

**The Florida Senate**  
**COMMITTEE MEETING EXPANDED AGENDA**

**CRIMINAL JUSTICE**  
**Senator Evers, Chair**  
**Senator Gibson, Vice Chair**

**MEETING DATE:** Wednesday, January 27, 2016  
**TIME:** 3:30—6:00 p.m.  
**PLACE:** Pat Thomas Committee Room, 412 Knott Building

**MEMBERS:** Senator Evers, Chair; Senator Gibson, Vice Chair; Senators Bradley, Brandes, and Clemens

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	Workshop on the death penalty to discuss legislative remedies to address Florida's capital sentencing process in response to the recent U.S. Supreme Court decision in <i>Hurst v. Florida</i> .		Discussed
2	Presentation by staff on:  The current law and practice for sentencing defendants to death; and  Recent legal developments concerning the application of the <i>Hurst</i> decision to the Florida death penalty procedures.		Presented
3	Testimony by representatives from:  The Office of the Attorney General; The Executive Office of the Governor; The Florida Prosecuting Attorneys Association; The Florida Public Defenders Association; The Florida Association of Criminal Defense Lawyers; The Office of the Capital Collateral Regional Counsel; The Florida Bar; and Other interested stakeholders		Presented
Other Related Meeting Documents			

**Statistical Information Relating to the Jury Vote in Sentencing in Capital Cases**

**TABLE 1**

<b>Distribution of Jury Votes in Death Cases by Calendar Year of Disposition by Florida Supreme Court<sup>1</sup> (N=296)</b>																
Original Jury Vote	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	Total	% <sup>2</sup>	Cum %
7-5	6	1	4	4	0	3	0	2	4	1	3	2	2	32	11%	11%
8-4	4	6	2	6	2	0	3	0	2	9	2	1	5	42	14%	25%
9-3	4	4	3	6	2	2	11	3	5	6	6	9	5	66	22%	47%
10-2	3	12	4	3	3	3	2	2	2	5	11	1	3	54	18%	66%
11-1	2	8	5	5	3	1	1	2	1	5	5	1	3	42	14%	80%
12-0	9	6	8	4	2	3	6	7	6	0	1	6	2	60	20%	100%
Subtotal	28	37	26	28	12	12	23	16	20	26	28	20	20	296	100%	
Other <sup>3</sup>	3	1	2	3	4	2	0	0	1	4	3	1	0	24		
TOTAL	31	38	28	31	16	14	23	16	21	30	31	21	20	320		

**TABLE 2**

<b>Distribution of Jury Votes in Death Cases Disposed by the Florida Supreme Court on Direct Appeal from Calendar Year 2000 to 2012<sup>4</sup> (N=296)</b>					
Original Jury Vote For Death	TOTAL	Death Sentence Affirmed	Percent Affirmed	Death Sentence Not Affirmed <sup>5</sup>	Percent Not Affirmed
7 to 5	32	17	53%	15	47%
8 to 4	42	31	74%	11	26%
9 to 3	66	48	73%	18	27%
10 to 2	54	39	72%	15	28%
11 to 1	42	37	88%	5	12%
12 to 0	60	38	63%	22	37%
TOTAL	296	210	71%	86	29%

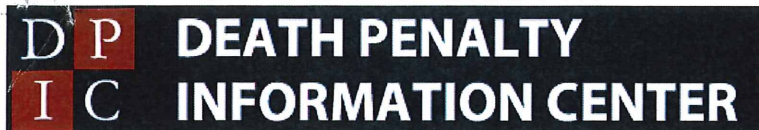
<sup>1</sup> Thirteen years of data compiled by the Supreme Court Clerk's Office.

<sup>2</sup> Calculated percentage excludes the "other" category.

<sup>3</sup> Includes waiver of penalty phase, and judicial overrides from jury recommendation of life to judge imposing death.

<sup>4</sup> Source document: Supreme Court Death Penalty Direct Appeals Disposed- With Jury Votes, 2000 to 2012

<sup>5</sup> Includes: reversal and remand for trial, reduced to life, dismissal, deceased defendant, and acquittal.



