

SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MARCH 14, 1977

The meeting was called to order at 10:15 a.m. Senator Bryan was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Sheerin
Senator Gojack
Senator Ashworth

ABSENT:

SB 220 Provides conditions for imposition of capital punishment.

AB 403 Provides for capital punishment in conformity with decisions of the United States Supreme Court.

The following persons continued discussion with the Committee on these matters:

Senator William J. Raggio; Geno Menchetti, Deputy Attorney General; Frank Daykin, Legislative Counsel Bureau.

SB 220 SECTION 6

Senator Bryan: What are the differences between Section 6 in SB 220 and AB 403?

Senator Raggio: We have restored the right to enter a plea to a specified sentence if approved by the Court and the District Attorney. Also on page 4, line 24 we have inserted the language "or the Court if the trial was without a jury" in the situation where the jury was unable to agree unanimously on the sentence to be imposed.

Senator Bryan: Have we made a preliminary determination as to whether or not hearsay was to be considered at the penalty phase of the hearing?

Senator Raggio: I don't know. There has been some concern that if the jury did not reach a unanimous decision on the death penalty, one alternative would be that one of the lesser alternate penalties would be automatically imposed. That would mean that you could always have the situation where a juror would hold out knowing that that automatically meant an alternate sentence. As a practical matter, I think it would be a rare case where a jury

having determined first degree guilt, would not be able to unanimously reach a penalty determination.

Senator Sheerin: I think you are really locked into just one alternative. If the jury can't reach a unanimous verdict then you would go with life without. The only other alternative would be to impanel a new jury for sentencing and I just can't see that.

Senator Bryan: Realistically, you cannot impanel a second group of jurors for the penalty phase and, with a cold record, have them make a sensible determination as to whether or not the person is to receive a life or death sentence.

Mr. Menchetti: One of the statutes that was upheld provides that if a jury cannot reach a unanimous decision on the sentencing phase, the verdict will automatically be life without. In regard to Senator Raggio's concern over the holdout juror, you could have that same problem over the issue of guilt. One juror can always do that to you.

Mr. Daykin: There are two alternatives: 1) the penalty shall be the lesser of the alternatives; or 2) the judge could call in or the Supreme Court could assign, 2 additional district judges and that panel would determine the penalty.

Senator Raggio: That becomes a very cumbersome process. I have never seen a situation where a jury has ever been hung up in a possible death situation.

Senator Bryan: If there is some type of impasse that develops in the penalty phase, do any of you see any constitutional pitfalls in taking it out of the hands of the jury and sending it to a 3-judge panel?

Mr. Daykin: No, because the court didn't say that the penalty had to be found by the jury.

Senator Sheerin: Neither has our constitution prohibited it. It says you can be tried by jury but it doesn't talk about being sentenced by the jury.

SB 220 SECTION 7

Senator Raggio: On line 48 where it talks about the aggravated nature of the offense outweighing any mitigating circumstances proved "beyond a reasonable doubt," should that be applied to mitigating circumstances as well?

Senator Close assumed the Chair at this time.

Mr. Daykin: I think as to mitigation, you might more reasonably say "the preponderance of the evidence." You require guilt and therefore appropriately, aggravating circumstances beyond a reasonable doubt but as to mitigation, it would seem that the preponderance of the evidence should suffice just as it does for an affirmative defense, such as insanity.

Mr. Menchetti: I have a problem with the way this section is worded in that it could be read to place the burden on the defendant to produce mitigating circumstances that outweigh the aggravating. I have a serious question as to the validity of that. I would suggest that we adopt language similar to that in AB 403, page 4, lines 28-29 where they find aggravating and mitigating circumstances and balance them.

Senator Bryan: Line 42 indicates that the jury shall deliberate and announce its findings on each additional aggravating circumstance. Doesn't that, in effect, direct them to find a special verdict with respect to each fact pattern?

Senator Close: It is the consensus of the Committee then, to adopt the language in AB 403, page 4, lines 28-29 in lieu of subsection 2 of SB 220.

SB 220 SECTION 9

Mr. Daykin: This was taken from one of the statutes which was upheld by the Supreme Court. The point was that the jury shall determine whether the defendant should be sentenced to life imprisonment or death but it shall not impose a sentence of death. There are some verbal inconsistencies in all of these bills which I would like to have the Committee's permission to resolve when I bring back these amendments.

Mr. Menchetti: I would like to address the issue of special findings. Appellate review is a very big concern in all of the cases upheld by the Supreme Court. We have already said that they must find at least one aggravating circumstance beyond a reasonable doubt. We are going to find, as we get to the end of this bill, that we are going to have to have a review of that finding to see if that is, in fact, the same statewide. My question is, can we have a meaningful appellate review without having the trier of fact indicate in its verdict, what aggravating circumstances it found beyond a reasonable doubt?

Senator Bryan: Do you read the case holdings to require a special finding to that effect?

Mr. Menchetti: I read the cases to require a meaningful appellate review. I can see the argument that if there is not stated in the verdict which of those aggravating circumstances they found beyond a reasonable doubt, it is going to be tough to review to see if the evidence is there to support that finding.

Mr. Daykin: I think Geno's language does not require a special verdict upon each aggravating circumstance that was presented but only upon those upon which the jury relied. That is a lesser burden.

Senator Bryan: Unless it is absolutely required, and if it is, I think we have to include that. It seems to me that you impose one additional burden upon the jury on which they must reach unanimous agreement.

Senator Raggio: Let's assume that we have the jury designate the aggravating circumstance upon which they relied. Do they have to find that circumstance beyond a reasonable doubt?

Senator Sheerin: Geno, as you read the Supreme Court cases, do they require "beyond a reasonable doubt" as far as aggravating circumstances are concerned?

Mr. Menchetti: They don't address the issue at all.

Senator Bryan: Regarding the appellate review, by requiring a special finding do you make that decision more subject to judicial attack? If a jury finds circumstance "X" to be the aggravating circumstance, do you then target "X" and have the 5 Justices make a determination that in their view, that circumstance wasn't sufficient to warrant the imposition of the death penalty. Do you expose the verdict?

Mr. Menchetti: Perhaps you do but my problem is this. The Supreme Court was concerned about arbitrariness and capriciousness in the imposition of the death penalty. They spent a lot of time discussing appellate review and their concern was that the review was 1) statewide and 2) so meaningful as to insure that an average jury would impose a death sentence in one set of facts whereas another jury, on those same facts, would not impose a death sentence. It seems to me, to have a review of that decision, you are going to have to have that trier of fact, be it a jury or the judge, state what they based the imposition of the death penalty on.

Senator Bryan: The only thing that bothers me about that is suppose there are 5 aggravating circumstances that were submitted and suppose, hypothetically, that all 5 were sufficient in the minds of the jury to impose the death penalty. If they make a finding of one, as you are suggesting, and it is the wrong one then the Supreme Court will reverse it.

Senator Dodge: Can't we say that they gave weight to this aggravation and to these mitigations and they found that the aggravating circumstances outweighed the mitigating.

Mr. Daykin: That's the answer. They must list the circumstances that they find to be established.

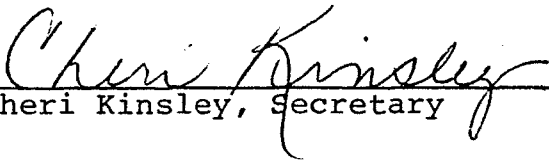
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Senator Raggio: The aggravating circumstances. And then a general statement that they outweigh the mitigating.

It was the consensus of the Committee to go with this approach.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted,


Cheri Kinsley, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN