

REASONABLENESS FOUND: SUPERMAJORITY SENTENCING IN GEORGIA DEATH PENALTY CASES

I. INTRODUCTION

A major campaign¹ seeking to reform Georgia's death penalty law resulted in the introduction of House Bill 185 ("HB 185").² The impetus for the campaign was a Georgia court's failure to impose the death penalty in a heinous murder case where the defendant was convicted of murdering a mother and her two-year-old daughter, and ten of the twelve jurors voted for the death penalty.³

Georgia law currently requires a unanimous jury vote for the imposition of the death penalty.⁴ HB 185 enables a supermajority of at least ten jurors to recommend the death penalty to the judge.⁵ In cases of jury deadlock over the proper

1. See Lateef Mungin, *Gwinnett murders created activists 10 angry people: After a deadlock saved a killer's life, upset jurors launched a fight against unanimous verdicts*. ATLANTA J. CONST., Feb. 11, 2007, available at <http://nl.newsbank.com/nl-search/we/Archives>.

2. H.R. 185, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

3. See *Headline Prime* (CNN television broadcast Oct. 24, 2005) transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0510/24/ng.01.html>. Whitney Land and her two-year-old daughter were carjacked in November 1999 in Clayton County. *Id.* The assailant robbed Ms. Land, shot her three times, and put her body in the trunk of her car. *Id.* The assailant then shot two-year-old Jordan, still in her car seat, in the face and chest. *Id.* After both were dead, the defendant set fire to the car, possibly to destroy any incriminating evidence. *Id.* The jury found the defendant guilty of murder and guilty of several statutory aggravating circumstances, (pursuant to O.C.G.A. § 17-10-30 (2007)). *Id.* During the sentencing phase, ten jurors recommended imposition of the death penalty. *Id.* Failure to reach a unanimous recommendation forced the judge to sentence the defendant to life imprisonment. *Id.*

4. O.C.G.A. § 17-10-31 (2007).

5. H.R. 185, available at http://www.legis.ga.gov/legis/2007_08/fulltext/hb185.htm. The most relevant portion of the proposed bill alters O.C.G.A. § 17-10-31.1(2007) to enable the judge to impose a sentence of death or life imprisonment, if the judge is informed by the jury foreperson

sentence, the Bill would allow a judge to select the appropriate penalty.⁶ Two central constitutional issues are raised: first, who must decide a defendant's death sentence and second, if the jury decides, must the decision be unanimous? U.S. Supreme Court precedent has never held judicial sentencing unconstitutional.⁷

This Comment focuses on the legality of HB 185. We begin with a brief history of death penalty jurisprudence, concentrating primarily on its past flaws and its evolution in Georgia. Next, we analyze the proposed changes contained in HB 185 and their effects on the current scheme. Then, we examine current death penalty procedures employed by Alabama and Florida, states whose sentencing statutes have survived constitutional challenges and are similar to HB 185's proposed changes. In doing this, we will show that HB 185's changes are more limited in scope than the sentencing statutes in Alabama and Florida. Finally, we examine the constitutionality of HB 185 under both the U.S. and Georgia Constitutions.

II. DEATH PENALTY LAW IN GEORGIA

The imposition of the death penalty has always been controversial. Numerous challenges to the death penalty have been brought before the U.S. Supreme Court. These challenges forced the Supreme Court to evaluate not only the propriety of the sentence itself but also the procedure for imposition and the method of application, setting the legal bounds of the penalty. That landscape changed dramatically in 1972 with the case of *Furman v. Georgia*. The implications of HB 185 cannot be fully understood without first examining the problems Georgia has had in the past with its death sentencing scheme and how subsequent changes have resolved those problems.

that upon their last vote, at least ten of the jurors voted for imposition of the death penalty. *Id.* This Bill passed the Georgia House of Representatives on March 20, 2007 and was read and referred in the Georgia Senate on March 27, 2007. *Id.*

6. *Id.*

7. To date, the U.S. Supreme Court has not held unconstitutional procedures that enable the Judge to impose sentence. *E.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002); *Harris v. Alabama*, 513 U.S. 504 (1995); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976).

A. Evolution of the Death Penalty in Georgia

In 1972, the Supreme Court issued a per curiam decision in *Furman v. Georgia* that struck down then existing death penalty sentencing statutes.⁸ The root of the problem was that Georgia, as well as other states, gave the jury broad discretion with little or no guidance in determining whether a death sentence was appropriate.⁹ The exercise of this broad discretion resulted in inconsistently imposed death sentences in Georgia and other states, leading to unconstitutional results.¹⁰ The Court took issue with the fact that the sentencing statutes allowed similarly situated defendants to be given dissimilar sentences.¹¹ With the holding in *Furman*, the Court effectively voided forty death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country to life imprisonment. This suspended all death sentences because all existing statutes were no longer valid.¹² Justice Douglas, attributing the problem to

8. *Furman v. Georgia*, 408 U.S. 238 (1972) (consolidating three cases, *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*). In *Furman*, the defendant was burglarizing a home when the owners returned; when he attempted to flee, Furman tripped causing his gun to fire accidentally killing the homeowner. *Id.* at 252. In both *Jackson* and *Branch*, the defendants were convicted of rape. At their trials, all three defendants were found guilty and sentenced to death. *Id.* at 253.

9. Dan T. Coenen, *Government and Politics: Furman v. Georgia*, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2931> (last visited June 29, 2007); Office of Planning and Analysis: *A History of the Death Penalty in Georgia: Executions 1924–2006*, <http://www.dcor.state.ga.us/pdf/TheDeathPenaltyinGeorgia.pdf> (last visited Nov. 6, 2007).

10. *McGautha v. California*, 402 U.S. 183 (1971). In the *McGautha* decision, the Court noted that unguided discretion by the jury could lead to unconstitutional results, a reality that was realized in *Furman*. *Id.*

11. *Furman*, 408 U.S. at 313 (cited by *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (per curiam) (“Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that ‘the death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.’”)).

12. Death Penalty Information Center, *Introduction to the Death Penalty: Suspending the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#EarlyandMid-TwentiethCentury> (last visited Nov. 6, 2007).

the broad discretion given to the jury, noted in his concurring opinion that:

Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The *vice in this case is not in the penalty but in the process* by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.¹³

Justice Stewart's separate concurrence followed with the oft-quoted line, "[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so *wantonly and so freakishly imposed*."¹⁴

After the *Furman* decision, state legislatures around the nation were forced to develop statutory schemes that would satisfy the Constitution's mandates. The Georgia General Assembly passed a new death penalty law that went into effect on March 28, 1973.¹⁵ With this new law, Georgia created a bifurcated system that separated the guilt phase from the sentencing phase.¹⁶ Georgia's new statute, which provided guidance to the jury and bifurcation of the phases, was challenged in the landmark case of *Gregg v. Georgia*—which,

13. *Furman*, 408 U.S. at 248 (emphasis added).

