientious judges the opportunity to thwart the will of the community by refusing to sentence deserving defendants to death.

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(Fla. 1988); *Banda v. State*, 536 So. 2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989); *Amoros v. State*, 531 So. 2d 1256 (Fla. 1988); *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988); *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987); *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *Blair v. State*, 406 So. 2d 1103 (Fla. 1981).

73. 591 So. 2d 167 (Fla. 1991).

74. *Id.* at 169.

75. *Id.* (citing FLA. CONST. art. I, § 17).

76. *Id.* (citing FLA. CONST. art. I, § 9).

77. *Id.* (citing FLA. CONST. art. V, § 3(b)(1)).

78. *Id.* (citing FLA. CONST. art. I, §§ 9, 17).

Which of these positions is more accurate is an empirical question that can be resolved only by examining the cases in which the death-to-life override has actually been used. Each position becomes a testable hypothesis.

Support for the first hypothesis would be found if death-to-life overrides were infrequent and ranked relatively high on mitigation and low on aggravation. Support for the second hypothesis would be found if the cases in which the death-to-life override was used were highly aggravated, involved anti-death penalty judges, and were followed by sustained community protests. We now turn to the data used to test these two competing hypotheses.

#### IV. DATA ON DEATH-TO-LIFE OVERRIDES

Unfortunately, there is no central source that can be consulted to identify cases in which a judge rejected a jury's recommendation of death.<sup>79</sup> Unlike cases ending in the imposition of death sentences, cases in which life sentences are imposed cannot be appealed directly to the Florida Supreme Court; hence, information on relevant cases cannot be obtained from that source.<sup>80</sup> Instead, to identify cases in which judges rejected a jury's recommendation of death, we relied on personal contacts who knew about this research, letters to prosecutors and defense attorneys involved in capital litigation, and newspaper clippings. This methodology uncovered a total of fifty-one relevant cases, but we cannot and do not claim completeness. These cases are listed in Appendix A.

The fifty-one cases involve forty-seven defendants. One defendant, William Cruse (Nos. 17-20) had four death recommendations overridden, while another, Rudolph Zadnick (Nos. 50-51) had two death recommendations overridden. Three women are among the defendants (Dee Casteel, No. 4, Julita de Parias, No. 21, and Katherine Telemachos, No. 47). The first such override of which we are aware occurred

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79. Justice Stevens noted in *Spaziano* that

[i]f there are any cases in which the jury override procedure has worked to the defendant's advantage because the trial judge rejected a jury's recommendation of death, they have not been brought to our attention by the Attorney General of Florida, who would presumably be aware of any such cases.

*Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., concurring and dissenting). At the hearings on Florida House Bill 820 (1984), Chair Elvin Martinez told the Committee on Criminal Justice that he had instructed his staff to obtain information on death overrides but that "[i]t's not easily available. It's going to almost require the [S]tate [A]ttorneys going through their files and their cases . . . ." Mello & Robson, *supra* note 6, at 66 n.169.

80. Capital cases are appealed automatically to the Florida Supreme Court. FLA. STAT. § 921.141(4) (1991).

in November 1974 (Zadnick, Nos. 50-51), while the most recent occurred in December 1991 (Telemachos, No. 47). The forty-seven defendants were sentenced to their terms of life imprisonment in the following years:

Table 1  
Death-to-Life Overrides By Year, 1974-91

1974	1	1983	0
1975	2	1984	2
1976	0	1985	5
1977	1	1986	2
1978	1	1987	12
1979	0	1988	6
1980	4	1989	5
1981	0	1990	3
1982	2	1991	1

Of the forty-seven defendants, ten were sentenced to death on other counts: James Bryant (No. 3), Dee Casteel (No. 4), Michael Irvine (No. 5), William Rhodes (No. 6), Guy Cochran (No. 13), David Cook (No. 15), William Cruse (Nos. 17-20), Joseph Garron (No. 24), Dominick Occhicone (No. 38), and George Porter (No. 39).

Of the remaining thirty-seven defendants, five were teenagers at the time of the crime: Ted Bassett (No. 2), James Bullard (No. 7), Eddie Ferguson (No. 22), Lovonza Robinson (No. 43), and Katherine Telemachos (No. 47). A sixth, Michael Canady (No. 9), had his age (twenty-one) cited in mitigation and, as in Bassett's case, the jury's vote for death in Canady's case was seven to five.

Of the remaining thirty-one cases, in at least six the jury vote was seven to five: Ronald Hale (No. 26), Thomas Hall (No. 27), James Mays (No. 34), Clarence Morris (No. 36), Michael Nelson (No. 7), and Gilbert Selver (No. 44). In most death penalty jurisdictions, a seven-to-five vote for death would automatically necessitate the imposition of a life sentence.<sup>81</sup> Under the *Tedder* standard, it is clear that reasonable people differed.

In three other cases, the victim's closest relative made a plea that the defendant be sentenced to life imprisonment. In the case of Robert Combs (No. 14), the victim's mother testified that she believed that Combs was innocent (the judge also expressed some doubts about Combs' guilt). The mother of Randall Jones' victim (No. 29) and the widow of Charles Young's (No. 49) victim also asked for mercy, and the judges in both cases cited extensive mitigation.

81. Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980) (appendix).

The Combs case is not the only one where some doubts about the defendant's guilt, role in the crime, or premeditation were cited as reasons for a life sentence. In the case of Julita de Parias (No. 21), the judge felt the State had not proven its argument that de Parias acted in a leadership role in the homicide. Thomas Hall's (No. 27) judge cited the lack of premeditation, and in sentencing George Taylor (No. 46) to life, the judge was probably influenced by the defendant's argument of self-defense. In Florida, "[a] convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy."<sup>82</sup>

Nineteen cases remain. In seventeen of these, the judge held that the aggravating circumstances did not outweigh the mitigating circumstances with enough sufficiency to justify a death sentence. For example, James Baily (No. 1) and Edward Cleveland (No. 12) were sentenced to life after the State failed to present sufficient aggravating circumstances. In Carlton Camper's case (No. 8), the trial judge said the aggravating circumstances necessary for a death sentence simply were not there. In the case of Joseph Marter (No. 33), Judge Kaney stated much the same, adding, "[i]t would be the easy thing, the politic thing, to sentence this defendant to death and let the Supreme Court take the heat for lowering it to life."<sup>83</sup>

Two cases do not fit into the above categories. In sentencing Thomas Crow (No. 16) to life imprisonment, the trial judge admitted that he erred in allowing the jury to hear inadmissible testimony, and he felt this error would cause the Florida Supreme Court to reverse a death sentence if one was imposed. Hence, as in so many other cases, the death-to-life override saved the supreme court from having to conduct an in-depth review before rejecting the death sentence. In the final case, that of Thomas Lackner (No. 31), the judge did not state his reasons for dismissing the jury's death recommendation. Since the defense argued that Lackner's mental status at the time of the crime was a powerful mitigator, we can speculate that the trial judge agreed.

