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# CRIMINAL PROCEDURE Sentence and Punishment: Amend Article 2 of Chapter 10 of Title 17 of the Official Code of Georgia Annotated, Relating to the Death Penalty Generally, so as to Provide that the Death Penalty May Be Imposed where the Jury Finds at Least One Aggravating Circumstance but Is Unable to Reach a Unanimous Verdict as to the Sentence, Taking into Account the Vote of the Jurors under Certain Circumstances; Change Provisions Relating to the Requirement of a Jury Finding of Aggravating Circumstance and Recommending the Death Penalty; Provide for an

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# Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

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## CRIMINAL PROCEDURE

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CODE SECTIONS:

O.C.G.A. § 17-10-31, -31.1 (amended)

BILL NUMBER:

HB 185

SUMMARY:

The bill would have amended the current Georgia Code regarding sentencing procedures in criminal trials. The bill would have modified the number of juror votes required to impose a death sentence in death penalty cases. The bill would only have affected the sentencing phase of criminal trials, not the guilt-innocence phase. The bill sought to provide judges with the ability to sentence defendants to either life imprisonment, life without parole, or death, when ten members of the jury vote for death as the sentence. The amendment would have changed the law from requiring a unanimous jury vote for the death penalty to allowing a ten-member vote of the jury to be sufficient to sentence a defendant to death.

EFFECTIVE DATE:

N/A

## History

On November 8, 1999, 22-year-old Whitney Land and her 2-year-old daughter Jordan were abducted in Land's car and shot.<sup>1</sup> Their bodies were placed in the trunk and the car was burned.<sup>2</sup> After one trial postponement and one mistrial, a jury in a third trial found Wesley Harris guilty of the double murder.<sup>3</sup> The prosecutor, Gwinnett District Attorney Danny Porter, sought the death penalty for the double murder.<sup>4</sup> He said the case was the "strongest for the death penalty that I have ever tried."<sup>5</sup> The jury did not agree: ten jurors voted for the death penalty, and two voted against the death penalty.<sup>6</sup>

Since the jury was not unanimous, Harris was sentenced in accordance with Georgia law to life without the possibility of parole.<sup>7</sup> The ten jurors who voted for the death penalty saw the verdict as an injustice, and began to campaign to change the death penalty law in Georgia.<sup>8</sup> Representative Barry Fleming (R-117th) responded to their activism by introducing a bill that would reduce the number of jurors needed to impose the death penalty sentence, from a unanimous twelve to nine.<sup>9</sup>

Representative Fleming cites another case as a reason for his legislation: a defendant found guilty of murdering an Augusta police officer was given the death penalty in two trials before a non-unanimous jury assigned him a life sentence in a third trial.<sup>10</sup> He says,

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1. Lateef Mungin, *Death Sentence "Stolen," Angry Jurors Say*, ATLANTA J.-CONST., Nov. 13, 2005, at E1, available at 2005 WLNR 18338371.

2. *Id.*

3. *Id.*

4. *Id.*

5. Lateef Mungin, *Sentence for Killer Sparks Rage, Relatives of Slain Mom, Toddler Call Life Without Parole Too Lenient*, ATLANTA J.-CONST., Nov. 9, 2005, at D3, available at 2005 WLNR 18082356.

6. *Id.*

7. *Id.*; see also *infra* text accompanying notes 41–50 (outlining current Georgia law regarding the death penalty).

8. See Lateef Mungin, *Gwinnett Murders Created Activists*, ATLANTA J.-CONST., Feb. 11, 2007, at A1, available at 2007 WLNR 2706753.

9. See *id.*

10. *Id.*; see also Telephone Interview with Rep. Barry Fleming (R-117th) (Apr. 23, 2007) [hereinafter Fleming Interview].

“in that case, one juror overruled the decisions of 35 other jurors.”<sup>11</sup> Representative Fleming says that district attorneys have informed him of at least sixteen cases where “hold-out” jurors caused the withholding of the death penalty.<sup>12</sup> He suspects that there may be at least twice that many.<sup>13</sup> He stated that his bill seeks to address these situations and is “narrowly tailored to fit a narrow problem.”<sup>14</sup>

### *National Death Penalty Response*

HB 185 was considered in light of national trends that may indicate that America is becoming less supportive of the death penalty.<sup>15</sup> According to the Death Penalty Information Center (DPIC), which compiles statistics on capital punishment, two states have imposed formal moratoria on the death penalty; executions in New York are on hold after the state’s death-penalty law was declared unconstitutional in 2004; eleven other states, most recently Florida and Tennessee, have effectively barred the practice because of concerns over lethal injection; and eleven more are considering either moratoria or repeals.<sup>16</sup> The raw numbers of executions and death sentences in the United States have plummeted: DPIC statistics show that, in 1999, states executed ninety-eight people, and, in 2006, that number dropped to fifty-three, a ten-year low.<sup>17</sup> American judges and juries condemned about 300 prisoners a year to death through the 1990s.<sup>18</sup> That number has now declined by over half, hitting a low of 128 in 2005.<sup>19</sup> Public support also seems to be faltering. A 2006 ABC/Washington Post Poll showed that two-thirds of Americans still

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11. Mungin, *supra* note 8.

12. See Fleming Interview, *supra* note 10.

13. See Video Recording of House Proceedings, Mar. 20, 2007 at 1 hr., 56 min., 58 sec. (remarks by Rep. Barry Fleming (R-117th)),

[http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_72682804,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.html) [hereinafter House Video].