14. *Id.* at 310 (emphasis added). The 'wanton and freakishly imposed' language has been cited numerous times in important cases, including: *Kansas v. Marsh*, 548 U.S. 163 (2006); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Walton v. Arizona*, 497 U.S. 639, 658-659 (1990); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pulley v. Harris*, 465 U.S. 37, 61-62 (1984); and *Gregg*, 428 U.S. at 188.

15. Office of Planning and Analysis, *supra* note 9, at <http://www.dcor.state.ga.us/pd/TheDeathPenaltyinGeorgia.pdf> (providing a historical explanation of the death penalty in Georgia from 1924 through 2006).

16. *Gregg*, 428 U.S. 153. While hitchhiking, Gregg robbed and murdered two men. *Id.* at 158. In accordance with the new Georgia scheme, Gregg's trial was split into two phases, a guilt phase and sentencing phase. *Id.* at 160. At the close of the guilt phase, the jury returned a verdict of guilty. *Id.* During the sentencing phase, the jury found the existence of two aggravating circumstances and returned a verdict for death on each count. *Id.* at 161. On appeal, the Supreme Court of Georgia affirmed the convictions and upheld Gregg's death sentence for the murder charge, but reversed the death sentence for the robbery charge. *Id.* at 161-62.

in effect, reinstated the death penalty.¹⁷ In *Gregg*, the U.S. Supreme Court held that the death penalty itself was constitutional and that a “bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.”¹⁸ The Court in *Gregg* noted that “freakish” and “inconsistent” imposition of the death penalty would likely be avoided because any and all sentencing issues were separated from guilt issues.¹⁹ Under Georgia’s sentencing procedures, the sentencer was given specific guidance on when death could be imposed and how each defendant should be considered individually.²⁰ Furthermore, the Court noted that “[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.”²¹ Since *Furman* and *Gregg*, the Supreme Court has never held that a jury has the exclusive authority to impose a death sentence.²² Nor has it held that it is unconstitutional for a judge to impose a death sentence.²³ It has, however, remained concerned with limiting discretion in sentencing. As discussed below, HB 185 comports with Supreme Court precedent and constitutional requirements. In examining HB 185’s constitutionality, we will survey Georgia’s current death penalty law, HB 185’s proposed changes, and schemes from sister jurisdictions that are similar to HB 185.

B. Current Georgia Death Penalty Law

Current Georgia law requires that, during the sentencing phase of a death penalty eligible crime, the jury must determine whether any aggravating circumstances are present before the death penalty can be imposed.²⁴ However, a unanimous finding

17. *Id.*

18. *Id.* at 192.

19. *Id.* at 192-94.

20. *Id.*

21. *Id.* at 195.

22. See cases cited, *supra* note 7.

23. *Id.*

24. O.C.G.A. § 17-10-30 (Currently there are eleven statutory aggravating factors that can be presented to the jury; however, with the exception of treason or airplane hijacking, the jury must find the existence of at least one

that one or more aggravating circumstances are present does not result in automatic imposition of the death penalty.²⁵ The jury must unanimously recommend imposition of the sentence,²⁶ and the jury's unanimous sentencing recommendation is binding on the trial court.²⁷ Identified as motivation for the Bill, the current system enables the jury to unanimously find a defendant guilty of a death penalty crime, unanimously find the existence of one or more aggravating circumstances, and then fail to impose the death penalty if one juror refuses to recommend the sentence.²⁸

This process is the focus of HB 185's changes to the current law. These adjustments do not remove the guided discretion of the jury, nor do they remove the requirement that the jury unanimously find the aggravating circumstances.²⁹ The Bill only affects who determines the ultimate sentence in cases of jury deadlock.³⁰ Because the mandates of Supreme Court precedent—like *Furman* and *Gregg*—are maintained, the constitutional basis of the scheme is preserved.

III. HOUSE BILL 185'S CHANGES TO THE CURRENT SCHEME

Critics of HB 185 argue that its enactment will result in a dramatic increase in the number of death sentences imposed.³¹ However, important restrictions have been engineered in the language of the Bill to keep this perceived threat in check. HB 185 is only applied in criminal cases where a unanimous jury has found the defendant guilty of a death eligible crime, and also found the presence of at least one statutory aggravating circumstance.³² Even then, the new aspects of the law would not be triggered unless at least ten jurors also voted to impose a

aggravating factor before the death penalty may be imposed).

25. O.C.G.A. §§ 17-10-31-31.1.

26. *Id.*

27. O.C.G.A. § 17-10-31; *Burden v. Zant*, 975 F.2d 771 (11th Cir. 1992).

28. O.C.G.A. §§ 17-10-30-31.1.

29. H.R. 185.

30. *Id.* (The judge is given some discretion based on the jury recommendation).

31. Georgia Sessions Archives, Video Archives 2007 House Session, http://www.georgia.gov/00/article/0,2086,4802_6107103_72682804,00.htm, Mar. 20, 2007 (beginning at 1:55).

32. H.R. 185.

death sentence.³³ First, the jury is given the chance to determine the sentence, just as it is under the current law. Only when the jury cannot agree on a sentence would the attributes of HB 185 be triggered.

The proposed changes to Georgia law are found in section (d)(2) of the Bill.³⁴ This section demonstrates the way the jury's discretion is guided, and how the judge can break a jury deadlock and impose a sentence within certain confines. The relevant text of the Bill would amend O.C.G.A. § 17-10-31.1 as follows:

(d) In imposing sentence, if *the jury* finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance, the judge may sentence the defendant to:

(1) Imprisonment for life without parole if the judge has been informed by the jury foreperson that upon their last vote, *a majority of the jurors* cast their vote for a sentence of death or for a sentence of life imprisonment without parole; or

(2) Death if the judge has been informed by the jury foreperson that upon their last vote, *at least ten of the jurors* cast their vote for a sentence of death; provided, however, that the judge may impose a sentence of life imprisonment or imprisonment for life without parole as provided by law.³⁵

The statute would still require a judge to order life imprisonment if the jury does not unanimously find the existence of at least one aggravating circumstance.³⁶ The proposal also leaves untouched the requirement that the judge impose imprisonment for life without parole if the jury unanimously recommends it, after unanimously finding an aggravating circumstance.³⁷

The law currently directs the judge to dismiss the jury and impose either life imprisonment or life imprisonment without parole when the jury finds at least one aggravating circumstance

33. *Id.*

34. *Id.*

35. *Id.* (emphasis added).