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82. *Buford v. State*, 403 So. 2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1164 (1982); see also *Burr v. State*, 466 So. 2d 1051, 1054 (Fla. 1985). But see *Heiney v. Florida*, 469 U.S. 920, 921 (1984) (Marshall, J., dissenting from denial of certiorari); *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1088 (1985); MODEL PENAL CODE, § 210.6(1)(f) and cmt. 5 (1980).

83. Mary R. Heffron, *Murderer Given Life Sentence, Despite Jury's Vote for Death*, SENTINEL STAR (Orlando), Apr. 1, 1980, at C3.

## V. CONCLUSIONS

Several conclusions can be drawn from the above data. The first concerns the frequency of death-to-life overrides. They are rare; the total of fifty-one cases, after excluding multiple charges on one defendant and cases in which the defendant was sentenced to death on other charges, is reduced to thirty-seven. This figure is the best measure of the number of defendants spared a death sentence because of the trial judge's override power. There have been 3.6 times as many life-to-death overrides (134) in Florida since 1972 as there have been death-to-life overrides (37), and thus the number of these cases is quite small. This may be because trial judges are unaware that the life-to-death override provision has actually been used.

Second, if trial judges fear that overriding a jury's death recommendation may result in negative political repercussions for their careers, they will be relieved to learn that there is not a scintilla of evidence that supports such fears. In only two cases have there been protests about a death-to-life override (Ramirez, No. 40, and Taylor, No. 46), and in both cases the protests quickly subsided after being heard. No judge in our data set has ever suffered political repercussions because of use of death-to-life override powers.

Third, the patterns show that evidence of strong mitigation was present in virtually all the cases. To be sure, some more retributive judges may have weighed the aggravating and mitigating evidence differently in a given case and sentenced the defendant to death, but even the death penalty's strongest supporters would no doubt admit that, at best, the death-to-life override cases are only marginally qualified for death sentences.

Fourth, the evidence of mitigation in the cases strongly suggests that most, if not all, of the trial judges in these cases would have been reversed by the state supreme court had they followed the jury's advice and imposed a death sentence. The data indicate that by imposing the life sentence themselves, the trial judges simply saved the state supreme court from the hassle—and the wasted cost. Because the Florida Supreme Court is already spending about half its time on death penalty cases,<sup>84</sup> sidetracking these marginal cases before they arrive in Tallahassee has saved the state significant fiscal resources.

Fifth, because of the resource-saving feature of the death-to-life overrides, those who oppose executions in Florida may want to con-

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84. This estimate comes from Florida Supreme Court Justice Kogan, quoted in the National Law Journal. See Marcia Coyle et al., *Trial & Error in the Nation's Death Belt: Fatal Defense, Fatal Flaws*, NAT'L L.J., June 11, 1990, at 30.

sider the possibility of working to abolish the possibility of death-to-life overrides. Despite resulting in more death sentences, this could be an appealing abolitionist policy for two reasons. First, it would invite extensive litigation to ascertain the constitutional permissibility of such a ban, thereby removing the attention of prosecutors and the courts from other litigation that might result in quicker executions. Second, sending the fifty-one cases reviewed above to the state supreme court (and similar cases in which death sentences would be imposed in future years if the abolitionists are successful) would probably not result in more executions (given the high probability of reversal), but fewer executions, as they would divert the limited resources of courts and prosecutors from more aggravated death penalty cases. The time it would take the state supreme court to review these death-to-life override cases would force further delays in deciding the more aggravated death penalty cases, hence delaying executions or even giving the defendants in these more aggravated cases more time to document mitigation or find other reasons that would entitle them to a life sentence. In short, the more death sentences in these less aggravated type of cases there are, the fewer the number of total executions there will be.

Finally, the data contain no evidence that the death-to-life override is being used by judges who are morally opposed to the death penalty as a way to thwart the will of the community and to spare the most heinous criminals from the state's electric chair. Those who might favor abolishing the death-to-life overrides because of the potential for abuse by anti-death penalty judges have nothing to worry about.

Only three judges have used their discretion to override death recommendations in more than one trial: Judge Thomas S. Reese (in the cases of Christopher Ferguson, No. 23, and Juan Rivera, No. 42), Judge John Antoon (in the cases of William Cruse, Nos. 17-20, James Mays, No. 34, and George Porter, No. 39), and Judge Ralph N. Person (in the cases of James Bryant and his three codefendants, Nos. 3-6, and Julita de Parias, No. 21). Furthermore, these three judges are clearly *not* death penalty abolitionists, as each has imposed death sentences on multiple occasions. Judge Reese has imposed the death penalty five times;<sup>85</sup> Judge Antoon sentenced Cruse and two other men to

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85. One of these defendants is Robert Combs (No. 14). A second is James McCrae, who was sentenced to death by Judge Reese despite the jury's unanimous recommendation of life imprisonment. See *McCrae v. State*, 582 So. 2d 613 (Fla. 1991). Judge Reese also sentenced Harold Lucas to death twice; see *Lucas v. State*, 568 So. 2d 18 (Fla. 1990); *Lucas v. State*, 490 So. 2d 943 (Fla. 1986). The final defendant he sentenced to death was George South. See William Sabo, *Judge Gives South Death*, FT. MYERS NEWS-PRESS, Feb. 11, 1988, at A1.

death;<sup>86</sup> Judge Person sentenced Bryant and his three codefendants to death on other counts, as well as one other man (twice).<sup>87</sup>

We therefore reject the hypothesis that the death-to-life override provision gives less conscientious judges the opportunity to thwart the will of the community by refusing to sentence deserving defendants to death. Instead, the data support the hypothesis that the death-to-life override provides a valuable function for the criminal justice system by allowing trial judges to sidetrack less aggravated cases from the death penalty appellate system. Conscientious trial judges struggling to decide what to do in cases in which there has been a recommendation of death despite solid mitigation should find it useful to know that there is strong precedent for overriding the jury's death recommendation.

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86. These men are George Porter and Crosley Green. See *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), *cert. denied*, 111 S. Ct. 1024 (1991); Robert Kohlman, *Brevard Killer Sentenced To Die*, FLA. TODAY (Brevard County), Feb. 9, 1991, at B1.