Home	Issues	Resources	Facts	Reports	About	Press	Donate
------	--------	-----------	-------	---------	-------	-------	--------

FACT SHEET

UPCOMING EXECUTIONS

EXECUTION DATABASE

STATE-BY-STATE

## Number of Executions by State and Region Since 1976

Updated December 9, 2015 following an execution in Georgia.	
Execution Totals	
Total Executions Since 1976	1423
Executions in 2016	1
Executions in 2015	28
Executions in 2014	35
Executions in 2013	39
Executions in 2012	43
Executions in 2011	43

Executions by Region	
South	1157
Midwest	177
West	85
Northeast	4
Texas & Oklahoma Alone	643

### Executions by State

State	Total Executions	Executions in 2016	Executions in 2015	Executions in 2014	Executions in 2013	Executions in 2012	Executions in 2011	Executions in 2010
Texas	531		13	10	16	15	13	17
Oklahoma	112		1	3	6	6	2	3
Virginia	111		1		1		1	3
Florida	92	1	2	8	7	3	2	1
Missouri	86		6	10	2		1	
Georgia	60		5	2	1		4	2
Alabama	56				1		6	5
Ohio	53			1	3	3	5	8
North Carolina	43							
South Carolina	43						1	
Arizona	37			1	2	6	4	1
Louisiana	28							1
Arkansas	27							
Mississippi	21					6	2	3
Indiana	20							
Delaware	16					1	1	
California	13							
Illinois	12							
Nevada	12							
Utah	7							1
Tennessee	6							
Maryland	5							
Washington	5							1
Nebraska	3							
Montana	3							
Pennsylvania	3							
U. S. Federal Gov't	3							
Kentucky	3							
Idaho	3					1	1	
South Dakota	3					2		
Oregon	2							
Connecticut	1							
New Mexico	1							
Colorado	1							

Wyoming	1								
---------	---	--	--	--	--	--	--	--	--

Tweet 1.3k  
Like



<a href="#">Home</a>	<a href="#">Issues</a>	<a href="#">Resources</a>	<a href="#">Facts</a>	<a href="#">Reports</a>	<a href="#">About</a>	<a href="#">Press</a>	<a href="#">Donate</a>
----------------------	------------------------	---------------------------	-----------------------	-------------------------	-----------------------	-----------------------	------------------------

[FACT SHEET](#)

[UPCOMING EXECUTIONS](#)

[EXECUTION DATABASE](#)

[STATE-BY-STATE](#)

**Executions by State and Year**

For executions in a state in past years, click the state:

(For current year executions, [click here](#))

- |                             |                                |                                |
|-----------------------------|--------------------------------|--------------------------------|
| <a href="#">Alabama</a>     | <a href="#">Kentucky</a>       | <a href="#">Oklahoma</a>       |
| <a href="#">Arizona</a>     | <a href="#">Louisiana</a>      | <a href="#">Oregon</a>         |
| <a href="#">Arkansas</a>    | <a href="#">Maryland</a>       | <a href="#">Pennsylvania</a>   |
| <a href="#">California</a>  | <a href="#">Mississippi</a>    | <a href="#">South Carolina</a> |
| <a href="#">Colorado</a>    | <a href="#">Missouri</a>       | <a href="#">South Dakota</a>   |
| <a href="#">Connecticut</a> | <a href="#">Montana</a>        | <a href="#">Tennessee</a>      |
| <a href="#">Delaware</a>    | <a href="#">Nebraska</a>       | <a href="#">Texas</a>          |
| <a href="#">Florida</a>     | <a href="#">Nevada</a>         | <a href="#">Utah</a>           |
| <a href="#">Georgia</a>     | <a href="#">New Hampshire</a>  | <a href="#">Virginia</a>       |
| <a href="#">Idaho</a>       | <a href="#">New Mexico</a>     | <a href="#">Washington</a>     |
| <a href="#">Illinois</a>    | <a href="#">North Carolina</a> | <a href="#">Wyoming</a>        |
| <a href="#">Indiana</a>     | <a href="#">Ohio</a>           | <a href="#">US Gov't</a>       |
| <a href="#">Kansas</a>      |                                |                                |

See also Interactive graphic from the [Pew Forum](#) showing executions by state and year.