14. House Video, *supra* note 13, at 2 hr., 13 min., 28 sec. (remarks by Rep. Barry Fleming (R-117th)).

15. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2007), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

endorse capital punishment for murderers.<sup>20</sup> But for the first time in twenty years, when given the choice between a life sentence without parole and the death penalty, more people preferred the life prison term to capital punishment, 48% to 47%.<sup>21</sup>

However, most polls show that Americans continue to support the death penalty.<sup>22</sup> A separate poll asked, “[i]n your opinion, is the death penalty imposed: too often, about the right amount, or not often enough?”<sup>23</sup> Fifty-one percent of respondents said “not often enough” and 25% said “about right.”<sup>24</sup> The sum of 76% for current or tougher capital sentencing has been steady in a narrow range of 71-77% for the five years Gallup has been asking this question.<sup>25</sup> “This poll confirms that the American people are not turning away from the death penalty,” said Kent Scheidegger, legal director of the California-based Criminal Justice Legal Foundation, which supports capital punishment.<sup>26</sup> “Claims to that effect by opponents of the death penalty are wishful thinking.”<sup>27</sup>

### *Current Death Penalty Law in Georgia*

Current law in Georgia first requires prosecutors to give the court notice of the state’s intent to seek the death penalty.<sup>28</sup> Upon a unanimous guilty verdict by the jury, it then requires the state to show that there are aggravating circumstances that warrant the imposition of the death penalty in the sentencing phase.<sup>29</sup> Various aggravating circumstances are listed in the Georgia Code and include a prior conviction for a capital felony or a finding that the crime committed was “outrageously or wantonly vile, horrible, or inhuman

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20. See ABC News/Washington Post Poll (June 22-25, 2006), available at <http://www.pollingreport.com/crime.htm> [hereinafter ABC Poll].

21. USA Today/Gallup Poll (May 5-7, 2006), available at <http://www.pollingreport.com/crime.htm>.

22. See, e.g., *id.* (showing 65% in favor of the death penalty, 28% opposed, and 7% unsure); ABC Poll, *supra* note 20 (showing 65% in favor, 32% opposed, and 3% unsure).

23. See Gallup Poll (May 8-11, 2006), available at <http://www.pollingreport.com/crime.htm>.

24. *Id.*

25. *Id.*

26. Press Release, Criminal Justice Legal Foundation, Gallup Poll Shows Support for Death Penalty Strong and Steady (May 4, 2006), available at <http://www.cjlf.org/releases/06-11.htm>.

27. *Id.*

28. GA. R. UNIFIED APP. 2(c)(1); O.C.G.A. § 17-10-32.1 (2004).

29. O.C.G.A. § 17-10-31 (2004).

in that it involved torture, depravity of mind, or an aggravated battery to the victim.”<sup>30</sup> In the sentencing phase, a judge or jury must find the existence of an aggravating circumstance beyond a reasonable doubt to impose either life without parole or the death penalty, except in cases of treason or aircraft hijacking.<sup>31</sup> Upon a jury’s unanimous finding of an aggravating circumstance, the jury may make a recommendation of death or of life without parole, which the judge must follow.<sup>32</sup> Absent a recommendation of death by the jury, the court must impose the lesser sentence, usually life in prison.<sup>33</sup> When the jury cannot agree on a recommendation of death, the judge must dismiss the jury and impose life or life without parole.<sup>34</sup> In this case, the judge may only impose life without parole when a majority of the jurors, in their last vote, had voted for death or life without parole.<sup>35</sup>

Where the defendant has pled guilty, a judge may sentence a defendant to life without parole or death only when the prosecutor has given notice of the state’s intent to seek the death penalty and the judge finds at least one aggravating circumstance beyond a reasonable doubt.<sup>36</sup> Otherwise, the judge must sentence the defendant to life imprisonment.<sup>37</sup>

### *Bill Tracking*

#### *Consideration and Passage by the House*

Representative Barry Fleming (R-117th), Representative Willie Talton (R-145th), Representative Melvin Everson (R-106th), Representative Timothy Bearden (R-68th), Representative Jerry Keen (R-179th), and Representative Mark Burkhalter (R-50th) sponsored

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30. O.C.G.A. § 17-10-30(b) (2004).

31. O.C.G.A. §§ 17-10-30(c), -30.1 (2004).

32. O.C.G.A. §§ 17-10-31, -31.1(b) (2004); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Burden v. Zant*, 975 F.2d 771 (11th Cir. 1992), *rev’d on other grounds*, 510 U.S. 132 (1994).

33. O.C.G.A. § 17-10-31 (2004); *Hill v. State*, 250 Ga. 821 (1983); *Miller v. State*, 237 Ga. 557 (1976).

34. *Hill*, 250 Ga. 821; *Miller*, 237 Ga. 557.

35. O.C.G.A. § 17-10-31.1(c) (2004).

36. O.C.G.A. § 17-10-32.1 (2004). No aggravating circumstance must be found in cases of treason or aircraft hijacking. O.C.G.A. § 17-10-32 (2004).