87. That man is Levarity Robertson. He was condemned to death by Judge Person on March 21, 1989, and again on August 21, 1989, after a separate trial for another murder. See letter from Steven Walter, Office of the Capital Collateral Representative, to Michael L. Radelet (Dec. 1, 1991) (copy on file with authors).

## APPENDIX A: INVENTORY OF CASES

1. *Bailey, James Warren*. September 26, 1988. Tampa. Bailey was convicted of the kidnap, rape, and murder of a prostitute. The victim had been selling drugs for Bailey and allegedly had cheated him out of some of the proceeds. Bailey murdered the prostitute, dismembered the body with a power saw and stored it in his freezer for three years before it was discovered. Judge Richard A. Lazzara reportedly said that recent (unspecified) decisions by the Florida Supreme Court prohibited the imposition of the death penalty in the case because the state failed to present sufficient aggravating circumstances, and that the most horrifying aspects of the murder occurred after the victim's death.<sup>88</sup>

2. *Bassett, Ted*. November 17, 1989. Daytona Beach. Bassett was convicted of killing two teenagers by locking them in a car trunk and pumping in exhaust fumes. In 1980 Bassett was sentenced to death for the crimes, and his codefendant was sentenced to life. The Florida Supreme Court affirmed the conviction and sentence in 1984.<sup>89</sup> On further collateral review, the supreme court ordered a new sentencing hearing because Bassett's trial attorney had failed to present nonstatutory mitigating evidence at trial.<sup>90</sup> At resentencing in 1989, the jury voted 7-5 to reimpose death. But Judge S. James Foxman (who had originally imposed the death sentence) disagreed, citing Bassett's age at the time of the crime (eighteen), his miserable childhood (Bassett was conceived in a rape and he had seen his mother repeatedly abused by a series of alcoholic stepfathers), and the fact that the codefendant's life sentence would make a death sentence for Bassett "wrong and unjust."<sup>91</sup>

3-6. *Bryant, James; Dee Casteel; Michael Irvine; and William Rhodes*. September 15, 1987. Miami. All four defendants were convicted of killing Arthur Venecia and his mother, Bessie Fischer. The jury recommended death on both counts for all four. Judge Ralph N. Person sentenced all four defendants to death on one count, but overrode the death recommendation on the other count.

Casteel's 10-2 death recommendation for the Venecia murder was overridden because she was not present at the scene when he was killed.

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88. Ivan J. Hathaway, *Bailey Gets 3 Life Sentences*, TAMPA TRIB., Sept. 27, 1988, at B2.

89. *Bassett v. State*, 449 So. 2d 803 (Fla. 1984).

90. *Bassett v. State*, 541 So. 2d 596 (Fla. 1989).

91. Robert Nolin, *Murder Victims' Families Outraged*, DAYTONA BEACH NEWS-JOURNAL, Nov. 18, 1989, at A1; Shirish Date, *This Time, Judge Spares Daytona Murderer*, ORLANDO SENTINEL, Nov. 18, 1989, at D1.



Irvine's 11-1 death recommendation for the Venecia murder was overridden because Irvine was not the person who caused Venecia's death.

Rhodes's 10-2 death recommendation for the Fischer murder was overridden because his involvement in her death was "relatively minor."

Bryant's 11-1 death recommendation for the Fischer murder was overridden because he "was not present at or near the scene of the murder."

In 1990 the Florida Supreme Court granted new trials to the four defendants because of improper jury selection and the fact that the defendants had not been tried separately.<sup>92</sup>

7. *Bullard, James*. October 7, 1982. West Palm Beach. Bullard, age nineteen, was convicted of stabbing a plumber. The jury voted 9-3 for death. Judge Edward Rodgers overrode, reportedly because it was not clear if Bullard was the actual murderer or simply an aider and abettor.<sup>93</sup>

8. *Camper, Carlton Henry*. January 16, 1987. Orlando. Camper, a pimp, was convicted of killing a prostitute who no longer wanted to work for him. Judge Gary Formet, in overriding the jury's recommendation, said that the aggravating circumstances necessary for a death sentence were simply not there.<sup>94</sup>

9. *Canady, Michael*. March 27, 1987. West Palm Beach. Canady (black), age twenty-one at the time of the crime, was convicted of killing a white Florida Highway Patrol Officer who discovered a suitcase of marijuana in the trunk of Canady's car. The jury voted 7-5 for death. Judge William Owen overrode, reportedly because of Canady's age, lack of prior record, remorse, and his brevity of intent to kill (the defendant's judgment was clouded by marijuana and alcohol)—all factors that (according to newspaper reports) Judge Owen said would cause the Florida Supreme Court to vacate any death sentence.<sup>95</sup>

92. Carlos Harrison, *New Trial Ordered for 4 in Dade on Death Row*, MIAMI HERALD, Mar. 30, 1990, at B1; Jay Ducassi, *Waitress Gets Death Penalty: First Woman in Dade To Be Sentenced To Die*, MIAMI HERALD, Sept. 17, 1987, at B1; Jay Ducassi, *Two Auto Mechanics Given Death Sentence for Killing for Hire*, MIAMI HERALD, Sept. 16, 1987, at B4. See also Sentencing Memoranda in *State v. Casteel* (No. 84-9397B), *State v. Irvine* (No. 84-9397C), *State v. Rhodes* (No. 84-9397D), and *State v. Bryant* (No. 84-9397A), (Fla. 11th Cir. Ct. 1987). See also Bryant v. State, 565 So. 2d 1298, 1299 (Fla. 1990); GARY PROVOST, WITHOUT MERCY (1990).

93. John Purnell, *Teenager Receives Life Term: Parole for Bullard Possible in 25 Years*, THE POST (Palm Beach), Oct. 8, 1982, at C2.

94. Selwyn Crawford, *Man Gets Life in Prostitute's Killing: Orange Judge Overrides Jury's Recommendation for the Death Penalty*, ORLANDO SENTINEL, Jan. 17, 1987, at D6.

95. Gary Kane, *Canady Spared His Life: Jury Overruled on Death Sentence*, PALM BEACH POST, Mar. 28, 1987, at B1. This case should not be confused with another capital case from Florida, in which Michael Eugene Cannady (no relation) was sentenced to death for a 1979 murder. See *Cannady v. State*, 427 So. 2d 723 (Fla. 1983).