**Alabama**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	1	0	0	1
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
1	0	4	1	0	2	0	0	2	1	3
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
2	2	4	0	2	3	2	4	1	3	0
2009	2010	2011	2012	2013	2014	2015				
6	5	6	0	1	0	0				

**Arizona**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	1	2	0	1	2	2
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
4	7	3	0	0	0	0	0	0	1	0
2009	2010	2011	2012	2013	2014	2015				
0	1	4	6	2	1	0				

**Arkansas**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	2	0	2	0	5	2	1	4
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	4	2	1	0	1	1	1	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**California**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	1	1	0	0	2	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	2	1	1	1	0	0	2	1	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Colorado**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Connecticut**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	1	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Delaware**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	1	2	1	1	3	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	2	1	2	0	0	0	1	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	1	1	0	0	0				

**Florida**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	1	0	0	0	1	8	3	3
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
1	2	2	4	2	2	3	1	3	2	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
4	1	6	1	3	3	2	1	4	0	2
2009	2010	2011	2012	2013	2014	2015				
2	1	2	3	7	8	2				

**Georgia**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	1	2	3	1
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
5	1	1	0	1	0	2	1	2	2	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	0	0	4	4	3	2	3	0	1	3
2009	2010	2011	2012	2013	2014	2015				
3	2	4	0	1	2	5				

**Idaho**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	1	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	1	1	0	0	0				

**Illinois**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	1	0	0	0	1	5	1	2
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	1	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Indiana**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	1	0	0	0	1	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	1	0	1	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	1	0	2	0	2	0	5	1	2	0
2009	2010	2011	2012	2013	2014	2015				
1	0	0	0	0	0	0				

**Kansas**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Kentucky**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	1	0	0	0	0	0	0	0	0	1
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Louisiana**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	1	5	1	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
8	3	0	1	1	0	1	0	1	1	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	1	1	0	1	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	1	0	0	0	0	0				

**Maryland**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986

0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	1	0	0	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	0	0	0	0	0	1	1	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Mississippi**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	1	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
2	0	1	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	2	0	0	1	1	0	2
2009	2010	2011	2012	2013	2014	2015				
0	3	2	6	0	0	0				

**Missouri**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	1	4	1	1	4	0	6	6	6
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
3	9	5	7	6	2	0	5	0	0	0
2009	2010	2011	2012	2013	2014	2015				
1	0	1	0	2	10	6				

**Montana**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	1	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	0	0	0	0	0	0	0	1	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Nebraska**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	1	0	1	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Nevada**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	1	0	0	0	0	0	1	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	2	1	0	0	0	0	0	1	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	1	0	1	0	0	2	0	1	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**New Hampshire**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0



1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**New Mexico**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	1	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**North Carolina**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	2	0	1
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	1	1	0	1	2	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
2	4	1	5	2	7	4	5	4	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Ohio**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	1	0	1	3	3	7	4	5	2	2
2009	2010	2011	2012	2013	2014	2015				
5	8	5	3	3	1	0				

**Oklahoma**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	1	0	2	0	0	3	2	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
4	6	11	18	7	14	6	4	4	3	2
2009	2010	2011	2012	2013	2014	2015				
3	3	2	6	6	3	1				

**Oregon**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	1	1
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**Pennsylvania**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997

0	0	0	0	0	0	0	0	2	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	1	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

**South Carolina**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	1	1
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	1	1	0	0	0	1	6	2
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
7	4	1	0	3	0	4	3	1	1	3
2009	2010	2011	2012	2013	2014	2015				
2	0	1	0	0	0	0				

**South Dakota**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	1	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	2	0	0	0				

**Tennessee**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	1	0	0	0	0	0	1	2	0
2009	2010	2011	2012	2013	2014	2015				
2	0	0	0	0	0	0				

**Texas**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	1	0	3	6	10
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
6	3	4	4	5	12	17	14	19	3	37
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
20	35	40	17	33	24	23	19	24	26	18
2009	2010	2011	2012	2013	2014	2015				
24	17	13	15	16	10	13				