37. O.C.G.A. § 17-10-32.1(b) (2004).

HB 185.<sup>38</sup> On January 29, 2007, the Clerk of the House first read HB 185.<sup>39</sup> On January 30, 2007, the Clerk of the House read HB 185 for a second time and the Speaker of the House, Representative Glenn Richardson (R-19th), assigned it to the Judiciary Non-Civil Committee.<sup>40</sup> As introduced, the bill set the number of juror votes required to impose the death penalty at nine.<sup>41</sup> In the House Judiciary Non-Civil Committee discussion of HB 185, Representative Kevin Levitas (D-82nd) proposed a substitute that would increase the number of jurors required under HB 185 to impose the death penalty from nine to eleven.<sup>42</sup> Representative Levitas stated that his amendment might aid the law in withstanding a constitutional challenge while also respecting the voice of each juror and saving money.<sup>43</sup> The amendment passed the Committee, 11 to 5, and the Committee then favorably reported the bill to the House floor on March 19, 2007.<sup>44</sup> Representative Fleming petitioned the House Committee to compromise at requiring ten jurors, but his amendment failed by a vote of 4 to 12.<sup>45</sup> Representative Fleming introduced the same proposal to the House as a floor amendment.<sup>46</sup>

At the House floor debate of HB 185 the Clerk of the House read the bill for the third time and then Representative Fleming presented the bill to the House with his floor amendment.<sup>47</sup> Representative Fleming informed the House that HB 185 “simply gives the judge an option if the jury comes back, non-unanimously, to apply the death penalty. It gives the judge a vote.”<sup>48</sup> Representative Fleming took questions from Representative Alisha Morgan (D-39th), Representative Roger Bruce (D-64th), Representative Mark Hatfield (R-177th), and Representative Joe Heckstall (D-62nd).<sup>49</sup>

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38. HB 185, as introduced, 2007 Ga. Gen. Assem.

39. State of Georgia Final Composite Sheet, HB 185, June 5, 2007.

40. *Id.*

41. HB 185, as introduced, 2007 Ga. Gen. Assem.

42. *See* HB 185 (HCS), 2007 Ga. Gen. Assem.

43. *See* Admin. Office of the Courts, Daily Report, Mar. 13, 2007, [http://www.ciclt.net/aoc/main.asp?PT=n\\_detail&Client=aoc&N\\_ID=100035](http://www.ciclt.net/aoc/main.asp?PT=n_detail&Client=aoc&N_ID=100035).

44. *Id.*

45. *Id.*; *see* State of Georgia Final Composite Sheet, HB 185, June 5, 2007.

46. *See* HB 185 (HFA), 2007 Ga. Gen. Assem.

47. House Video, *supra* note 13, at 1 hr., 55 min., 0 sec. (remarks by Clerk of the House); *id.* at 1 hr., 56 min., 0 sec. (remarks by Rep. Barry Fleming (R-117th)).

48. *Id.* at 2 hr., 01 min., 42 sec. (remarks by Rep. Barry Fleming (R-117th)).

49. *See id.*

Six representatives spoke in support of HB 185, including: Representative Talton, Representative Bearden, Representative Everson, Representative Charlice Byrd (R-20th), Representative Doug Collins (R-27th), and Representative David Ralston (R-7th).<sup>50</sup> Representative Talton asked the audience to consider “what are the rights of the victim?”<sup>51</sup> Representative Bearden stated, “nowhere in the constitution does it state any decision must be unanimous.”<sup>52</sup> Both Representative Talton and Representative Bearden described, in detail, cases where innocent victims were killed by criminals who were ultimately not given the death penalty because of one “hold-out” juror.<sup>53</sup> Representative Bearden summed up the testimony in support of HB 185 saying, “when [criminals] do these types of crimes, they deserve to die.”<sup>54</sup> Representative Everson spoke about several dramatic cases including the Whitney and Jordan Land case, concluding “it’s amazing that one or two jurors could undermine the will of the remaining jurors who said that they never saw such a case that deserved the death penalty.”<sup>55</sup>

Representative Byrd reiterated that “[w]e are here today for the voices of future victims. My voice is for the vote of the safety of those voices.”<sup>56</sup> Supporters of the bill placed heavy emphasis on the fact that the bill “does nothing to change the current structure of death penalty law in the state except the sentencing phase.”<sup>57</sup> Representative Collins specifically addressed the allegation that this bill would place too much authority in the hands of judges, saying “to simply say that [judges] would not be able to sentence death, or that they would be forced into death because they simply wanted to win an election, in my opinion, is putting too less [sic] of a value on our judges.”<sup>58</sup> Finally, Representative Ralston closed by admonishing the

50. *Id.*

51. *Id.* at 2 hr., 19 min., 41 sec. (remarks by Rep. Willie Talton (R-145th)).

52. House Video, *supra* note 13, at 2 hr., 30 min., 48 sec. (remarks by Rep. Timothy Bearden (R-68th)).

53. *Id.* at 2 hr., 18 min., 40 sec. (remarks by Rep. Willie Talton (R-145th)); *id.* at 2 hr., 32 min., 40 sec. (remarks by Rep. Timothy Bearden (R-68th)).

54. *Id.* at 2 hr., 35 min., 18 sec. (remarks by Rep. Timothy Bearden (R-68th)).

55. *Id.* at 2 hr., 40 min., 10 sec. (remarks by Rep. Melvin Everson (R-106th)).

56. *Id.* at 2 hr., 47 min., 20 sec. (remarks by Rep. Charlice Byrd (R-20th)).