10-11. *Chandler, Ronald and Richard Cravero*. July 25, 1975. Miami. Chandler and Cravero were convicted of the murder of a former partner; their falling out was associated with control over an international cocaine smuggling ring. Chandler's defense attorney, Gerald Kogan (who later was appointed to the Florida Supreme Court), told the jury that "two deaths for one is never right . . . [D]eath is a very final, final thing. When you are dead and buried, and somebody finds out that [a witness] lied, you can't resurrect them." Judge Dan Satin reportedly agreed, stating that "[d]eath is a truly awesome punishment." He said that he found no aggravating circumstances that would justify a death sentence.<sup>96</sup>

12. *Cleveland, Edward Clifton*. September 12, 1980. Pensacola. Cleveland was convicted of killing a fifteen-year-old girl who had run away from her home in Ohio. Judge William Frye III sentenced Cleveland to life, reportedly because the State failed to prove the aggravating circumstances necessary to impose a death sentence. "Judging from the evidence alone the court cannot allow the death penalty to be imposed solely on the fact that the victim's body was dismembered."<sup>97</sup> Public Defender Terry Terrell argued that the jury improperly considered post-death events.

13. *Cochran, Guy Reginald*. October 11, 1985. Tampa. Cochran was convicted of abducting a nineteen-year-old woman from a night-spot and killing her. He was also convicted of killing Leon Arbelaez in a robbery four days previously. The jury recommended a life sentence for the woman's murder and death for the Arbelaez murder. However, Judge Donald Evans overrode both recommendations.<sup>98</sup> The Florida Supreme Court wrote:

In the Arbelaez case, Cochran pulled a gun on a drug dealer outside a bar and demanded his money. When the victim advanced on Cochran, Cochran backed up and fell over a planter. The victim grabbed Cochran and attempted to take his gun. Cochran shot the victim in the chest and fled.<sup>99</sup>

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96. Gayle Pollard, 'Death Is Awesome: Two Get Life,' *MIAMI HERALD*, July 26, 1975, at B1; John Camp, *Jury Favors Death for 2: Third Gets Life*, *MIAMI HERALD*, July 15, 1975, at B2. Both men later escaped from prison but were recaptured. *Escapee Captured*, *MIAMI HERALD*, Jan. 28, 1988, at B3; Joan Fleischman, *Notorious Dade Killer on the Loose: Escape Befuddles Prison Officials*, *MIAMI HERALD*, Sept. 10, 1987, at A1.

97. Carlton Proctor, *Cleveland Gets Life Sentence for Killing 15-Year-Old-Girl*, *PENSACOLA JOURNAL-NEWS*, Sept. 13, 1980, at C1; Carlton Proctor, *Death: Jury Recommends Electric Chair for Cleveland*, *PENSACOLA JOURNAL-NEWS*, Aug. 2, 1980, at C1.

98. *Man Receives 1 Death, 1 Life Sentence in Murders*, *TAMPA TRIB.*, Oct. 13, 1985, at B4. See also *Cochran v. State*, 547 So. 2d 928, 931 n.3 (Fla. 1989) (judge's override of the jury's recommendation of life imprisonment for the woman's murder was not warranted).

99. *Cochran*, 547 So. 2d at 932 n.5.

14. *Combs, Robert Ike*. October 26, 1988. Fort Myers. In 1980 following a jury's recommendation, Judge Thomas S. Reese sentenced Combs to death for a drug-related murder. After initially affirming the conviction and sentence in 1981,<sup>100</sup> in 1988 the Florida Supreme Court, on collateral review, ordered resentencing with a new jury.<sup>101</sup> At the new hearing, the victim's mother testified that she thought Combs was innocent. Nevertheless, the jury voted to recommend a death sentence. Judge James Thompson overrode this recommendation, reportedly stating that imposition of the death penalty would necessitate complete reliance on the testimony of the victim's boyfriend and that he had some reasonable doubts about the credibility of that testimony.<sup>102</sup>

15. *Cook, David*. October 25, 1985. Miami. Cook was convicted of two counts of murder; the jury recommended death on each count. The victims, a married couple, were members of the cleaning crew at a Miami Burger King and had been shot during a robbery. According to Judge Thomas M. Carney's sentencing memorandum, he overrode the jury's death recommendation for the murder of the husband, but not for the wife, because there were no sufficient aggravating circumstances in the husband's murder. The wife was the second person shot; thus, the first murder was used as an aggravating circumstance in sentencing Cook to death for her murder. In addition, murdering her eliminated a witness to the first murder and, because she was terrorized before being murdered, her death was especially cruel.<sup>103</sup> In 1989 the Florida Supreme Court ordered a new sentencing hearing in the case because two of the aggravating circumstances found by the trial judge were not supported by the evidence.<sup>104</sup> However, Cook was resentenced to death.<sup>105</sup>

16. *Crow, Thomas Floyd*. April 26, 1985. Panama City. In sentencing Crow to life after the jury recommended death (by an 8-4 vote), Judge N. Russell Bower reportedly said that he had "committed an error" by letting the jury hear certain testimony during the penalty

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100. *Combs v. State*, 403 So. 2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982).

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

102. Tony Katsulos, *Convicted Killer Won't Go to Chair: Judge Overrules Jury Recommendation, Sentences Combs to Life in Jail*, FT. MYERS NEWS-PRESS, Oct. 27, 1988, at B1; Devi Sen, *New Verdict Expected Today in Murder Resentencing Trial*, FT. MYERS NEWS-PRESS, Oct. 21, 1988, at B5.

103. See *Cook v. State*, 542 So. 2d 964, 966 (Fla. 1989), *cert. denied*, 112 S. Ct. 252 (1991); Sentencing Memorandum, *State v. Cook* (No. 84-19874) (Fla. 11th Cir. Ct. Oct. 25, 1985); *Couple's Killer Gets Death Penalty*, MIAMI HERALD, Oct. 26, 1985, at B2.

104. *Cook*, 542 So. 2d at 970-71.