**Utah**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	1	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
1	1	0	0	0	1	0	0	0	1	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	1	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	1	0	0	0	0	0				

**Virginia**

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	1	0	1	2	1
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
1	1	1	3	2	4	5	2	5	8	9

1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
13	14	8	2	4	2	5	0	4	0	4
2009	2010	2011	2012	2013	2014	2015				
3	3	1	0	1	0	1				

### Washington

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	1	1	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	0	0	1	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	1	0	0	0	0	0				

### Wyoming

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	1	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	0	0	0	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

### US Gov't

1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
0	0	0	0	0	0	0	0	0	0	0
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
0	0	0	0	0	0	0	0	0	0	0
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
0	0	0	2	0	1	0	0	0	0	0
2009	2010	2011	2012	2013	2014	2015				
0	0	0	0	0	0	0				

[Return to Executions](#)

## STATES WITH THE DEATH PENALTY (31)

Alabama	Louisiana	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	South Dakota
California	Montana	Tennessee
Colorado	Nevada	Texas
Delaware	New Hampshire	Utah
Florida	North Carolina	Virginia
Georgia	Ohio	Washington
Idaho	Oklahoma	Wyoming
Indiana	Oregon	
Kansas		
Kentucky		

## Other State Information:

- [State by State Information](#)
- [Summary of State Statutes](#)
- [Execution Information](#)
- [Sentencing Information](#)
- [Clemency Process by State](#)
- [Murder Rates by State](#)



Home	Issues	Resources	Facts	Reports	About	Press	Donate
------	--------	-----------	-------	---------	-------	-------	--------

FACT SHEET

UPCOMING EXECUTIONS

EXECUTION DATABASE

STATE-BY-STATE

## Jurisdictions with no recent executions

Although the United States is considered a death penalty country, **executions** are rare or non-existent in most of the nation: the majority of states--**26 out of 50**--have not carried out an execution in at least 10 years. An additional 8 states have not had an execution in at least 5 years, for a total of **34 states** with no executions in that time. **Only 6 states carried out an execution in 2015, and only 3 states (TX, MO, and GA) accounted for 86% of the executions.** Three additional jurisdictions (the District of Columbia, the Federal Government, and the Military) have not had an execution in at least 10 years.

The tables below list the jurisdictions with no executions in many years (updated Dec. 22, 2015):

26 states, plus the District of Columbia, the Federal Government, and the Military, with no executions in at least 10 years	
Jurisdictions with no death penalty	Last Execution
1. Alaska	Before 1976
2. Connecticut	May 12, 2005
3. Hawaii	Before 1976
4. Illinois (12)	March 17, 1999
5. Iowa	Before 1976
6. Maine	Before 1976
7. Maryland (5)	December 6, 2005
8. Massachusetts	Before 1976
9. Michigan	Before 1976
10. Minnesota	Before 1976
11. Nebraska (3)*	December 2, 1997
12. New Jersey	Before 1976
13. New Mexico (1)	November 6, 2001
14. New York	Before 1976
15. North Dakota	Before 1976
16. Rhode Island	Before 1976
17. Vermont	Before 1976
18. West Virginia	Before 1976
19. Wisconsin	Before 1976
20. District of Columbia	Before 1976
Jurisdictions with the death penalty	Last Execution
21. Arkansas (27)	November 28, 2005
22. Colorado (1)	October 12, 1997
23. Kansas	Before 1976
24. New Hampshire	Before 1976
25. Oregon (2)	May 15, 1997
26. Pennsylvania (3)	July 5, 1999
27. Wyoming (1)	January 22, 1992
28. U.S. Federal Government (3)	March 18, 2003
29. U.S. Military	Before 1976