36. Compare *id.* to § 17-10-31.1 (a).

37. Compare *id.* to § 17-10-31.1 (b).

but cannot reach a unanimous sentence recommendation.³⁸ HB 185 changes this procedure by adding the death penalty as an option the judge could select in limited circumstances.³⁹

HB 185 also addresses an ambiguity which, if left alone, could lead to unconstitutional results. Current law allows the judge to impose a sentence of imprisonment for life without parole if a majority of the jurors cast their vote for a sentence of death or life imprisonment without parole, as long as *the court* finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance.⁴⁰ HB 185 would amend that language and would require *the jury*, not *the court*, to find the presence or absence of aggravating circumstances beyond a reasonable doubt.⁴¹ This change satisfies the mandate of U.S. Supreme Court precedent which requires that the jury find the presence of aggravating circumstances, not the judge.⁴²

As evidenced by the above description, HB 185 does not come into play until several prerequisites have been met.⁴³ When the Bill is implicated, the jury's findings are still given weight. In some cases, the judge would not deviate from the current statutory process. The material change occurs only when the final vote of the non-unanimous jury results in at least ten votes for death.⁴⁴ Even then, the judge is not *required* to impose the death penalty. The judge may choose to follow the will of the supermajority, and impose the death penalty, or choose to impose life or life without parole.⁴⁵ The next section examines the sentencing schemes in other jurisdictions and explains how HB 185 incorporates language similar to other schemes that have survived constitutional scrutiny, while avoiding constitutional pitfalls.

38. O.C.G.A. § 17-10-31.1 (c).

39. H.R. 185.

40. O.C.G.A. § 17-10-31.1 (c) (emphasis added).

41. H.R. 185.

42. *Ring*, 536 U.S. 584 (holding that aggravating circumstances, as factual issues which can increase sentence, must be found by a jury).

43. H.R. 185.

44. *Id.*

45. *Id.*

IV. SENTENCING SCHEMES IN OTHER JURISDICTIONS

“Today thirty-eight states, the United States military, and the United States government have in place statutory schemes permitting the [imposition] of the death penalty for certain crimes.”⁴⁶ Among the states that permit the death penalty, “three distinct types of capital sentencing schemes emerged: systems [1] where juries have exclusive sentencing authority; [2] where judges have exclusive sentencing authority; or [3] where juries play an advisory role to the judge, who ultimately renders the final verdict.”⁴⁷ While the most prominent scheme gives juries exclusive sentencing authority, the Supreme Court has never held that judges could not impose sentence. In fact, in the Court’s opinion, judicial sentencing should result in more consistent sentences.⁴⁸

These distinctions developed in the aftermath of *Furman*, when states attempted to create systems that avoided the “freakish” imposition of the death penalty.⁴⁹ Basically, states “gave the judge or jury exclusive power, or combined power in both.”⁵⁰ States with a combination of the two types of capital sentencing are said to have a “hybrid [sentencing] scheme.”⁵¹ Currently in the United States there are four hybrid states:

46. Andrew Ditchfield, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007); see also Death Penalty Info. Ctr., *Facts About the Death Penalty* (2006), <http://www.deathpenaltyinfo.org/FactSheet.pdf>. [hereinafter *Ditchfield Article*] (noting that the capital punishment statute in New York was declared unconstitutional in 2004; thus, while New York is listed as a retentionist jurisdiction, its status as a state employing the death penalty is unclear.).

47. John M. Richardson, Comment, *Reforming the Jury Override: Protecting Capital Defendants’ Rights by Returning to the System’s Original Purpose*, 94 J. CRIM. L. & CRIMINOLOGY 455, 461 (Winter 2004).

48. *Proffitt*, 428 U.S. at 251.

49. *Furman*, 408 U.S. at 310. The Court never prescribed exact procedures to the states, but merely held that they must develop constitutional schemes that avoided the deficiencies found in *Furman*. Thus, state laws vary in procedure, although most can be grouped in the above three categories.

50. *Ditchfield Article*, *supra* note 46.

51. *Id.*

Alabama, Delaware, Florida, and Indiana.⁵² To the extent that the hybrid schemes, and schemes which allow judicial sentencing, have been challenged, they have been upheld as constitutional;⁵³ providing strong evidence that the similar scheme proposed in HB 185 would survive scrutiny. Just like Georgia, two of the hybrid states, Alabama and Florida, are within the Eleventh Circuit.

A. *The Alabama Scheme*

The Alabama death penalty scheme also employs a bifurcated system, where the jury must first find the defendant guilty of a death eligible crime.⁵⁴ Once the jury finds a defendant guilty, a sentencing hearing is held where relevant evidence is presented to the jury.⁵⁵ The jury then decides whether there are

52. *Id.* (citing Jason C. Tran, *Death by Judicial Overkill: The Unconstitutionality of Overriding Jury Recommendations Against the Death Penalty*, 30 LOY. L.A. L. REV. 863, 865 (1997) (“The Delaware and Indiana legislatures, however, passed legislation changing their systems such that the trial judge must now accept the jury’s findings with respect to aggravating factors, thus transforming the jury’s advisory role.”); *Ortiz v. State*, 869 A.2d 285 (2005) (upholding the constitutionality of Delaware’s death sentencing statute).

53. *See, e.g., Marsh*, 548 U.S. 163; *Harris*, 513 U.S. at 514; *Spaziano*, 468 U.S. 447; *Proffitt*, 428 U.S. 242; *Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002).

54. ALA. CODE § 13A-5-46 (e, f) (2007) (providing: (e) After deliberation, the jury shall return an advisory verdict as follows: (1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole; (2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole; (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death. (f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.).

55. *Id.*

aggravating circumstances present and considers any mitigating circumstances, weighing the aggravating and mitigating factors.⁵⁶ This system requires the jury to advise the court as to the sentence within certain procedural parameters. The jury is to return an advisory verdict of life imprisonment without parole if a majority of the jurors vote for life without parole.⁵⁷ The system requires the jury to return an advisory sentence of death to the court if at least ten of the twelve jurors vote for death.⁵⁸

Upon receiving the advisory sentence from the jury, the court hears evidence concerning the presentence report.⁵⁹ In imposing its sentence, the court considers the evidence presented and the jury's advisory sentence.⁶⁰ When rendering a sentence, the court must enter a report detailing the existence or nonexistence of each aggravating circumstance, each mitigating circumstance, and the court's findings of fact summarizing the crime and the defendant's participation in it.⁶¹

Recently, legislation was proposed in Alabama that would amend the above-mentioned process.⁶² The proposed change would remove the word "advisory" from the current sentencing

56. *Id.*

57. *Id.*

58. *Id.*

59. ALA. CODE §13A-5-47(b) (2007). This report is created to inform the court of the investigations findings, the kinds of sentences and the sentencing range believed to apply, and any mitigating or aggravating circumstances. The report must be a current representation of the defendant's circumstances. While insufficient reports have required remand, *Guthrie v. State*, 689 So.2d 935 (Ala. Crim. App.1996), failure to produce a presentence report is plain error and calls for a reversal of conviction. *Nelson v. State*, 681 So.2d 252 (Ala. Crim. App.1995).