57. *Id.* at 2 hr., 51 min., 12 sec. (remarks by Rep. Doug Collins (R-27th)); *see also id.* at 4 hr., 16 min., 56 sec. (remarks by Rep. David Ralston (R-7th)).

58. House Video, *supra* note 13, at 2 hr., 53 min., 53 sec. (remarks by Rep. Doug Collins (R-27th)).

body that the public has “lost confidence in our judicial system doing the right thing, particularly in death penalty cases.”<sup>59</sup>

Representative Ed Setzler (R-35th) and Representative Levitas also spoke in support of HB 185, but opposed the floor amendment that would change the bill from requiring eleven jurors to only requiring ten jurors.<sup>60</sup> Both representatives are members of the Non-Civil Judiciary Committee, which considered the bill.<sup>61</sup> Representative Setzler began by noting that of the thirty-eight states that currently impose the death penalty, “thirty-four of those thirty-eight require not only a twelve-vote jury finding for conviction, but require a twelve-vote jury finding for sentencing.”<sup>62</sup> The ultimate question to be asked should be, “[h]ow many of those twelve [jurors] do we believe are going to operate in bad faith in bringing a final death or life without parole sentence?”<sup>63</sup> Representative Setzler felt that in the Jordan Land case, where there were two “hold-out” jurors, only one person operated in bad faith.<sup>64</sup> Thus, he felt that the eleven to one bill should be supported, but not the ten to two bill because this would “make sure that bad faith jurors can’t keep folks who, based on their heinous acts, deserve the death penalty [from it],” while also preserving “the integrity of our jury system.”<sup>65</sup> Additionally, Representative Levitas cautioned, “I think it is incumbent upon us not to pass legislation up and out of this House for signature by the Governor that we do not believe will pass constitutional muster.”<sup>66</sup> Representative Levitas added:

I think that it is not likely, at all, that a ten to two verdict will be upheld by the Supreme Court. And if we are passing up this bill knowing that to be the case, then not only are we putting the victims through this process twice, but we are not upholding our oath and duty to the taxpayers and the voters of this state by

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59. *Id.* at 4 hr., 20 min., 02 sec. (remarks by Rep. David Ralston (R-7th)).

60. *See id.* at 3 hr., 32 min., 33 sec. (remarks by Rep. Ed Setzler (R-35th)); *id.* at 3 hr., 36 min., 35 sec. (remarks by Rep. Kevin Levitas (D-82nd)).

61. *See id.* at 3 hr., 25 min., 37 sec. (remarks by Rep. Ed Setzler (R-35th)).

62. *Id.*

63. House Video, *supra* note 13, at 3 hr., 32 min., 00 sec.

64. *Id.*

65. *Id.*

66. *See id.* at 3 hr., 37 min., 09 sec. (remarks by Rep. Kevin Levitas (D-82nd)).

sending up something that we know will come back to us at a later time.<sup>67</sup>

Majority Leader Jerry Keen (R-179th) spoke specifically in support of the amendment to HB 185 that would make the required number of jurors ten.<sup>68</sup> He argued that “this bill in its original form when it was submitted to the committee was at 9-3” and pointed out that the defendant in the Jessica Lunsford case in Florida would not have received the death penalty if it were not for Florida’s amended death penalty law.<sup>69</sup>

Seven state representatives spoke in opposition to HB 185, including Representative Robert Mumford (R-95th), Representative Stacey Abrams (D-84th), Representative Stephanie Benfield (D-85th), Representative Hatfield, Representative Randal Mangham (D-94th), Representative Robbin Shipp (D-58th), and Representative Roberta Abdul-Salaam (D-74th).<sup>70</sup> The representatives opposing the bill felt that “there is no greater decision in Georgia jurisprudence than the imposition of the death penalty [and] that decision has historically and should continue to be decided by a jury of twelve citizens who are able to reach a unanimous verdict.”<sup>71</sup> Furthermore, “a vote for this proposal is a defamation of 400 years of Anglo-Saxon jurisprudence.”<sup>72</sup> Representative Abrams stated, “we believe that the collective wisdom of twelve persons trumps the individual prejudices of each separately. We require unanimity to secure, not the protection of the guilty as we have been accused, but to secure the triumph of right.”<sup>73</sup> Representative Benfield addressed the cases where “hold-out” jurors prevented the death penalty from being imposed, stating, “bad cases make bad laws . . . there are a handful of these cases. We

67. *Id.* at 3 hr., 37 min., 55 sec.

68. *Id.* at 4 hr., 23 min., 15 sec. (remarks by Rep. Jerry Keen (R-179th)).

69. House Video, *supra* note 13, at 4 hr., 23 min., 50 sec. Florida law allows the imposition of the death penalty by a judge regardless of the jurors’ sentencing recommendation where aggravating circumstances exist and mitigating circumstances are insufficient to outweigh the aggravating circumstances. FLA. STAT. § 921.141(3) (2006). This law has been challenged as unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). See *Johnson v. State*, 904 So.2d 400 (Fla. 2005); see also discussion of *Ring*, *infra* text accompanying notes 110-119.

70. See House Video, *supra* note 13.

71. *Id.* at 2 hr., 23 min., 35 sec., (remarks by Rep. Robert Mumford (R-95th)).