105. *Cook v. State*, 581 So. 2d 141 (Fla.), *cert. denied*, 112 S. Ct. 252 (1991).

phase. The testimony concerned the fact that the victim had engaged in homosexual activity shortly before his death.<sup>106</sup>

17-20. *Cruse, William Bryan*. July 29, 1989. Bartow (on venue change from Brevard County). Cruse was convicted of killing six people in a shooting rage at a Palm Bay shopping center. The jury recommended death on all six counts. Cruse was sentenced to death for two of the killings (police officers). Judge John Antoon sentenced Cruse to life sentences for the other four murders, despite jury votes of 11-1, 11-1, 10-2, and 11-1 for death. According to his sentencing memorandum, Judge Antoon did so because Cruse's "extreme mental disturbance" outweighed the aggravating circumstances.<sup>107</sup>

21. *De Parias, Julita*. September 17, 1988. Miami. De Parias was the lover of Jesse Ramirez (No. 40), but was tried separately for the murder of the son of a wealthy Dade County developer. The jury voted 9-3 for death. In overriding that recommendation, Judge Ralph Person stated that the State's attempt to portray De Parias as the leader of the homicide plot had failed.<sup>108</sup>

22. *Ferguson, Eddie Joe*. November 7, 1990. Fort Myers. Ferguson was convicted of killing a woman during a robbery. Ferguson was only sixteen years old at the time of the crime. Judge William Nelson decided not to conduct a penalty phase because he did not believe that appellate courts would uphold a death sentence. In 1990 the Second District Court of Appeal ordered Judge Nelson to proceed with sentencing.<sup>109</sup> Despite the defendant's age and an I.Q. of seventy-one, the jury voted 10-2 in favor of a death sentence. Judge Nelson disagreed and sentenced Ferguson to life.<sup>110</sup> The sentence was imposed on Ferguson's twentieth birthday.

23. *Ferguson, Christopher Leroy*. December 3, 1986. Fort Myers. Ferguson was convicted of breaking into the apartment of his next-door neighbor and killing her with a hammer. The jury voted 11-1 for

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106. Mike Cazalas, *Bower Gives Crow Life Prison Term for Murder*, NEWS-HERALD (Panama City), Apr. 27, 1985, at 1; Ron Wiginton, *Jury Recommends Crow Die in Electric Chair*, NEWS-HERALD (Panama City), Sept. 5, 1984, at C1.

107. *Sniper in Palm Bay Slaying Sentenced to Death*, FLA. TIMES-UNION (Jacksonville), July 30, 1989, at A1; *Cruse Receives Death Sentences in Shooting Spree: Judge Rejects Mental-Illness Plea*, SUN-SENTINEL (Ft. Lauderdale), July 29, 1989, at A24; Sentencing Memorandum, *State v. Cruse* (Case No. 87-1763-CF-A) (Fla. 18th Cir. Ct. July 29, 1989). On appeal, Cruse's convictions and death sentences were affirmed. *Cruse v. State*, 588 So. 2d 983 (Fla. 1991).

108. Christine Evans, *Duct Tape Ringleader Gets Life Term*, MIAMI HERALD, Sept. 17, 1988, at B1.

109. *State v. Ferguson*, 556 So. 2d 462 (Fla. 2d DCA 1990).

110. Peter Franceschina, *Lee Killer, 20, Gets Life in Prison: Judge Rejects Death Penalty for Ferguson*, NEWS-PRESS (Ft. Myers), Nov. 7, 1990, at B1; Peter Franceschina, *Jury Recommends Death for Killer: Ferguson, 20, Faces Sentencing Today*, NEWS-PRESS (Ft. Myers), Nov. 6, 1990, at B1.

death. Judge Thomas S. Reese reportedly said that the law did not make the death penalty appropriate in this case.<sup>111</sup>

24. *Garron, Joseph Henry*. October 4, 1985. New Port Richey. Garron was convicted of killing his wife and thirteen-year-old stepdaughter. The jury voted to recommend the death penalty by 9-3 and 12-0 votes respectively. While waiting for trial, Garron was twice found incompetent to stand trial. At trial, three psychiatrists testified that he was insane. Judge Lawrence E. Keough overrode the jury's recommendation for the wife's murder. At the same time, following the jury's death recommendation as to the daughter, Judge Keough found that the daughter was killed to eliminate a witness and that she had not died until she suffered from being shot four times.<sup>112</sup> Garron was condemned to death for that murder.

25. *Graham, Doyle Curtis*. September 25, 1980. Fernandina Beach. Graham (white) was convicted of killing a convenience store clerk (black); the all-white jury recommended death. Judge Henry Lee Adams, Jr. (black), who reportedly characterized himself during the sentencing proceedings as a "philosophical opponent" of capital punishment, said the circumstances of the crime did not justify the death penalty.<sup>113</sup>

26. *Hale, Ronald Frederick*. October 23, 1984. Tampa. Hale was convicted of two murders. For one he was convicted of second-degree murder; for the other, a stabbing of a sixteen-year-old girl, his jury recommended death by a 7-5 vote. Judge John P. Griffin overrode this recommendation, reportedly because, as the judge put it, the "aggravating circumstances haven't been sufficiently proved" because Hale was under the influence of drugs on the night of the crimes.<sup>114</sup>

27. *Hall, Thomas Edward*. July 12, 1985. Tampa. Hall was convicted of armed burglary, aggravated battery with a firearm, possession of a firearm during commission of a felony, and first-degree murder for killing his girlfriend's husband in a domestic dispute.

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111. Denes Husty, *Hammer Murderer Gets Life*, NEWS-PRESS (Ft. Myers), Dec. 4, 1986, at B1.

112. *Garron v. State*, 528 So. 2d 353, 355 (Fla. 1988); Michael Wade, *Garron Receives Death Sentence*, TAMPA TRIB. (Pasco Trib. ed.), Oct. 5, 1985, at 1; Sentencing Memorandum, *State v. Garron* (No. 82-2123CFAWS) (Fla. 6th Cir. Ct. Oct. 10, 1985). A new trial was ordered on appeal.

113. Jonathan Rogers, *Death Penalty Rejected*, FLA. TIMES-UNION (Jacksonville), Sept. 26, 1980, at B3; Jonathan Rogers, *Jury Recommends Death for Killer of Store Clerk*, FLA. TIMES-UNION (Jacksonville), July 3, 1980, at B3.

114. Robert Samek, *Hale's Life Is Spared*, TAMPA TRIB., Oct. 24, 1984, at B1. Hale won a new trial in 1986 because of the improper exclusion of a black male from his jury. *Hale v. State*, 480 So. 2d 115 (Fla. 2d DCA 1985).

