SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 10-A

SPONSOR: Senators Brown-Waite, Burt, Klein, Silver, Campbell, Bronson and Horne

SUBJECT: The Death Penalty

DATE: January 5, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson/Gomez	Cannon	CJ	Favorable
2.				
3.				
4.				
5.				

I. Summary:

Senate Bill 10-A, provides that a death sentence shall be executed by electrocution at the election of the person sentenced to death who shall be executed by lethal injection if he or she waives that election.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 922.10 and 922.105.

II. Present Situation:

A. Brief History of some Major Recent Events Relevant to Florida's Electric Chair and Florida's Capital Postconviction Proceedings

On October 29, 1997, the Florida Supreme Court in *Jones v. State*, 701 So.2d 76 (Fla. 1997) upheld Florida's use of the electric chair. However, a majority of the Justices urged the Legislature to allow lethal injection. In a concurring opinion, Chief Justice Harding warned that such a step "would avert a possible constitutional 'train wreck' if this or any other court should ever determine that electrocution is unconstitutional."

During the 1998 Regular Legislative Session, the Legislature passed legislation providing for executions by means of lethal injection *only* if electrocution was held to be unconstitutional. *See* ch. 98-4, L.O.F. The Legislature also passed legislation proposing an amendment to Art. I, Sec. 17, Fla. Const., which prohibited "cruel or unusual punishment." This joint resolution became Revision 2 on the ballot. Revision 2 passed during the November 1998 general election. The amendment provides, in part, state constitutional authorization for any method of execution designated by the Legislature and not declared unconstitutional.

On July 8, 1999, Alan Lee Davis was executed. Witnesses at the execution observed a line of blood descending from the area around the defendant's nose and the mouth strap and pooling on

Davis' shirt. The medical examiner concluded at a subsequent autopsy that the cause of the blood was a nose bleed.

On September 24, 1999, the Florida Supreme Court in *Provenzano v. Moore*, 24 Fla. L. Weekly S314 (Fla. 1999) held that Florida's electric chair is not cruel or unusual punishment.

On October 26, 1999, the U.S. Supreme Court granted certiorari in *Bryan v. Moore*, Case No. 99-6723, a case in which the constitutionality of Florida's electric chair is again at issue. On December 7, 1999, the Governor announced a Special Session from January 5, 2000 to January 7, 2000. The Governor's Proclamation identified the call as being for the sole and exclusive purpose of considering the following items of substantive legislation:

> Legislation authorizing that death sentences be carried out by lethal injection or electrocution, and exemptions from public records law thereto; mandating the concurrent preparation and filing of postconviction and collateral claims with the direct appeal in all capital cases; and including further limitations on the filing of such claims; and requiring a nonbinding advisory jury recommendation in capital sentencing proceedings.

B. Laws Relating to Electrocution and Lethal Injection

Section 922.10, F.S., provides that a death sentence shall be executed by electrocution.

Section 922.105, F.S., provides that, if electrocution is held to be unconstitutional by the Florida Supreme Court under the State Constitution, or is held to be unconstitutional by the U.S. Supreme Court under the Federal Constitution, or if the U.S. Supreme Court declines to review any judgment holding electrocution to be unconstitutional under the Federal Constitution made by the Florida Supreme Court or the federal court of appeals that has jurisdiction over Florida, all persons sentenced to death for a capital crime shall be executed by lethal injection.

This section adopts the opinion and all points of law in *Malloy v. South Carolina*, 237 U.S. 180 (1915), that the federal ex post facto clause is not violated by retroactive application of a legislatively enacted change in the method of execution.

This section further provides legislative findings that a change in the method of execution does not increase the punishment or modify the penalty of death for capital murder, and any retroactive application of a legislative change in the method of execution does not violate Florida's "saving clause," Art. I, Sec. 10, Fla. Const., or Florida's ex post facto clause, Art. I, Sec. 9, Fla. Const.

This section further provides that a person authorized by state law to prescribe medication and designated by the Department of Corrections may prescribe the drugs necessary to compound a lethal injection. A person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. For purposes of this section, the preparing compounding, dispensing, and administering of a lethal injection do not constitute the practice of medicine, nursing, or pharmacy.

This section also exempts the execution protocol from ch.120 F.S., rulemaking procedures.

This section also prohibits the reduction of a death sentence as a result of a determination that a method of execution is unconstitutional under the State or Federal Constitution. The sentence shall remain in force until it can be lawfully executed by any valid method of execution.

Finally, nothing in this section is intended to require any physician, nurse, pharmacist, or employee of the Department of Corrections, or any other person to assist in any aspect of an execution which is contrary to the person's moral or ethical belief.

C. State Constitutional Prohibition Against Cruel and Unusual Punishment

Art. I, Sec. 17, Fla. Const., which was amended by the Florida electorate in 1998, provides:

> SECTION 17. Excessive Punishments.--
> Excessive fines, cruel and unusual punishment, attainder, forfeiture, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

III. Effect of Proposed Changes:

Section 922.105, F.S., is amended to provide that a death sentence shall be executed by lethal injection unless the person affirmatively elects to be executed by electrocution. The sentence shall be executed under the direction of the Secretary of the Department of Corrections or the Secretary's designee.

The election for death by electrocution is waived unless it is personally made in writing and delivered to the warden of the correctional facility within 30 days after the issuance of the Florida Supreme Court's mandate affirming the sentence of death on the direct appeal or, if mandate issued before the effective date of the act, within 30 days after the effective date. If a warrant of execution is pending on the effective date of the act, or the warrant issued within 30 days after the

effective date, the person subject to warrant shall have waived election of electrocution unless a written election signed by the person is submitted to the warden no later than 48 hours after a new date for execution is set by the Governor.