72. *Id.*

73. *Id.* at 2 hr., 57 min., 37 sec. (remarks by Rep. Stacey Abrams (D-84th)).

have heard some anecdotes and they are very compelling but the solution is far too broad, in my opinion.”<sup>74</sup> Opponents pointed out that voting for the bill is not about supporting the death penalty in general.<sup>75</sup> Representative Hatfield said it did not address “any pervasive problem in our state.”<sup>76</sup> He determined that the number of cases where “hold out” jurors had been a problem in the state of Georgia was approximately sixteen.<sup>77</sup> Opponents further criticized the bill, saying that “when you make the judge the ultimate decider, someone in that race for that superior court judgeship will look at the record and come back and say look at this soft judge who refused to impose the death penalty after ten people or eleven people say he should die.”<sup>78</sup>

Following the testimony from all of the representatives, Representative Fleming spoke in support of HB 185 and the amendment.<sup>79</sup> Representative Fleming showed a short videotape of a police officer being killed during a routine traffic stop, saying “this is what the jury saw in the case where one juror didn’t think it was worth the death penalty.”<sup>80</sup> Representative Fleming concluded by saying, “ladies and gentlemen, it is time to change the law in Georgia. It’s in your hands, you can do it, vote for the amendment and vote for the bill.”<sup>81</sup>

By a vote of 100 to 69, the House adopted Representative Fleming’s floor amendment.<sup>82</sup> The House then adopted the favorable committee report on HB 185.<sup>83</sup> By a vote of 106 to 65 the House passed HB 185, as substituted and amended, on March 20, 2007.<sup>84</sup>

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74. *Id.* at 3 hr., 4 min., 8 sec. (remarks by Rep. Stephanie Benfield (D-85th)).

75. *See id.* at 3 hr., 13 min., 48 sec. (remarks by Rep. Mark Hatfield (R-177th)).

76. House Video, *supra* note 13, at 3 hr., 15 min., 12 sec. (remarks by Rep. Mark Hatfield (R-177th)).

77. *Id.*

78. *Id.* at 3 hr., 50 min., 15 sec. (remarks by Rep. Randal Mangham (D-94th)).

79. *Id.* at 4 hr., 26 min., 06 sec. (remarks by Rep. Barry Fleming (R-117th)).

80. *Id.* at 4 hr., 26 min., 38 sec.

81. *Id.* at 4 hr., 28 min., 15 sec.

82. Georgia House of Representatives Voting Record, HB 185 (Mar. 20, 2007); State of Georgia Final Composite Sheet, HB 185, June 5, 2007.

83. *See* House Video, *supra* note 13, at 4 hr., 30 min., 45 sec. (remarks by Speaker Glenn Richardson (R-19th)).

84. Georgia House of Representatives Voting Record, HB 185 (March 20, 2007); State of Georgia Final Composite Sheet, HB 185, June 5, 2007.

### *Consideration by the Senate*

The Clerk of the Senate read HB 185 for the first time on March 27, 2007, and Lieutenant Governor Casey Cagle assigned it to the Senate Judiciary Committee.<sup>85</sup> HB 185 died in the Senate Judiciary Committee.<sup>86</sup> The Chairman of the Senate Judiciary Committee, Senator Preston Smith (R-52nd), offered the bill to pass committee without debate and was opposed by a majority of the Senators present for the committee meeting.<sup>87</sup> HB 185 was not taken up again in the Senate Judiciary Committee and never made it to the floor of the Senate.<sup>88</sup>

### *The Bill*

As passed the House, Section 1 of the bill would have amended Code section 17-10-31 to allow the court to sentence the defendant in a criminal trial as provided in amended Code section 17-10-31.1.<sup>89</sup>

Section 2 of the bill would have 1) eliminated the requirement of Code section 17-10-31.1(a) that a jury recommend life without parole or death before a judge may impose it; 2) allowed a judge to impose death along with life or life without parole where a jury is unable to reach an unanimous verdict as provided in Code section 17-10-31.1(c); and 3) required at least ten of twelve jurors to have voted for the death penalty in order for the judge to impose the death penalty as provided in Code section 17-10-31.1(c).<sup>90</sup> The statutory requirement of a finding of aggravating circumstances was maintained by the bill.<sup>91</sup>

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85. State of Georgia Final Composite Sheet, HB 185, June 5, 2007.

86. *Id.*

87. See Student Observation of the Senate Judiciary Committee Meeting (Apr. 16, 2007) (on file with the Georgia State University Law Review).

88. See State of Georgia Final Composite Sheet, HB 185, Apr. 20, 2007.

89. HB 185 (HFA), 2007 Ga. Gen. Assem.

90. *Id.*

91. See HB 185 (HFA), 2007 Ga. Gen. Assem.

*Analysis**Outline of Opposition to HB 185*

Opponents of HB 185 give a variety of reasons for their opposition. They first respond to Representative Barry Fleming's (R-117th) assertion that his bill is narrowly tailored. They fear that the bill is not narrowly tailored and that reducing the standard for the death penalty sweeps in much more than "hold-out" jurors. Representative Stacey Abrams (D-84th), who voted against the bill, said:

I don't believe two instances, in thousands of trials in thirty years, warrant the state taking action. We should deal with broader problems. When dealing with something of this magnitude, the death penalty, we should work only to provide justice. This is designed to kill more people faster and does not allow restraint on the DA or the legislative side.<sup>92</sup>

Representative Abrams and others fear that this law will allow more mistakes in an already-flawed system.<sup>93</sup> Opponents cite the overrepresentation of minorities on death row, and the danger of allowing a "veto" of the minority voice in death penalty sentencing trials.<sup>94</sup> Opponents also point to the number of exonerations by DNA evidence to prove that false convictions have already occurred in at least 100 cases.<sup>95</sup> They point to Robert Clark, who was exonerated in December of 2005 and awarded \$1.2 million by the Georgia House of Representatives in March of 2007 in an effort to compensate him for the twenty-four years he spent in jail after a wrongful conviction.<sup>96</sup>

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92. Telephone Interview with Rep. Stacey Abrams (D-84th) (May 3, 2007) [hereinafter Abrams Interview].