Judge M. William Graybill overrode the jury's 7-5 death recommendation, reportedly because of the lack of premeditation.<sup>115</sup>

28. *Jackson, James*. April 17, 1978. Starke. Jackson was convicted with Bennie Demps and Harry Mungin of a prison murder; the victim was a "snitch." According to the prosecution, Mungin served as the lookout while Demps held the victim, and Jackson stabbed him; post-conviction investigation in Demps' case has cast significant doubt upon this version of the events. Judge Wayne Carlisle, following the jury's recommendations, sentenced Mungin to life and Demps (who had been serving a life sentence at the time of the crime) to death. Jackson's death recommendation was not followed, according to newspaper reports, because "the case was not strong enough that 'do-gooders' couldn't carry it to the Supreme Court and claim that the death penalty would be cruel and unusual punishment."<sup>116</sup> The past criminal records of the defendants reportedly were strong influences on the judge's decisions.<sup>117</sup>

29. *Jones, Daniel Clinton*. January 25, 1990. Bartow. Jones was convicted of murdering his girlfriend, and the jury voted 8-4 to recommend death. The victim's mother had asked that a life sentence be imposed. Judge E. Randolph Bentley imposed a life sentence, reportedly noting that "because of the combination of mental factors and organic brain damage that diminished the defendant's ability to conform to the requirements of the law, . . . he should not be released or considered for parole." The judge also noted Jones' "horrendous and abusive family life" (including being raped at age five), brain damage that "probably" resulted from the abuse, and his "long periods of institutional confinement" as a child.<sup>118</sup>

30. *Jones, Freddie Cecil*. May 6, 1987. Miami. Jones was sentenced to death in 1982 for the murder of a truck driver. He won a new trial in 1985.<sup>119</sup> At his retrial, he was convicted of second-degree murder.<sup>120</sup>

115. Malcolm Spicer, *Murderer Sent to Jail, Not Electric Chair*, TAMPA TRIB., July 13, 1985, at B4; *Hall v. State*, 505 So. 2d 657 (Fla. 2d DCA 1987).

116. Percy Hamilton, *Demps Sentenced to Death for Inmate Knife Slaying*, FLA. TIMES-UNION (Jacksonville), Apr. 18, 1978, at B1 (paraphrasing statements by Judge Carlisle).

117. *Id.*; R. Michael Anderson, *Death Penalty in Prison Slaying Is Upheld*, FLA. TIMES-UNION (Jacksonville), Jan. 9, 1981, at B3; Bill Shields, *Inmate Receives Death Sentence*, GAINESVILLE SUN, Apr. 18, 1978, at 1.

118. Andy Sidden, *Judge Overrules Jury, Gives Life Term*, THE LEDGER (Lakeland), Jan. 26, 1990, at B1; Beth Foushee, *Man Gets Life Sentence, No Parole*, TAMPA TRIB., Jan. 26, 1990 (Polk County Supp.) at 1.

119. *Jones v. State*, 464 So. 2d 547 (Fla. 1985).

120. Jones was sentenced to 402 years. See *Miami Man Gets 402 Years in Slaying*, MIAMI HERALD, March 18, 1986, at D2. This conviction was affirmed on appeal. *Jones v. State*, 508 So. 2d 490 (Fla. 3d DCA 1987).

Three months before that murder, Jones allegedly killed another truck driver after hijacking his truck. At trial for this murder in 1987, the jury voted 8-4 for death. According to newspaper reports, Judge Norman Gerstein refused to elaborate on the reasons why he disagreed with this recommendation, but he did say, "I did what the law required me to do."<sup>121</sup>

31. *Lackner, Ronald Paul*. March 14, 1988. Inverness. Lackner was convicted of murdering his estranged wife. The jury voted 12-0 to recommend the death penalty. In mitigation the defense argued that the murder was committed when Lackner was experiencing emotional trauma because of the impending divorce. Judge Thomas Sawaya reportedly did not specify his reasons for overriding the jury's recommendation.<sup>122</sup>

32. *Lusk, Bobby Earl*. May 11, 1977. Miami. Lusk and a codefendant were convicted of murdering a seventy-one-year-old hotel guest who suffocated after being gagged during a robbery of her hotel room. Both defendants were offered life imprisonment in exchange for a guilty plea, but only the codefendant accepted the deal. Judge Wilkie D. Ferguson, Jr. overruled the jury's death recommendation, reportedly because of evidence of limited premeditation, and added, "[t]he death penalty in this case would be tantamount to executing [Lusk] for taking advantage of his constitutional rights."<sup>123</sup> In 1980 Lusk was sentenced to death (after a jury recommendation of life) for a prison murder.<sup>124</sup>

33. *Marter, Joseph Alan*. March 31, 1980. Orlando. Marter was convicted of first-degree murder for stabbing a nineteen-year-old woman; the jury unanimously recommended death. Judge Frank N. Kaney reportedly said the killing "does not rise to Florida standards for the death penalty . . . . It would be the easy thing, the politic thing, to sentence this defendant to death and let the Supreme Court take the heat for lowering it to life."<sup>125</sup>

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121. Jay Ducassi, *Judge Sentences Two-Time Killer to Three Consecutive Life Terms*, MIAMI HERALD, May 7, 1987, at D7.

122. Keith Morelli, *Lackner Receives Life in Prison; Death Recommendation Rejected*, Ocala Star Banner, March 15, 1988, at B2; Cindy Cokely, *Lackner's Life Spared: Judge Gives Man Life Sentence for Murder*, CITRUS COUNTY CHRON., Mar. 15, 1988, at 1; Cindy Cokely, *Jury Recommends Death Penalty, 12-0, for Lackner*, CITRUS COUNTY CHRON., Dec. 18, 1987, at 1.

123. *Killer Sentenced to Three Life Terms*, MIAMI HERALD, May 12, 1977, at C5. The conviction was affirmed on appeal. *Lusk v. State*, 367 So. 2d 1088 (Fla. 3d DCA 1979).

124. Deborah Charnal, *Inmate Gets Death Sentence*, GAINESVILLE SUN, Feb. 6, 1980, at 13. As of early 1992, Lusk remained on death row for this conviction. *Lusk v. Dugger*, 583 So. 2d 1035 (Fla.), cert. denied, 112 S. Ct. 425 (1991).

125. Mary R. Heffron, *Murderer Given Life Sentence, Despite Jury's Vote for Death*, SENTINEL STAR (Orlando), Apr. 1, 1980, at C3.