60. ALA. CODE § 13A-5-47(e) (2007) (the trial court shall determine whether the aggravating circumstances outweigh the mitigating circumstances, and in doing so, the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.).

61. *Scott v. State*, 937 So.2d 1065 (Ala. Crim. App. 2005). When a judge fails to produce such findings, sentences have not been reversed, but are remanded to the trial court for its findings. This report shows that the court fully considered all available information when deciding the sentence.

62. H.R. 52, Leg. Reg. Sess. (Ala. 2007).

statute and make the jury's verdict binding on the judge, thus removing the judge's discretion from the sentencing process.⁶³ This change would mean that if a majority of the jurors voted for life without parole, the court must impose that sentence. Furthermore, if at least ten of the twelve jurors voted for death, then the court must impose death.⁶⁴

Alabama's current law gives the judge discretion to determine the sentence after considering the jury's advisory findings and the evidence presented.⁶⁵ This law goes much further than Georgia's HB 185, which makes the jury's unanimous sentence determination binding on the court and only gives the judge discretion in very limited circumstances.⁶⁶ The proposed changes to Alabama's statutory scheme completely remove the advisory character of the jury's verdict, and make a *non-unanimous* sentence recommendation for death *binding* on the court.⁶⁷ In contrast, HB 185 provides that a non-unanimous jury recommendation for death be presented to the judge for the court's oversight and consideration.⁶⁸ Even under HB 185, only a unanimous recommendation for death is binding on the court.⁶⁹ Thus, HB 185 involves a more narrow change to

63. *Id.*

64. *Id.*

65. Alabama's scheme was upheld in *Harris*, 513 U.S. 504. Harris was convicted of capital murder after she arranged for the man she was having an affair with to kill her husband, a deputy sheriff. *Id.* at 507. Harris and her lover planned to split the life insurance proceeds. *Id.* Alabama law considers the jury recommendation as to sentence as purely advisory. *Id.* at 509. The jury recommended, by a 7 to 5 vote, that she be imprisoned for life without parole. *Id.* at 508. The trial judge then considered her sentence holding that because Harris had planned the crime and financed its commission and stood to benefit the most from her husband's murder, the sentence ought to be death. *Id.* The U.S. Supreme Court held that Alabama law, which vested sentencing authority in the trial judge but required the judge to consider the advisory jury verdict, did not violate the Eighth Amendment by failing to specify the weight the judge must give to the jury's recommendation. *Id.* The Court noted that because the Constitution permits the trial judge, acting alone, to impose a capital sentence, *see Spaziano*, it is not offended when a State further requires the judge to consider a jury recommendation and trusts the judge to give it the proper weight. *Id.*

66. H.R. 52 (Ala. 2007).

67. *Id.* (emphasis added).

68. H.R. 185.

69. *Id.*

Georgia's current statutory scheme and does not extend to the full breadth of Alabama's current and proposed statutory procedure, buttressing the constitutionality of HB 185.

B. The Florida Scheme

The other Eleventh Circuit state with a hybrid sentencing scheme is Florida.⁷⁰ In Florida, the jury also renders advisory verdicts for sentencing in a bifurcated penalty phase.⁷¹ The jury advises the court whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances, and, based on those determinations, whether the defendant should be sentenced to life imprisonment or death.⁷² Then, the court considers the aggravating circumstances, any mitigating circumstances, and the jury's advisory sentence. At that point, the court renders a sentencing verdict.⁷³ Florida's statute, like Alabama's, requires the court to enter a report explaining the findings upon which the sentence is based.⁷⁴ The main difference between Florida's current system and Georgia's proposed system is that under Florida's current statute, the jury's verdict is based on a

70. Florida's scheme was upheld in *Spaziano*, 468 U.S. 447; *Proffitt*, 428 U.S. 242; and *Bottoson*, 833 So.2d 693.

71. FLA. STAT. ANN. § 921.141 (2007) ("Part (2) Advisory sentence by the jury—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Part (3) Findings in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.").

72. *Id.*

73. *Id.*

74. *Id.* If the judge imposes a death sentence, she must put in writing the facts that led her to conclude that sufficient statutory aggravating circumstances exist and that there are insufficient statutory mitigating circumstances outweighing the aggravating circumstances. *Id.*

majority vote and is advisory.⁷⁵ HB 185 confers some discretion upon the judge when a jury deadlocks over sentence in death penalty cases, and still ensures that each defendant gets individualized consideration and the benefit of a second-look at their crime.⁷⁶

It has been suggested that Florida's death penalty statute, and other hybrid schemes, will be challenged in coming years based on the level of judicial discretion.⁷⁷ Even if those procedures are successfully challenged, HB 185 would likely survive similar scrutiny because it is more narrowly tailored and it is compliant with Supreme Court precedent. As explained below, HB 185 is constitutional under both the federal and state constitutions.

V. CONSTITUTIONALITY OF PROPOSED HOUSE BILL 185

Within the confines of checks and balances, the province of the judicial branch is to determine the constitutionality of enactments, not to question their propriety.⁷⁸ If enacted, HB 185 must pass constitutional muster under both the United States Constitution and the Georgia Constitution.

A. *Federal Constitution*

The plain language of the Sixth Amendment of the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . ."⁷⁹ The Eighth Amendment guarantees citizens freedom from the imposition of cruel and unusual

75. *Id.*

76. See *Furman*, 408 U.S. 238; see also *Gregg*, 428 U.S. 153. H.R. 185 comports with the "twin objectives."

77. 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, 923-24 (2003).

78. *Luther v. Borden*, 48 U.S. 1 (1849). ("[I]t is the true province of the judiciary to decide what they rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully or wisely made."); see also *Fletcher v. Peck*, 10 U.S. 87 (1810); *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831).

79. U.S. CONST. amend. VI.

punishment.⁸⁰ Both of these amendments were made applicable to the States through the Fourteenth Amendment.⁸¹ The plain language of these amendments does not address whether a jury must impose the sentence. Nor do the amendments address, in instances where the jury does impose the sentence, whether the sentence must be imposed by a unanimous jury. In applying basic tenets of construction, given the high regard for juries and concerns about maintaining the jury's independence,⁸² one could infer that the framers would have included this language in the Constitution had they intended unanimity and unbridled discretion of the jury.⁸³

In its post-*Furman* jurisprudence, whether challenged under the Sixth and/or the Eighth Amendment, the U.S. Supreme Court has never held that the Constitution requires a jury to determine whether the death penalty is the appropriate sentence.⁸⁴ The Court noted in *Furman v. Georgia* and *Gregg v. Georgia*:

[A] state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury [or sentencing judge] to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. So long as a state system

80. *Id.* at amend. VIII.

81. The Sixth Amendment's applicability to the states is evidenced in *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." *Id.* at 156.