93. *See id.*; *see also* House Video, *supra* note 13, at 2 hr., 57 min., 28 sec. (remarks by Rep. Stacey Abrams (D-84th)).

94. *See id.* at 4 hr., 3 min., 27 sec. (remarks by Rep. Roberta Abdul-Salaam (D-74th)); *id.* at 3 hr., 10 min., 36 sec. (remarks by Rep. Stephanie Benfield (D-85th)); *id.* at 3 hr., 50 min., 15 sec. (remarks by Rep. Randal Mangham (D-94th)).

95. *See id.* at 3 hr., 7 min., 9 sec. (remarks by Rep. Stephanie Benfield (D-85th)); *id.* at 2 hr. 24 min. 33 sec. (remarks by Rep. Robert Mumford (R-95th)).

96. *See* House Video, *supra* note 13, at 3 hr., 7 min., 7 sec. (remarks by Rep. Stephanie Benfield (D-85th)); *id.* at 3 hr., 42 min., 53 sec. (remarks by Rep. Randal Mangham (D-94th)).

They say that the requirement of a unanimous jury decision is a safeguard against these mistakes. Representative Abrams stated, “[w]e [Americans] recognize that this is an irrevocable decision fraught with human judgment errors—IDs are faulty, human nature and bias are imported into the jury room. At the core, our system holds innocence above vengeance. The conscience of America will not tolerate this failure in our justice system.”<sup>97</sup>

Opponents also claim that national support for the death penalty is wavering, and that the trend shows that Americans have more doubt today about the death penalty than they have in more than thirty years.<sup>98</sup> Representative Fleming sees any such trend as an indication of a relatively successful movement by criminal defense attorneys and anti-death penalty advocates.<sup>99</sup> He theorizes that an underground version of this movement is part of the reason his bill is needed.<sup>100</sup> Representative Fleming states that opponents to the death penalty attempt to subvert its imposition by lying in order to be seated on juries in death penalty cases.<sup>101</sup> He says, “[p]eople morally opposed to the death penalty obviously aren’t opposed to fibbing.”<sup>102</sup> HB 185 would undermine the intent of those jurors.

Notably, both sides credit the media for changes in juror behavior. Representative Fleming says that Court TV and other television shows have changed the expectations of jurors, and also that cultural events like the Clinton scandal have effectively told people that it is okay to lie.<sup>103</sup> Representative Stephanie Benfield (D-85th) sees that high-profile exonerations based on DNA evidence and the O.J. Simpson trial have diminished people’s faith in the criminal justice system.<sup>104</sup> She also cites the recent Duke lacrosse player case, in which the alleged victim falsely accused four boys of rape, as

97. See Abrams Interview, *supra* note 92.

98. See *supra* text accompanying notes 15–27 (discussing national trends regarding the imposition of the death penalty).

99. See Fleming Interview, *supra* note 10; see also Telephone Interview with Douglas County District Attorney David McDade (May 3, 2007) [hereinafter McDade Interview].

100. See Fleming Interview, *supra* note 10.

101. See *id.*

102. Carlos Campos, *Bill: 9 Jurors to Give Death*, ATLANTA J.-CONST., Jan. 30, 2007, at A1, available at 2007 WLNR 1761974.

103. Fleming Interview, *supra* note 10.

104. Telephone Interview with Rep. Stephanie Benfield (D-85th) (May 4, 2007).

showing the American people that false accusations can happen.<sup>105</sup> She believes that HB 185 responds to a few high-profile cases where the prosecutors involved failed to get the death penalty, and that it does not look at the real reasons the death penalty has been imposed less and less each year.<sup>106</sup> She also believes that HB 185 would actually backfire and lead jurors that are anti-death penalty to vote for a not guilty verdict in the guilt-innocence phase, thus allowing guilty parties to go free instead of assuring they are justly punished.<sup>107</sup>

Opponents like Representative Mark Hatfield (R-177th) argue that by lessening the number of requisite jurors, it will be easier to give the death penalty than to award damages in a civil case.<sup>108</sup> But supporters maintain that the death penalty will still be the hardest verdict to get in Georgia after HB 185 becomes law.<sup>109</sup> In order to get to the death penalty sentencing phase, the guilt of the defendant must have already been decided unanimously.<sup>110</sup> Georgia law also requires aggravating circumstances to be found before the death penalty may be sought.<sup>111</sup> District Attorney David McDade stated that it is extremely difficult, and *should* always be extremely difficult, to get the death penalty.<sup>112</sup> He says that HB 185 recognizes that there are circumstances where the system has broken down and seeks to address those situations.<sup>113</sup>

Supporters also dismiss concerns that giving the judge the final say in the death penalty sentencing phase would be unconstitutional or inappropriate.<sup>114</sup> Opponents say that HB 185 would effectively give a judge a vote, and further that political pressure on elected judges may lead them to impose the death penalty in inappropriate cases.<sup>115</sup> But Representative Fleming points out that judges impose sentences in

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105. *Id.*

106. *Id.*

107. *See id.*

108. House Video, *supra* note 13, at 3 hr., 18 min., 45 sec. (remarks by Rep. Mark Hatfield (R-177th)).

109. *See id.* at 2 hr., 4 min., 10 sec. (remarks by Rep. Barry Fleming (R-117th)).