34. *Mays, James, Jr.* February 29, 1989. Melbourne. Mays was convicted of shooting a man who had startled him in a dark parking lot. The jury voted 7-5 for death. Judge John Antoon overrode this recommendation, reportedly because the defendant's history of mental problems went back to when he was only two years old.<sup>126</sup>

35. *Mitchell, Joseph.* May 25, 1988. Live Oak. Mitchell was convicted of raping and killing a seventeen-year-old woman during the burglary of her home. The jury voted 9-3 to recommend the death penalty. Judge John Peach disagreed with this recommendation, reportedly saying that there were more mitigating circumstances than aggravating circumstances.<sup>127</sup>

36. *Morris, Clarence.* May 11, 1984. St. Petersburg. Morris was convicted in the death of an eighty-five-year-old woman who died after being mugged. The jury (mostly elderly) voted 7-5 in favor of a death sentence for Morris; they also voted to recommend a life sentence for his codefendant. Judge Susan Schaeffer sentenced Morris to life, reportedly because she felt it necessary to treat both defendants similarly. A second reason for the override was Morris' long history of mental problems.<sup>128</sup>

37. *Nelson, Michael.* March 9, 1982. West Palm Beach. Nelson was convicted of killing his wife in hopes of obtaining \$80,000 from her life insurance policy. The jury recommended death by a 7-5 vote. The victim drowned in her bathtub; earlier Nelson had tried to poison her. The victim's sister told the judge that she opposed the death penalty. Judge Marvin Mounts rejected the jury's recommendation, reportedly saying, "I cannot classify this crime as especially heinous, atrocious or cruel under the existing Florida law."<sup>129</sup>

38. *Occhicone, Dominick A.* November 9, 1987. New Port Richey. Occhicone was convicted on two counts of first-degree murder for killing his estranged fiancée's parents, and the jury voted 7-5 to recommend the death penalty on both counts. Judge Lawrence E. Keough followed the jury's recommendation for the mother's murder<sup>130</sup> but overrode it for the father's death. The mother suffered

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126. Robert Kohlman, *Mays Given Life in Prison for Slaying*, FLA. TODAY (Melbourne), Feb. 28, 1989, at B1; Robert Kohlman, *Jury Wants Death for Killer of Kansas Man*, FLA. TODAY (Melbourne), Dec. 7, 1988, at B1.

127. Susan Lamb, *Killer of Teen Girl Sentenced to Life*, GAINESVILLE SUN, May 26, 1988, at B3.

128. Lynda Richardson, *Judge Overrides Jury, Sentences Man to Life in Fatal Mugging*, ST. PETERSBURG TIMES, May 12, 1984, at B12.

129. Anne Krueger, *Nelson Must Serve Life Prison Term for Wife's Murder*, THE POST (Palm Beach), March 10, 1982, at C1.

130. This death sentence was affirmed on appeal. *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990), cert. denied, 111 S. Ct. 2067 (1991).



more anguish than the father because the father was shot first; she knew this and had to spend several terrified minutes before she was shot. Further, since the father died relatively quickly, Judge Keough did not find his murder to be especially heinous, atrocious, or cruel.<sup>131</sup>

39. *Porter, George*. March 4, 1988. Melbourne. Porter pleaded guilty to killing his former girlfriend and her new boyfriend; the jury unanimously recommended death for the woman's killing and, by a 10-2 vote, death for the man's murder. At trial, Porter acted as his own attorney before abruptly pleading guilty (and that night he attempted suicide). Judge John Antoon sentenced Porter to death for the woman's murder but to life imprisonment for the murder of her companion. He found that the woman's murder was especially heinous, atrocious, and cruel, as well as cold and calculated, because Porter had threatened the victim on numerous occasions and the victim did not die instantaneously.<sup>132</sup>

40. *Ramirez, Jesse*. June 25, 1987. Miami. Ramirez and three others were convicted of kidnapping the son of a wealthy Miami developer. When a ransom scheme failed, they bound the victim with duct tape, and he suffocated. The jury voted 10-2 to recommend a death sentence for Ramirez. Nonetheless, Judge Steven Robinson sentenced Ramirez to life, citing the defendant's long history of child abuse and his recent conversion to Christianity. A second defendant in the case, Julita de Parias (No. 21) also had a jury recommendation of death overridden in her case. Two months after the sentencing, about 150 protesters marched to protest the rejection of the death penalty. The victim's father (an influential member of the Latin Builders Association) reportedly said: "[t]his man will never be judge again. I don't care what it costs me."<sup>133</sup> Nonetheless, in 1990 Judge Robinson was easily reelected.<sup>134</sup>

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131. David Sommer, *Occhicone Sentenced to Death*, TAMPA TRIB. (Pasco County ed.), Nov. 10, 1987, at 1.

132. Elizabeth Baker, *Porter Given Death Penalty*, FLA. TODAY (Melbourne), March 5, 1988, at B1; Elizabeth Baker, *Jury Urges Electric Chair in Porter Trial: Final Decision Up to Circuit Judge*, FLA. TODAY (Melbourne), Jan. 23, 1988, at B1; Elizabeth Baker, *Prosecutors Seek Death for Porter*, FLA. TODAY (Melbourne), Jan. 22, 1988, at B1; Sentencing memorandum, *State v. Porter*, (No. 86-5546-CF-A) (Fla. 18th Cir. Ct. March 4, 1988). Porter's death sentence was affirmed on appeal. *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), cert. denied, 111 S. Ct. 1024 (1991).

133. Sentencing memorandum, *State v. Ramirez*, (No. 85-16798A)(Fla. 11th Cir. Ct. June 25, 1987); *153 Protest Murder Case Sentence*, MIAMI HERALD, Aug. 18, 1987, at B2; Dave Von Drehle, *Duct-Tape Ruling May Put Judge in Political Danger*, MIAMI HERALD, June 28, 1987, at B2; Jay Ducassi, *Slain Man's Kin Irate at Life Term for Killer*, MIAMI HERALD, June 27, 1987, at D1.

134. THE AMERICAN BENCH, JUDGES OF THE NATION 602 (Marie T. Hough et al. eds., 6th ed. 1991-92).

41. *Ripley, Michael Wallace*. February 21, 1989. Bartow. Despite relentless protestations of innocence, Ripley was convicted of killing his wife (six weeks after their marriage); the jury voted 11-1 to recommend a death sentence. Judge J. Tim Strickland rejected this recommendation, reportedly saying "the aggravating circumstances offered by the state were not sufficient to outweigh the mitigating circumstances offered by the defendant." Judge Strickland noted the "circumstantial nature" of the evidence in the case.<sup>135</sup>

42. *Rivera, Juan Sota*. August 21, 1986. Fort Myers. Rivera was convicted of shooting a man in a fight outside a bar, and his jury recommended death by an 8-4 vote. Rivera had also been convicted of third-degree murder in 1973. Judge Thomas Reese reportedly said that the aggravating circumstances did not outweigh the mitigating circumstances, and therefore he sentenced Rivera to life imprisonment.<sup>136</sup>

43. *Robinson, Lovonza*. May 16, 1980. Sebring. Robinson (age nineteen at the time of the crime) and two codefendants (ages fifteen and seventeen at the time of the crime) were convicted of the torture-murder of a sixty-two-year-old man. The codefendants were sentenced to life imprisonment, but Robinson's jury voted 9-3 to recommend death. Judge John H. Dewell disagreed, reportedly citing the fact that the codefendants were not sentenced to death and that some doubts existed about the veracity of the state's chief witness (one of the codefendants who was permitted to plea bargain to a lesser charge in exchange for his testimony).<sup>137</sup>