82. See American Bar Association Division for Public Education, *Dialogue on the American Jury: We the People in Action, Part I The History of Trial by Jury*, [http://www.abanet.org/jury/more info/dialoguepart1.pdf](http://www.abanet.org/jury/more%20info/dialoguepart1.pdf); see also Diamond, *supra* note 77.

83. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Marbury v. Madison*, 5 U.S. 137 (1803) (The generally accepted canons of construction are as follows: (1) Plain meaning of the words (the generally accepted meaning; common usage), (2) The effect of all the words, (3) How the term is used elsewhere in the document, (4) A list of terms that have something in common, (5) Affirmative statements imply negative intent, (6) Framers' Intent, and (7) How the structure of the document is itself put together).

84. See cases cited, *supra* note 7.

satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed.⁸⁵

Since *Furman* and *Gregg*, the Supreme Court has emphasized the pursuit of these “twin objectives” and that “[n]othing in those twin objectives suggests that the sentence must or should be imposed by a jury.”⁸⁶ While death penalty jurisprudence has evolved since *Furman*, the Court stated it is “unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.”⁸⁷ The Court further held that a scheme is constitutional when a jury is only giving an advisory opinion on what the sentence should be as long as the “penalties imposed are the product of properly guided discretion and not arbitrary whim.”⁸⁸ Even though the new statutes that were created after *Furman* limited the sentencer’s discretion, defendants still claimed that the death penalty was being applied unconstitutionally. These claims required the Supreme Court to supply constitutional rules for the states to apply.

1. Early Challenges

One of the first post-*Furman* death sentencing schemes to be challenged was Florida’s, in *Proffitt v. Florida*.⁸⁹ Proffitt challenged Florida’s new sentencing scheme under the Eighth Amendment, arguing that Florida law still allowed the death penalty to be imposed in an arbitrary manner.⁹⁰ The U.S. Supreme Court held that the statute, on its face, appeared to solve the constitutional deficiencies that were identified in

85. *Marsh*, 548 U.S. 163.

86. *Spaziano*, 468 U.S. at 460.

87. *Id.* at 464.

88. *Harris*, 513 U.S. at 514.

89. *Proffitt*, 428 U.S. 242. Charles Proffitt was convicted of first degree murder. *Id.* at 245. In a separate sentencing hearing, the jury returned a recommendation for death. *Id.* at 246. After the judge specifically found the existence of four aggravating circumstances and that no statutory mitigating circumstances were present, he sentenced Proffitt to death. *Id.*

90. *Id.* at 253. The Court has noted that the death penalty is being applied in an ‘arbitrary’ manner when “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313.

Furman, because it directed the Court to weigh the statutorily defined aggravating circumstances against the statutorily defined mitigating circumstances.⁹¹ The Court concluded that this weighing forced the sentencing judge to focus on the particular aspects of the homicide as well as the individual characteristics of the defendant.⁹² While acknowledging the importance of the jury's role in capital sentencing, the Court also acknowledged that "it has never suggested that jury sentencing is constitutionally required."⁹³ The Court found that Florida's procedures supplied adequate safeguards against arbitrary and capricious death penalty imposition.⁹⁴ Furthermore, the Court added that judicial sentencing should lead to more consistency in sentencing in capital cases, since the judge "is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."⁹⁵

A second challenge to Florida's death penalty sentencing scheme arose in *Spaziano v. Florida*.⁹⁶ During its weighing of the aggravating and mitigating circumstances, the trial court found the existence of two aggravating circumstances and no mitigating circumstances, "except, perhaps, the age [twenty-eight years old,] of the defendant."⁹⁷ The court then imposed a death sentence, overriding the jury recommendation of life imprisonment.⁹⁸ After several appeals and remands in the Florida court system, Spaziano's case finally made it to the U.S. Supreme Court.

There, Spaziano presented several constitutional challenges, arguing, *inter alia*, that Florida's system, which allows the judge to override the jury's recommendation, violated the Eighth Amendment.⁹⁹ He also argued that, given the Supreme

91. *Id.* at 251.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Spaziano*, 468 U.S. at 447. Spaziano was convicted of first degree murder; in a separate sentencing hearing, a majority of the jury recommended life imprisonment. *Id.* at 451.

97. *Id.* at 452.

98. *Id.*

99. *Id.*

Court's emphasis on the jury's importance in capital sentencing, Florida's system also violated the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ The Court addressed the petitioner's fundamental premise that "the capital sentencing decision is one that, in all cases, should be made by a jury."¹⁰¹ The Court again articulated the "twin objectives" of capital sentencing and said that "nothing in those twin objectives suggests that the sentence must or should be imposed by a jury."¹⁰²

The Supreme Court noted that the capital sentencing phase is not a "trial" in itself and does not implicate the Sixth Amendment's guarantee of a jury trial.¹⁰³ Justice Blackmun, writing for the majority, stated that capital sentencing is basically the same as any other sentencing proceeding, "a determination of the appropriate punishment to be imposed on an individual . . . The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue."¹⁰⁴ In upholding Florida's scheme against another constitutional attack, the Court concluded that:

In light of the fact that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.¹⁰⁵

Thus, the Court held that a judge acting alone could impose a death sentence.¹⁰⁶

2. *Recent Challenges*

After *Proffitt* and *Spaziano*, some states still had

100. *Id.* at 457.

101. *Id.* at 458.

102. *Id.* at 460. The twin objectives are that the sentencing scheme must rationally narrow the class of death-eligible defendants and permit a jury to render a reasoned, individualized sentencing determination. *See supra* Part V.A.

103. *Id.* at 459.

104. *Id.*

105. *Id.* at 464.

106. *See, e.g., Harris*, 513 U.S. at 515; *Spaziano*, 468 U.S. 447.

constitutional flaws in their sentencing schemes concerning who should make certain factual findings. In 2000, Arizona law allowed the trial judge, sitting alone during the sentencing phase, to determine the presence or absence of aggravating factors.¹⁰⁷ These factors are required under Arizona law for the imposition of the death penalty.¹⁰⁸ In *Apprendi v. New Jersey*, the U.S. Supreme Court held that if a state makes an increase in the defendant's maximum penalty contingent on a finding of fact, that fact must be found by a jury beyond a reasonable doubt, even if the state defines the fact as a sentencing factor.¹⁰⁹

Two years after its decision in *Apprendi*, the Supreme Court decided *Ring v. Arizona*, which extended the *Apprendi* rule to capital sentencing.¹¹⁰ Ring challenged Arizona's capital sentencing statute under the Sixth and Fourteenth Amendments.¹¹¹ Ring argued that the scheme was unconstitutional because it entrusted to the judge, and not to the jury, the finding of facts that subjected the defendant to the

107. ARIZ. REV. STAT. ANN. § 13-703 (2007).

108. *Ring*, 536 U.S. at 588. If statutory aggravating circumstances are employed as factors to guide the discretion of the judge or jury in imposition of the death penalty, but not prerequisites for such a sentence, there is no problem with the judge alone finding the existence of such circumstances. However, if a sentencing scheme requires finding the existence of aggravating circumstances before the death penalty can be imposed, the aggravating circumstances are used as facts, not guiding factors.

109. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi* was not a capital case. In *Apprendi*, the Defendant was convicted pursuant to guilty plea for possession of firearm for unlawful purpose and unlawful possession of prohibited weapon. *Id.* *Apprendi's* sentence was extended under New Jersey's hate crime statute. *Id.*

110. *Ring*, 536 U.S. at 588. Ring was tried for a number of offenses related to the burglary of a Wells Fargo van and the murder of its driver. *Id.* at 589-90. The alternative charges of premeditated murder and felony murder were presented to the jury. *Id.* The jury had a six to six deadlock on the issue of premeditated murder but unanimously found Ring guilty of felony murder. *Id.* Under Arizona's law, the death penalty can only be imposed for felony murder if the defendant was the actual killer, or if he was a "major participant" in the armed robbery that led to the killing by exhibiting a reckless disregard for human life. *Id.* at 595. Based on testimony from the sentencing hearing, the trial judge answered both of these questions affirmatively. *Id.*

111. *Id.* at 595.

maximum sentence, which was death.¹¹² The judge found the existence of two aggravating factors and one non-statutory mitigating factor, Ring's minimal criminal history.¹¹³ Because the judge determined that aggravating circumstances were present and not sufficiently mitigated, the death sentence could be and was imposed.¹¹⁴

On appeal, the U.S. Supreme Court addressed whether the Sixth Amendment's guarantee to a jury trial requires the jury to determine the existence of aggravating circumstances.¹¹⁵ Applying the holding of *Apprendi* to Arizona's sentencing statute, the Court acknowledged that entrusting the finding of facts necessary to support a death sentence to a judge might be "an admirably fair and efficient scheme of criminal justice."¹¹⁶ However, the Supreme Court also recognized that the "founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."¹¹⁷ According to the Court, since the death penalty could not be imposed without a finding of the existence of aggravating factors, those aggravating factors "operate as "the functional equivalent of an element of a greater offense," and therefore the Sixth Amendment requires that they be found by a jury."¹¹⁸

While *Ring* was being decided, another Florida prisoner petitioned the U.S. Supreme Court challenging Florida's death penalty sentencing statute in *Bottoson v. Moore*.¹¹⁹ In February 2002, the U.S. Supreme Court stayed Bottoson's execution and placed his case in abeyance pending the decision in *Ring*.¹²⁰

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 597.

116. *Id.* at 607

117. *Id.*

118. *Id.* at 609.

119. *Bottoson*, 833 So.2d at 695. After Bottoson was convicted of first degree murder, he appealed the sentence to the Supreme Court of Florida. *Id.* Florida affirmed the sentence and Bottoson petitioned the United States Supreme Court, which summarily denied defendant's petition for writ of certiorari. *Id.* Then, Bottoson petitioned for writ of habeas corpus, which failed. *Id.*

120. *Id.*

Once the Court decided *Ring*, it lifted Bottoson's stay without mentioning its decision in *Ring* and denied his petition for certiorari.¹²¹ The Court did not direct the Florida Supreme Court to reconsider Bottoson's case in light of *Ring*.¹²² In effect, the Court's action gave Florida a "green light" to execute Bottoson. The Florida Supreme Court pointed out that the U.S. Supreme Court had repeatedly upheld Florida's capital sentencing statute against several challenges.¹²³ In his concurring opinion, Florida Supreme Court Justice Wells stated that to interpret *Ring* as undermining Florida's capital sentencing scheme, one must reach the absurd result that the U.S. Supreme Court lifted Bottoson's stay even though *Ring* rendered Florida's scheme unconstitutional.¹²⁴

However, concurring only in the result were Justices Lewis, Pariente, and Shaw who called for Florida to revise its death penalty scheme.¹²⁵ They proposed that the jury should decide the presence of aggravators.¹²⁶ They also recommended use of special verdict forms that require the jury to indicate what aggravators they found and the vote as to each aggravator so that they "do not run afoul of the spirit, intent, and reasoning of *Ring*."¹²⁷

3. *Application of Federal Precedent to House Bill 185*

From these cases, one can determine some parameters for capital sentencing statutes. The Supreme Court has repeatedly emphasized the "twin objectives" of any capital sentencing scheme.¹²⁸ As long as the capital sentencing statute meets these objectives, narrowing the class of death eligible defendants and allowing the jury to conduct individualized consideration of the defendant and the circumstances of the crime,¹²⁹ the Court is unlikely to interfere with a State's determination of how to

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 697.

125. *Id.* at 710. The aspects of the scheme noted by the justices as in danger of constitutional challenge are absent in HB 185's scheme.

126. *Id.*

127. *Id.* at 723-24.

128. *Spaziano*, 468 U.S. at 460.

129. *Marsh*, 548 U.S. 163.

achieve those objectives.¹³⁰ Georgia HB 185 is in accordance with all of these requirements and with U.S. Supreme Court precedent.

As required by *Gregg*, Georgia's bifurcated sentencing scheme provides guided discretion to the jury in sentencing because it narrows the class of death eligible defendants by requiring the jury to find the existence of at least one aggravating circumstance to impose the death penalty and requires the jury to take into account the defendant's individual characteristics and circumstances.¹³¹ As dictated by *Apprendi*, imposition of the death penalty requires finding the existence of aggravating circumstances; thus, this function is appropriately assigned to the jury.¹³² Along the same lines, the jury must be the finder of all facts, especially the presence of aggravating factors, as required by *Ring*.¹³³ Under HB 185, the judge has no input regarding the existence of aggravating factors.¹³⁴ These are *solely* determined by the jury and must be found unanimously.¹³⁵ Other Supreme Court precedent has required the jury to look closely at the individual and not just the crime that was committed, by way of loosened evidentiary rules allowing mitigation evidence.¹³⁶ As such, HB 185 still accomplishes the "twin objectives" that a state capital sentencing statute must achieve in order to pass constitutional muster.¹³⁷

As noted in *Proffitt* and *Spaziano*, the United States Constitution does not require the jury to determine the sentence of a defendant, nor does it prohibit the judge from doing so.¹³⁸

130. *Spaziano*, 468 U.S. at 460. ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. It must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime.").

131. *Gregg*, 428 U.S. at 192.

132. *Apprendi*, 530 U.S. at 490.

133. *Ring*, 536 U.S. at 588.

134. H.R. 185.

135. *Id.*

136. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

137. *Gregg*, 428 U.S. 153; *Furman*, 408 U.S. 238.

138. *Proffitt*, 428 U.S. 242; *Spaziano*, 468 U.S. 447.