34 states, plus 3 jurisdictions, with no executions in at least 5 years	
Jurisdictions with no death penalty	Last Execution
1. Alaska	Before 1976
2. Connecticut (1)	May 12, 2005
3. Hawaii	Before 1976
4. Illinois (12)	March 17, 1999
5. Iowa	Before 1976
6. Maine	Before 1976
7. Maryland (5)	December 6, 2005
8. Massachusetts	Before 1976
9. Michigan	Before 1976
10. Minnesota	Before 1976
11. Nebraska (3)*	December 2, 1997
12. New Jersey	Before 1976
13. New Mexico (1)	November 6, 2001
14. New York	Before 1976
15. North Dakota	Before 1976
16. Rhode Island	Before 1976
17. Vermont	Before 1976
18. West Virginia	Before 1976
19. Wisconsin	Before 1976
20. District of Columbia	Before 1976
Jurisdictions with the death penalty	Last Execution
21. Arkansas (27)	November 28, 2005
22. California (13)	January 17, 2006
23. Colorado (1)	October 12, 1997
24. Kansas (0)	Before 1976
25. Kentucky (3)	November 21, 2008
26. Louisiana	Jan. 7, 2010
27. Montana (3)	August 10, 2006
28. Nevada (12)	April 26, 2006
29. New Hampshire (0)	Before 1976
30. North Carolina (43)	August 17, 2006
31. Oregon (2)	May 15, 1997
32. Pennsylvania (3)	July 5, 1999
33. Utah	June 17, 2010
34. Washington	Sept. 10, 2010
35. Wyoming (1)	January 22, 1992
36. U.S. Federal Government (3)	March 18, 2003
37. U.S. Military (0)	Before 1976

Number in parentheses indicates total executions since 1976.

\*Nebraska abolished the death penalty in 2015, but the repeal was suspended pending a referendum on the death penalty in Nov. 2016.



(DPIC, map updated Dec. 22, 2015). See DPIC's [2015 Year End Report](#). See also [Executions](#) and [Executions by County](#).

Tweet 12  
Like

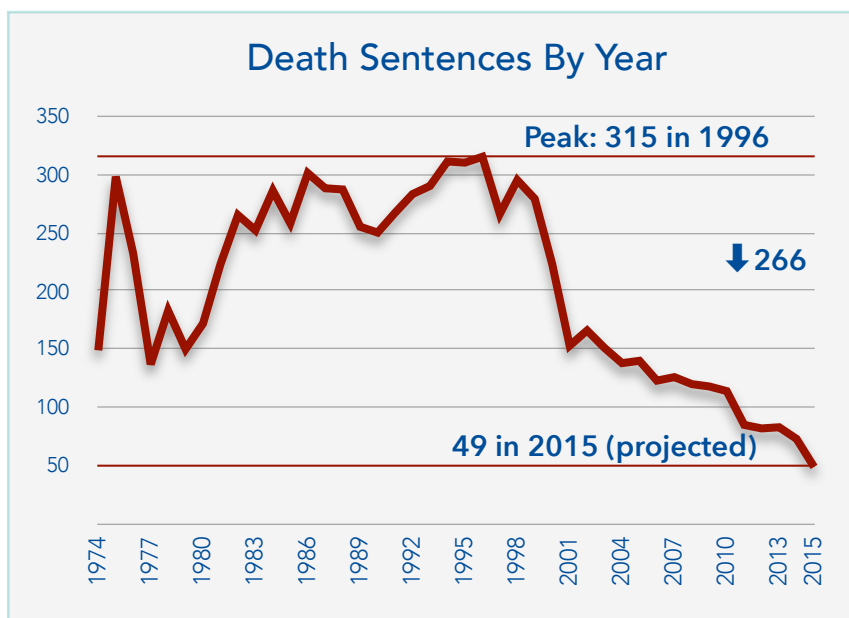
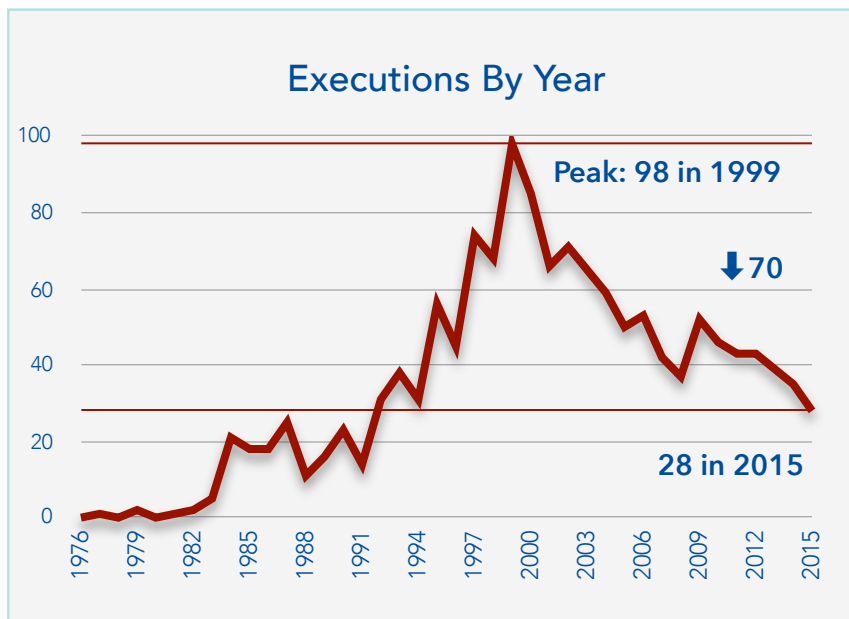
THE DEATH PENALTY IN 2015: YEAR END REPORT

