

recommendation, the jury retires for further deliberations and is nonetheless unable to agree on either of the two permissible recommendations, then arguably any one of the following results could obtain:

(1) the jury could be sent back under specific instructions that it must return a majority recommendation of a life sentence (or that the court will be required to impose such a sentence) if the jury is unable to make the unanimous decision for imposition of the death penalty; (2) the trial judge could declare that the failure to produce a permissible recommendation results in a hung jury and order a rehearing on sentencing before a new jury empaneled for that purpose; or (3) the judge could discharge the jury for having failed to make a recommendation, and proceed to impose sentence in the absence of a recommendation and based upon the record adduced at the sentencing hearing.

We reject the first of these three alternatives for the simple reason that there is nothing whatsoever in the statute to suggest that a life sentence recommendation or the imposition of a life sentence must automatically follow if the jury is unable to recommend death. 9 We reject the second alternative because Senate Bill 106 specifically calls for the sentencing proceeding to take place before the "trial jury" unless the trial jury has been waived or the defendant has pleaded guilty. Except for these two instances, no provision is made for the empaneling of a jury other than the trial jury; even when a case is remanded following appeal for resentencing, that resentencing is to be determined by the trial judge and not by a newly empaneled jury. 10 We are persuaded that alternative #3 represents the appropriate course of action in a hung jury situation. We base this conclusion on the fact that while the involvement of a jury, and in particular the trial jury, in the sentencing proceeding is important, its recommendation is advisory only and the trial judge is clearly empowered to impose a sentence other than the one recommended. We believe that the clearly advisory nature of the jury's recommendation strongly supports a conclusion that the trial judge should be free to impose sentence if the jury is unable to provide a valid recommendation. 11 While the Supreme Court has noted the important societal function performed by jury sentencing, it has also expressed the view that judicial sentencing offers certain advantages in a capital punishment scheme. Proffitt v. Florida, 96 S. Ct. at 2966.

Having expressed this conclusion, we must hasten to