The Constitution only requires the jury to find beyond a reasonable doubt the facts that comprise the elements of the charged offense.¹³⁹ The Supreme Court held that laws which allow the judge to determine sentences are still expressing the voice of the community by way of the legislative process.¹⁴⁰ The fact that HB 185 enables the judge, in limited circumstances, to impose the death penalty in the absence of a unanimous jury recommendation does not run afoul of the U.S. Constitution. Furthermore, the Court noted that in certain situations, the judge may be better equipped to impose the sentence.¹⁴¹ The only time the judge has the discretion to impose a death sentence is when a supermajority of ten jurors vote for the death penalty, after unanimously finding the existence of aggravating circumstances.¹⁴² All fact finding is still reserved for the jury.¹⁴³ “In light of the fact that the Sixth Amendment does not require jury sentencing,” allowing the judge to determine the sentence in a very narrow set of circumstances is constitutionally sound.¹⁴⁴

In sum, HB 185 complies with the language of the U.S. Constitution and the spirit of the document as interpreted by the U.S. Supreme Court. HB 185 has built-in protections carefully designed to avoid the constitutional defects of previously flawed schemes. It is narrowly tailored and is only triggered in limited circumstances. Accordingly, HB 185 would meet the federal constitutional requirements if enacted by the legislature.

B. Georgia Constitution

Next, the validity of HB 185 is tested under the Georgia

139. U.S. CONST. amend. V & XIV. (The due process clauses of the Fifth and Fourteenth Amendments “[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970)).

140. *Spaziano*, 468 U.S. at 462.

141. *Proffitt*, 428 U.S. at 251. (The Court added that judicial sentencing should lead to more consistency in sentencing in capital cases since the judge is “more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.”).

142. H.R. 185.

143. *Id.*

144. *Spaziano*, 468 U.S. at 464.

Constitution. Georgia guarantees its citizens that “the right to trial by jury shall remain inviolate . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and *the jury shall be the judges of the law and the facts.*”¹⁴⁵

1. In Georgia, the Judge Decides Issues of Law

Facially, the provision “the jury shall be the judges of the law and the facts” appears to give the jury complete control over all of the issues in a criminal case, including issues of both fact and law.¹⁴⁶ In interpreting this language, the Supreme Court of Georgia explained:

It has long been settled that this language, identical to that in earlier constitutions, means that jurors are made absolutely and exclusively judges of the facts in the case, and, they are, *in this sense only*, judges of the law. It is the *province of the court to construe the law* and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict.¹⁴⁷

A Georgia jury does not have heightened responsibilities, as a result of the above noted constitutional provision.¹⁴⁸ Contrary to the strong language, a Georgia jury’s responsibility is to be the finder of fact.¹⁴⁹

This phrase is not applied literally and actually means that the jury decides most issues of fact and can interpret how the law applies to their factual determinations.¹⁵⁰ According to Georgia law, the jury “shall be the judges of the law and the facts *in the trial of all criminal cases* and shall give a general verdict of ‘guilty’ or ‘not guilty.’”¹⁵¹ The statute states, “[u]pon a verdict of ‘guilty,’ the *sentence* shall be imposed by the judge, unless otherwise provided by law.”¹⁵² This statute specifically gives

145. GA. CONST. art. I, § 1, ¶. 11 (emphasis added).

146. The authors are in no way intending to allege there is a constitutional deficiency in the quoted constitutional phrase.

147. Conklin v. State, 331 S.E.2d 532, 542 (Ga. 1985) (emphasis added).

148. *Id.*

149. *Id.*

150. GA. PROC. CRIM. PROC. § 21:6 (2007).

151. O.C.G.A. § 17-9-2 (2007) (emphasis added).

152. *Id.*

the judge the right to sentence the defendant and even implies that there is a difference in the jury's role, depending on which phase of prosecution is ongoing.¹⁵³ In 2007, the Georgia Court of Appeals acknowledged that "[i]t is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence."¹⁵⁴ Thus, the jury's role even as fact finder is not always exclusive.¹⁵⁵

2. In Georgia, the Judge Can Decide Issues of Fact

Though Georgia's Constitution has very strong language regarding the jury's role in a criminal case, the Supreme Court of Georgia has not always interpreted this language to allow the jury to have exclusive discretion regarding all facts. Pursuant to *Batts v. State*, it is not repugnant to the Georgia Constitution to give the court the authority to make certain fact-finding decisions.¹⁵⁶ HB 185 does not infringe on the jury's fact-finding responsibilities. The jury is the sole fact finder regarding the defendant's guilt or innocence, and the jury is the sole fact finder regarding any aggravating factors.¹⁵⁷ The judge's decision-making only occurs during the penalty phase, and only after ten jurors have recommended a sentence of death. If the Georgia Constitution allows the judge to make certain factual determinations in the guilt/innocence phase of a criminal trial, it is reasonable to assume that the judge is allowed to exercise his or her discretion as to the proper sentence, in a very limited set of circumstances, during the penalty phase of a criminal trial.

3. Bifurcation: The Differences in the Phases

The guilt/innocence phase is the more substantive portion of the trial. During this phase, the jury hears all the evidence that demonstrates whether the defendant is guilty or not guilty of the crime charged. If the defendant is found not guilty during this phase, there is no sentencing phase. However, if the defendant is found guilty, the procedurally-based sentencing phase commences. The jury has already unanimously found the

153. *Id.*

154. *Garza v. State*, 648 S.E.2d 84 (Ga. Ct. App. 2007).

155. *Id.*

defendant guilty; thus all that remains undetermined is what the defendant's sentence will be. After presentation of additional evidence affecting sentence, the jury votes on the defendant's sentence.

As explained above, the jury is not required to decide issues of law, and the judge is even allowed to make some factual determinations during the guilt phase of prosecution.¹⁵⁸ Because of the differences in the guilt and sentencing phase, HB 185 can confer more discretion on trial judges than is currently allowed.

a. Evidentiary Rules

As stated, the two phases of Georgia's bifurcated scheme are quite different and serve different purposes. In fact, it was the bifurcation of the phases, in part, that led to the approval of Georgia's death penalty scheme in *Gregg*.¹⁵⁹ One difference in the two phases is the evidentiary rules. In the penalty phase, evidence of past crimes is admissible against the defendant, something often excluded in the guilt phase, and the defendant is given wide latitude to admit almost anything that could mitigate their actions.¹⁶⁰ After the defendant is found guilty, the jury then considers not only evidence of aggravating circumstances, but also any evidence of mitigating

156. *Batts v. State*, 235 S.E.2d 377 (Ga. 1977). In *Batts*, the defendant allegedly confessed to committing two armed robberies. *Id.* at 665. At trial, he was found guilty of two armed robberies and sentenced to life in prison. The defendant challenged the court's admission of the confession, arguing it was involuntary. *Id.* To make this decision, the court held a hearing outside the presence of the jury. *Id.* The defendant claimed this procedure violated his rights and Georgia's constitutional requirement that "in criminal cases the jury shall be the judges of the law and the facts." *Id.* He claimed that this provision required the jury to determine the voluntariness of the confession. *Id.* at 666. The Supreme Court of Georgia held that the law allowed the judge alone to determine the voluntariness of a confession as long as the defendant did not make a timely motion to charge the jury. *Id.* Since the defendant in this case did not request a charge, the court correctly decided the issue. *Id.*

157. H.R. 185.

158. *Batts*, 235 S.E.2d 377.