If an execution by electrocution or lethal injection is held to be unconstitutional, then the death sentence shall be carried out by any constitutional method.

Notwithstanding chapter 401, (medical communications and transportation), chapter 458, F.S. (medical practice), chapter 459 (osteopathic medicine), chapter 464 (nursing), chapter 465 (pharmacy), or any other law to the contrary, prescription, preparation, compounding, dispensing, and administration of lethal injection does not constitute the practice of medicine, nursing, or pharmacy.

This act shall take effect on becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

I. The Eighth Amendment Analysis of Methods of Executions

The analysis employed in *Provenzano v. Moore*, 24 Fla. L. Weekly S314 (Fla. 1999), is essentially the analysis employed by the Federal Ninth Circuit Court of Appeal in *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994). The Ninth Circuit Court described this analysis as "methodology review." The Florida Supreme Court relied on this analysis in *Jones v. State*, 701 So.2d 76 (Fla. 1997) and in the *Provenzano* case. In order for a punishment to constitute cruel and unusual punishment the punishment must either involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." The Florida Supreme Court found "abundant evidence" that electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. Determining that the circuit court's findings of fact that death was instantaneous and painless was supported by "competent substantial evidence," the Florida Supreme Court concluded, as it had previously concluded in the *Jones* case, that Florida's electric chair did not constitute cruel or unusual punishment.

The dissenting Justices in *Provenzano*, like the dissenting Justices in *Jones*, argued that the majority failed to look at other "objective" indices of "evolving standards of decency," such as the action of legislatures throughout the United States. Their argument was that the majority of states have lethal injection, including the states which formerly had electrocution. However, the majority in *Provenzano* and *Jones* determined that the actions taken by other legislatures are not dispositive, citing to *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("The fact that a majority of jurisdictions have adopted a different practice . . . does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

A different Eighth Amendment issue relevant to this bill has recently been addressed by the U.S. Supreme Court in *Stewart v. LeGrand*, 526 U.S. 115 (1999), in which the Court held that LeGrand, who had challenged lethal gas as a cruel and unusual punishment, waived any objection he might have to lethal gas by picking lethal gas over lethal injection, the default method of execution in Arizona. A different but related issue addressed in the *Campbell* case and in *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995) was whether being offered the choice itself would violate the Eighth Amendment. Both courts rejected this Eighth Amendment claim.

II. Florida's Saving Clause and Ex Post Facto Laws

Article II, Section 32, of the 1885 Florida Constitution provided that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." In *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926), the petitioner, an inmate under warrant of death, sought to review the judgment of the lower court imposing death by hanging. The petitioner argued that, subsequent to the court's imposition of his death sentence, the Legislature changed the law to make electrocution the method of execution. Based upon Article II, Section 32, the court denied the petitioner's claim.

> The statute in effect when Washington committed the offense was found to be "a legislative enactment for dealing with punishment for crime" and, thus, a "criminal statute." Id., 109 So. at 591. Accordingly, the statutory revision was not permitted to affect Washington's punishment for the previously committed crime. The challenged modification of the law in *Washington* directly related to the sentence pronounced by a criminal court and concerned the specific mode of capital punishment to be imposed.

State v. Florida Parole Commission, 624 So.2d 324, 326 (Fla. 1st DCA 1993).

In reaching this holding, the Court dismissed the United States Supreme Court holding in *Malloy v. South Carolina*, 237 U.S. 180 (1915) as not being relevant, since the Court's holding there was premised on the federal ex post facto clause. The United States Supreme Court held in *Malloy* that retroactive application of a South Carolina statute changing the mode of execution from hanging to electrocution did not change the penalty (death), but only the mode for producing the penalty; since the punishment was not increased, the statute was not an ex post facto law.

Article X, Section 9, of the present Florida Constitution is nearly identical to Article II, Section 32, of the 1885 Constitution.

The holding, then, in *Washington v. Dowling*, is that Florida's "saving clause" was violated by a retroactive application of change in the method of execution (i.e., applying the new method, electrocution, to death-sentenced prisoners who were subject to the former method, hanging, until the change in the law). The saving clause issue may still be a cognizable issue with respect to retroactive application of lethal injection, which is provided for in the bill; however, remarks by Justices in the *Provenzano* opinion may indicate the Court's willingness to recede from *Washington v. Dowling*, especially in light of the strong suggestion from the Court that the Legislature offer lethal injection as a method of execution. Additionally, to the extent *Malloy* continues to remain binding precedent, the retroactive application of lethal injection, as provided for in this bill, should not be a cognizable ex post facto issue.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Method of Execution

The Department of Corrections figures reflect the cost of purchasing two execution tables in the first year and the costs of actually carrying out an execution by lethal injection. The recurring costs are based on one execution. Any actual expenditures in FY 1999-2000 will be absorbed within current resources.

Total Estimated Costs

	FY 1999-2000	FY 2000-2001	FY 2001-2002	TOTAL
Department of Corrections	* $26,503	$13,503	$13,503	$53,509

* Costs will be absorbed within current resources.

The department plans on using the existing death chamber with some minor modifications so that it can accommodate both lethal injection and electrocution. However, if it is determined that the electrocution death chamber cannot or should not be used for lethal injection executions, it would cost approximately $122,500 to construct a new chamber based on Department of Corrections figures (1,250 square feet at $98 per square foot, which is the typical secure construction cost for non-housing units).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.