44. *Selver, Gilbert*. February 3, 1989. West Palm Beach. Selver was convicted of first-degree murder for hiring a man to kill a customer who had failed to complete a drug deal. The alleged triggerman was acquitted. Judge Harold Cohen disagreed with the jury's 7-5 vote to recommend death, reportedly because the alleged triggerman was acquitted, the victim was involved in the drug culture, and the death penalty should be reserved for "a narrow range of cases . . . which truly cry out for its use." According to *The Palm Beach Post*, the closeness of the jury's vote influenced the judge's decision: "[t]he 7-5 vote is by no means an overwhelming statement."<sup>138</sup>

135. Judgment and Sentence of Michael Ripley, (No. CF88-979) (Fla. 10th Cir. Ct. Feb. 21, 1989); Andy Sidden, *Judge Gives Ripley Life in Prison*, THE LEDGER (Lakeland), Feb. 22, 1989, at B1; Beth Foushee, *Ripley Gets Life in Prison*, TAMPA TRIB., Feb. 22, 1989, at 1.

136. Beth Francis, *Killer Receives Life Term*, NEWS-PRESS (Ft. Myers), Aug. 22, 1986, at B1.

137. David Nicholson, *Man's Sentence Life for Mutilation Murder*, TAMPA TRIB. (Heartland ed.), May 17, 1980, at B1; David Nicholson, *Jury Recommends Death in Mutilation Murder Case*, TAMPA TRIB. (Heartland ed.), Feb. 27, 1980, at B1; David Nicholson, *Jury Finds Avon Park Man Guilty in Mutilation-Murder*, TAMPA TRIB. (Heartland ed.), Feb. 15, 1980, at A1.

138. Angela Bradbery, *Judge: Drug Murder Not Serious Enough for Death Sentence*, PALM

45. *Sorey, William June*. August 17, 1987. Marianna. Sorey was convicted of killing a friend in a "petty gambling dispute."<sup>139</sup> The defense argued that the victim might have died anyway because ambulance technicians inserted an oxygen tube inserted into the victim's stomach instead of his lungs. The jury voted 8-4 to recommend death. Judge Robert L. McCrary sentenced Sorey to life.<sup>140</sup>

46. *Taylor, George William*. August 14, 1987. Tampa. Taylor was convicted of killing a man with a meat cleaver. Taylor had agreed to engage in homosexual relations with the victim (whom he had met at a bar) for thirty dollars, and a dispute developed over payment. Taylor argued the killing had been done in self-defense. The jury voted 11-1 to recommend a death sentence. Judge John P. Griffin disagreed. After the sentencing, five jurors spoke out against the judge's decision.<sup>141</sup>

47. *Telemachos, Katherine*. December 20, 1991. Ft. Lauderdale. As a nineteen-year-old, Telemachos was convicted of hiring two men to murder her father. The jury deliberated for thirty-three minutes before recommending death by an 8-4 vote. In sentencing her to life, Judge Charles Greene reportedly cited her emotional immaturity and childhood health problems. She had suffered repeated kidney failures and, at age ten, she was one of the first Americans to survive a liver transplant. Judge Greene, a former prosecutor, had suffered from a life-threatening cancer as a child.<sup>142</sup>

48. *White, Victor J.* July 17, 1987. Sanford. White was convicted of killing the fourteen-month-old son of the woman with whom he was living; the jury voted 9-3 to recommend execution. Judge O. H. Eaton, Jr., rejected this recommendation, reportedly because the murder was not especially "heinous, atrocious, and cruel."<sup>143</sup>

49. *Young, Charles "Biff."* July 15, 1990. West Palm Beach. Young was convicted of beating to death a seventy-eight-year-old security guard; the weapon was a wrought-iron flamingo yard decora-

BEACH POST, Feb. 4, 1989, at B2 (quoting Judge Cohen). The conviction was reversed on appeal, and a new trial was ordered because of errors in the admission of a collateral crime and hearsay evidence. *Selver v. State*, 568 So. 2d 1331 (Fla. 4th DCA 1990).

139. Robyn Hearn, *Jury Recommends Death for Sorey*, JACKSON COUNTY FLORIDIAN, June 25, 1987, at 1.

140. *Id.*; letter from Jackson County Clerk of Courts, Sept. 6, 1991 (on file with authors).

141. Bayard Steele, *Judge Goes Against Jury, Gives Murderer Life Sentence*, TAMPA TRIB., August 15, 1987, at B4; *Overruled Jurors Blast Judge for Sparing Killer*, MIAMI HERALD, Aug. 22, 1987, at D2. The life sentence was affirmed on appeal. *Taylor v. State*, 563 So. 2d 822 (Fla. 2d DCA 1990). See also *Taylor v. State*, 586 So. 2d 1345 (Fla. 2d DCA 1991).

142. Fred Grimm, *Did Immaturity, or Color, Spare Killer?*, MIAMI HERALD, Dec. 22, 1991, at C7; *Judge Finds Mercy in Memories*, TALLAHASSEE DEMOCRAT, Dec. 22, 1991, at B6.

143. Brad Church, *Baby Killer Gets 'Life': Judge Sets Aside Death Recommendation*, SANFORD HERALD, July 17, 1987, at 1.

tion. Young, who acted as his own attorney at trial, was given a death recommendation by a 9-3 vote. Judge Walter Colbath, a former family court judge, reportedly said that Young was "the product of one of the most dysfunctional families seen by the court, spanning three generations." The family had a history of alcoholism, abuse, and neglect. In rejecting the jury's recommendation, the judge also noted that the victim's widow had asked for a life sentence.<sup>144</sup>

50-51. *Zadnick, Rudolph Daniel*. November 27, 1974. Orlando. Zadnick was convicted of killing the woman with whom he had been living (for five days) and her five-year-old son. The murder weapon was a frying pan. Judge Peter de Manio overrode the jury recommendations (12-0 for the boy and 10-2 for the mother), reportedly because he believed the jury might have been unduly influenced by the fact that one of the victims was a child.<sup>145</sup>

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144. Christine Stapleton, *Man Gets Life for Bludgeoning Murder: Victim's Wife Didn't Want Death Penalty*, PALM BEACH POST, July 14, 1990, at B2.

145. Paul Jenkins, *Judge Overrides Jury as Zadnik Gets Life*, SENTINEL STAR (Orlando), November 28, 1974, at B1.