159. *Gregg*, 428 U.S. at 153.

160. *Lockett*, 438 U.S. at 604.

circumstances.¹⁶¹

In *Lockett v. Ohio*, the U.S. Supreme Court held that the “Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁶² Georgia law provides a defendant with more latitude than required under *Lockett*, and dictates that the trial judge “exercises broad discretion in allowing any evidence reasonably tending toward mitigation.”¹⁶³ Furthermore, in acknowledging the importance of mitigating circumstances, the Supreme Court of Georgia held “that evidentiary rules may be trumped by a defendant’s need to introduce mitigation evidence.”¹⁶⁴ During this phase, the defendant can set forth any evidence that would suggest leniency. Also, there is no requisite level of proof for the jury to apply in determining whether there are sufficient mitigating circumstances to require leniency, as opposed to aggravating circumstances, which must be proven beyond a reasonable doubt. This presentation of evidence compels the jury to look closely at the individual before them and not just the crime that was committed.

b. Sentencing Factors

Another difference was illustrated in *Jones v. State*, where the Supreme Court of Georgia held that “under Georgia law statutory aggravating circumstances are sentencing factors rather than ‘elements’ of death eligible murder. Accordingly, we reaffirm that statutory aggravating circumstances need not be included in indictments.”¹⁶⁵ In other words, evidence or burdens of proof used in the guilt phase are not controlling

161. *Id.*

162. *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) (emphasis added) (quoting *Lockett*, 438 U.S. at 604).

163. *Id.* at 359 (quoting *Cofield v. State*, 274 S.E.2d 530 (1981)).

164. *Id.*

165. *Jones v. State*, 653 S.E.2d 456 (Ga. 2007). Defendant Jones pled guilty to four counts of murder and eighteen related offenses. *Id.* at 457. After State gave notice of its intent to seek the death penalty in a sentencing trial, defendant applied for interim review. *Id.* The state was allowed to proceed in seeking the death penalty. *Id.*

during the sentencing phase. Even though aggravating circumstances are not required to be included in the indictment, Georgia law does require a finding of at least one statutory aggravating circumstance, beyond a reasonable doubt by a unanimous jury, before the death penalty can actually be imposed.¹⁶⁶ HB 185 does nothing to alter that requirement.¹⁶⁷

c. The Bifurcation Process, Generally

A third difference in the two phases is how the bifurcated phases should be viewed. In *Kansas v. Marsh*, the U.S. Supreme Court upheld Kansas's death penalty statute.¹⁶⁸ The challenged scheme, in effect, automatically imposed death in certain situations.¹⁶⁹ Justice Thomas, writing for the majority, noted that the challengers' arguments of unconstitutionality centered on fears that the law would impose death on innocent persons. However, he stated that the issue being addressed in the sentencing phase was not a person's innocence or guilt but whether Kansas's sentencing scheme was constitutional.¹⁷⁰ Justice Scalia, in his concurring opinion, noted that a person's guilt was not at issue because sentencing schemes are only triggered when a person has been found unanimously guilty by

166. O.C.G.A. § 17-10-30.

167. H.R. 185.

168. *Marsh*, 548 U.S. 163. Marsh was convicted in Kansas state court of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. *Id.* at 164. The jury found three aggravating circumstances that were not outweighed by mitigating circumstances and sentenced him to death. *Id.* Marsh claimed on appeal that Kansas law establishes an unconstitutional presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. *Id.* The Kansas Supreme Court agreed and concluded that the scheme's weighing equation violated the Eighth and Fourteenth Amendments and remanded for a new trial. *Id.* The U.S. Supreme Court reversed and remanded, upholding Kansas' scheme. *Id.* at 165.

169. *Id.* (Kansas' scheme provides, "if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty *shall* be imposed", meaning that the penalty was automatically imposed when the jury found aggravators and not mitigating circumstances.) (emphasis added).

170. *Id.* at 179-80.

a jury of his peers.¹⁷¹

In sum, proposed HB 185 is constitutional under the Georgia Constitution, and the right to a jury remains “inviolable.”¹⁷² The Bill does nothing to impinge on a person’s right to a jury to unanimously find his guilt or innocence during the guilt phase.¹⁷³ It does nothing to encroach upon the jury’s duty to determine whether there are aggravating circumstances present during the sentencing phase.¹⁷⁴ As required by Georgia, the jury is still the arbiter of fact and is able to “apply the law so construed to the facts in evidence.”¹⁷⁵ HB 185 merely clarifies the procedures already in place which allow the judge to impose sentence if the jury cannot reach a unanimous decision.¹⁷⁶

VI. CONCLUSION

Any time proposals are made concerning the death penalty, there will be increased scrutiny and fervent debate. Furthermore, as long as the death penalty remains an option, there will be challenges to its constitutionality. However, it is important to analyze the actual proposal being made to death penalty jurisprudence and not the emotional issues surrounding capital punishment as a whole. As explained above, Georgia proposed HB 185 does not intrude on the jury’s important and requisite role during the guilt phase of prosecution. Moreover, it preserves the jury’s power and duty to determine the factual issues during the sentencing phase of prosecution. Enactment would still require a unanimous jury to find the defendant guilty, and it would still require a unanimous jury to find the presence of aggravating circumstances before execution was considered as an option.¹⁷⁷ HB 185 adheres to the “twin objectives” of capital sentencing and does not extend as far as other hybrid schemes which have been upheld.¹⁷⁸ The changes proposed by the Bill simply allow the trial judge some

171. *Id.* at 183.

172. GA. CONST. art. I, § 2, ¶ 11(a).

173. H.R. 185.

174. *Id.*

175. *Garza*, 648 S.E.2d at 85.

176. O.C.G.A. § 17-10-31.1(c).

177. H.R. 185.

178. *Furman*, 408 U.S. 238; *Gregg*, 428 U.S. 153; *see supra* note 76.

discretion to break the jury deadlock over a defendant's sentence.¹⁷⁹ Giving the judge power to sentence is constitutional and may prove the wiser choice.¹⁸⁰ These proposed procedures are in accordance with both the U.S. and Georgia Constitutions, and are in line with Supreme Court precedent. If enacted, as currently drafted, proposed Georgia House Bill 185 is constitutional.

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179. H.R. 185.

180. *Harris*, 513 U.S. 504; *Spaziano*, 468 U.S. 447; *Proffitt*, 428 U.S. 242.

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