110. *See* O.C.G.A. § 17-10-31 (2004).

111. *Id.*

112. McDade Interview, *supra* note 99.

113. *Id.*

114. *See* House Video, *supra* note 13, at 3 hr., 50 min., 15 sec. (remarks by Rep. Randal Mangham (D-94th)).

115. *See id.*

nearly all criminal cases, including cases of heinous crimes including rape and child molestation.<sup>116</sup> Supporters say that opponents to this bill essentially advocate for the rights of the defendant while ignoring the maxim that a defendant acted as “judge, jury, and executioner” for the victims.<sup>117</sup> Supporters maintain that HB 185 will serve justice in situations where it is most deserved, and that it will assure that the rights of the victim are not forgotten. Representative Doug Collins (R-27th) stated, “I believe that we are simply allowing, not only justice for the accused, but justice for those who had no voice in the end and who had no voice to bring forward.”<sup>118</sup>

### *Constitutional Considerations*

Any change to the death penalty scheme in Georgia is likely to be challenged on its constitutionality.<sup>119</sup> Recent Supreme Court holdings and scrutiny of the death penalty statutes of other states show that such a law will likely be challenged in two areas: judicial sentencing and non-unanimity.<sup>120</sup> The future of bills like HB 185 will not only be determined by their ability to withstand these challenges, but also by the viability of the death penalty itself in the state of Georgia.

### *Judge Sentencing*

Death penalty schemes must comport with the short history of Supreme Court cases that address the death penalty. In 1972 in *Furman v. Georgia*, five justices found that Georgia’s imposition of the death penalty violated the Eighth Amendment prohibition on cruel and unusual punishment, effectively abolishing the practice.<sup>121</sup> States responded by redrafting their death penalty statutes to comport with *Furman*, and the death penalty effectively returned in *Gregg v.*

116. See Fleming Interview, *supra* note 10.

117. House Video, *supra* note 13, at 2 hr., 31 min., 45 sec. (remarks by Rep. Timothy Bearden (R-68th)).

118. *Id.* at 2 hr., 56 min., 9 sec. (remarks by Rep. Doug Collins (R-27th)).

119. Electronic Mail Interview with Anne Emanuel, Professor of Law, Georgia State University College of Law (May 9, 2007) [hereinafter Emanuel Email].

120. *Id.*

121. *Furman v. Georgia*, 408 U.S. 238 (1972).

Georgia.<sup>122</sup> The thirty-eight states that use the death penalty vary in their death penalty schemes, with most relying on the jury for the final decision, and few relying on the judge to make the ultimate decision.<sup>123</sup> Should Georgia pass a bill similar to HB 185, it will adopt a “hybrid” death penalty scheme, which gives the jury an advisory role but allows the judge to make the final decision.<sup>124</sup>

Hybrid statutes were challenged in a recent Supreme Court case, *Ring v. Arizona*.<sup>125</sup> The Court in *Ring* extended its previous ruling in *Apprendi v. New Jersey*<sup>126</sup> to the context of the death penalty.<sup>127</sup> *Apprendi* requires the jury to find, beyond a reasonable doubt, any fact that increases the penalty for a crime.<sup>128</sup> *Ring* therefore invalidated death penalty schemes that allowed the judge, without the jury, to find any of the aggravating factors necessary to impose the death penalty.<sup>129</sup> While *Ring* did not hold on whether or not the jury must make the final determination of death, some scholars find that to be the implication.<sup>130</sup> They also worry that hybrid statutes that allow judges to override the recommendation of the jury, as would a law based on HB 185, ultimately result in poor decision-making, rather than the “full consideration” and “reasoned moral response” required by earlier precedent.<sup>131</sup> These scholars’ reviewed the findings of the Capital Jury Project (CJP), which interviewed 1198 death penalty jurors in fourteen states.<sup>132</sup> The CJP “show[ed] hybrid statutes are associated with hasty decision making, failure to understand

122. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court found that Georgia had corrected its earlier problem of arbitrary sentencing, thus ensuring a uniform, and therefore constitutional, sentencing scheme. *Id.* at 195.

123. William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 933 (2006).

124. Wanda D. Foglia & William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 CRIM. LAW BULL. 1 (2006).

125. *Ring v. Arizona*, 536 U.S. 584 (2002).

126. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

127. *Ring*, 536 U.S. at 609.

128. *See Apprendi*, 530 U.S. 466 (2000).

129. *Ring*, 536 U.S. at 609.

130. Foglia & Bowers, *supra* note 124.

131. *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)).

132. *Id.* The CJP is a continuing research project that interviews jurors from death penalty cases to determine if states’ death penalty schemes comport with the Constitutional requirement that such schemes cannot be arbitrary, imposed under *Furman v. Georgia*. *See* Capital Jury Project, What Is the Capital Jury Project?, <http://www.albany.edu/scj/CJPwhat.htm> (last visited Mar. 26, 2008).

sentencing instructions, and denial of responsibility for the punishment.”<sup>133</sup> So, while the current statutory schemes of the remaining hybrid states have not been invalidated, their future looks murky to some.<sup>134</sup> Therefore, a law based on HB 185 should consider the implications of *Ring* concerning judicial override.

### *Non-Unanimous Jury Verdicts*

HB 185 provides for non-unanimous sentencing decisions in capitol cases.<sup>135</sup> The bill changes the current requirement that a jury must vote unanimously for the death penalty to requiring that at least ten members of the jury vote for the death penalty in order to allow the judge to then impose the death sentence.<sup>136</sup> One Supreme Court case may indicate an uncertain future for a law based on HB 185. In *Ballew v. Georgia*, the Court carefully evaluated the question of whether “a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed by him by the Sixth and Fourteenth Amendments.”<sup>137</sup> The Court held that a jury of five was insufficient: “Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.”<sup>138</sup> Although HB 185 does not seek to reduce the number of jurors in the guilt-innocence phase of the trial, the reasoning of the Court in *Ballew* is instructive. The Court announced that the “Sixth Amendment mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community.”<sup>139</sup> Most important to HB 185, the Court

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133. Foglia & Bowers, *supra* note 124.

134. See generally Bowers, *supra* note 123; Benjamin F. Diamond, Note, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905, 920-24 (2003).

135. HB 185 (HCSFA), 2007 Ga. Gen. Assem.

136. *Id.*

137. *Ballew v. Georgia*, 435 U.S. 223, 224 (1978).

138. *Id.* at 239.

139. *Id.* at 230.

discussed how juries must be representative of the community.<sup>140</sup> This representation must include “minority viewpoints.”<sup>141</sup>

HB 185 may essentially exclude two members of the jury from voicing their viewpoints during the sentencing phase of the trial. *Ballew* suggests that “meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service.”<sup>142</sup> Thus if HB 185 was challenged, the Supreme Court may find the non-unanimous sentencing provisions unconstitutional because “[t]he exclusion of elements of the community from participation ‘contravenes the very idea of a jury . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine.’”<sup>143</sup> Therefore, although proponents of HB 185 may point out that the Supreme Court has allowed non-unanimous jury verdicts, its heightened attention to death penalty cases may result in careful application of *Ballew*’s principles.<sup>144</sup>

### *Future of the Death Penalty in Georgia*

These concerns, as well as national trends, will likely affect the death penalty in Georgia.<sup>145</sup> There are also current perceived problems with the imposition of the death penalty within the state.<sup>146</sup> The American Bar Association examined the imposition of the death penalty in Georgia and published its findings in January of 2006.<sup>147</sup>

140. *Id.* at 236.

141. *Id.*

142. *Id.* at 236-37.

143. *Ballew*, 435 U.S. at 237 (quoting *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970)).

144. Emanuel Email, *supra* note 119.

145. See *supra* text accompanying notes 15-27.

146. See, e.g., Bill Rankin, Heather Vogell, Sonji Jacobs & Megan Clark, *AJC Special Report: Death Still Arbitrary*, ATLANTA J.-CONST., Sept. 23, 2007, at A1, available at 2007 WLNR 18647379 (Part I of four-part series outlining current problems with Georgia’s death penalty); Sonji Jacobs, *AJC Special Report on the Death Penalty*, ATLANTA J.-CONST., Sept. 24, 2007, at A9, available at 2007 WLNR 18693102 (Part II of series); Sonji Jacobs, *AJC Special Report: A Matter of Life or Death*, ATLANTA J.-CONST., Sept. 25, 2007, at J1, available at 2007 WLNR 18768795 (Part III of series); Bill Rankin, Heather Vogell & Sonji Jacobs, *Georgia Death Penalty: Quick Fix for Fairness is Elusive*, ATLANTA J.-CONST., Sept. 30, 2007, at A1, available at 2007 WLNR 19118123 (Part IV of series).

147. See AM. BAR ASS’N, GEORGIA DEATH PENALTY ASSESSMENT REPORT, EXECUTIVE SUMMARY (2006), available at <http://www.abanet.org/moratorium/assessmentproject/georgia/executivesummary.doc>.

The report recommends a moratorium on the death penalty in Georgia until certain problem areas are addressed.<sup>148</sup> The report cites the following areas as most in need of reform: inadequate defense counsel, lack of defense counsel for state habeas corpus proceedings, inadequate proportionality review, inadequate pattern jury instructions on mitigation, racial disparities in Georgia capital sentencing, inappropriate burden of proof for mentally retarded defendants, and death penalty for felony murder.<sup>149</sup> Representative Barry Fleming (R-117th) discredits the ABA and its findings because the ABA is a “liberal group” that “constantly attacks the death penalty.”<sup>150</sup> However, it is likely that this and other assessments will add to the wavering public perception of the imposition of the death penalty, if not lead to important reforms of the death penalty scheme in Georgia.

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148. *Id.* at 5.

149. *Id.* at 3-4.

150. House Video, *supra* note 13, at 2 hr., 8 min., 40 sec. (remarks by Rep. Barry Fleming (R-117th)).

