

add that reasonable arguments can be made in support of the other alternatives and that there are risks involved in a trial judge proceeding without the benefit of any sentencing recommendation by a jury. While we believe that a trial judge should proceed as we have suggested, if confronted with a hung jury, he would to a certain extent be doing so at the risk of a subsequent appellate holding by the Court of Appeals that he could not and should not have imposed a sentence, and particularly a death sentence, without having before him a proper jury recommendation. We believe that the risk is substantially reduced if he places himself in the same position he would be in if the jury had recommended life imprisonment and applies the more stringent burden of proof applicable in such situations if he is considering imposing the death penalty. See fn. 11, supra, and our response to your fifth question, infra.

5. You have next asked what standards the trial judge must apply under §413(d) and (e) if the jury recommends life imprisonment and the judge disregards the recommendation and determines that the sentence of death should be imposed. You have suggested that the statute may be interpreted either to permit the court to make its own independent findings or to require the court to find the jury's recommendation to be clearly erroneous or supported by insufficient evidence before it refuses to accept the jury's advisory sentence and impose the death penalty. 12

As we have noted above in response to Question #4, the jury recommendation which the statute calls for is clearly of an advisory nature and the ultimate sentencing power is given to the trial judge. The trial judge is clearly not bound to follow the jury's recommendation but, unlike the jury (see our answer to Question #6), the judge is clearly required (by §413(e)) to support his sentence determination by specific, written findings of fact. While these features of Senate Bill 106 suggest that the judge is free to ignore the jury's recommendations and any subsidiary findings and make his own findings and determine sentence independently, the Florida Supreme Court has stated that: "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla., 1975); accord, Thompson v. State, 328 So. 2d 1, 5 (Fla., 1976); cf. Spinkellink v. State, 313 So. 2d 666, 671 (Fla., 1975). The quoted language from Tedder v. State, as well as these other Florida cases, was referred to in the Supreme Court's opinion in Proffitt v. Florida, supra, in a context suggesting that