DEATH PENALTY USE IN 2015 DECLINES SHARPLY

FEWEST EXECUTIONS, FEWEST DEATH SENTENCES, AND FEWEST STATES EMPLOYING THE DEATH PENALTY IN DECADES

KEY FINDINGS

- There were 28 executions in 6 states, the fewest since 1991.
- There were 49 death sentences in 2015, 33% below the modern death penalty low set last year.
- New death sentences in the past decade are lower than in the decade preceding the Supreme Court's invalidation of capital punishment in 1972.
- Six more former death row inmates were exonerated of all charges.



## U.S. DEATH PENALTY DECLINE ACCELERATES IN 2015

Executions by State	2015	2014
Texas	13	10
Missouri	6	10
Georgia	5	2
Florida	2	8
Oklahoma	1	3
Virginia	1	0
Ohio	0	1
Arizona	0	1
<b>Totals</b>	<b>28</b>	<b>35</b>

By all measures, use of and support for the death penalty continued its steady decline in the United States in 2015. The number of new death sentences imposed in the U.S. fell sharply from already historic lows, executions dropped to their lowest levels in 24 years, and public opinion polls revealed that a majority of Americans preferred life without parole to the death penalty. Opposition to capital punishment polled higher than any time since 1972.

The numbers also pointed to the increasing geographic isolation of the death penalty and its disproportionate overuse by a handful of jurisdictions. Fewer states and counties imposed death sentences, and 93% of executions were concentrated in just 4 states. 16% of all the new death sentences imposed in the country came from a single California county and – while nearly every state requires juries to unanimously agree to a death sentence – more than a quarter of the nation’s new death sentences were imposed by judges in two states after juries did not unanimously agree on death. Nearly two-thirds of the new death sentences in the U.S. in 2015 were imposed in the same 2% of American counties that have disproportionately accounted for more

than half of all U.S. death sentences in the past.

The national trend towards abolition of the death penalty in law or practice continued: Nebraska legislatively abolished the death penalty; the Connecticut Supreme Court declared its death penalty unconstitutional; and Pennsylvania joined three other states in imposing gubernatorial moratoria on executions. For the first time in a generation, there were fewer than 3,000 men and women on death rows nationwide. Six more men and women were exonerated from death row. And as two Justices of the Supreme Court issued an historic opinion inviting systemic constitutional challenges to the death penalty in America, numerous additional states put executions on hold because of problems in obtaining execution drugs or in administering their execution protocols.

### NEW DEATH SENTENCES

**New death sentences in the United States have fallen to historic lows.** With less than two weeks remaining in 2015, and few cases pending, 14 states and the federal government have imposed 49 new death sentences. This was a 33% decline from the 73 death sentences imposed in 2014 – itself already a 40-year low. The number of new death sentences imposed in the U.S. in 2015 was the fewest in any single year since 1973, when states began enacting new capital sentencing statutes in response to the Supreme Court’s

***49 new death sentences were imposed in 2015, a 33% decline from what was already a 40-year low.***



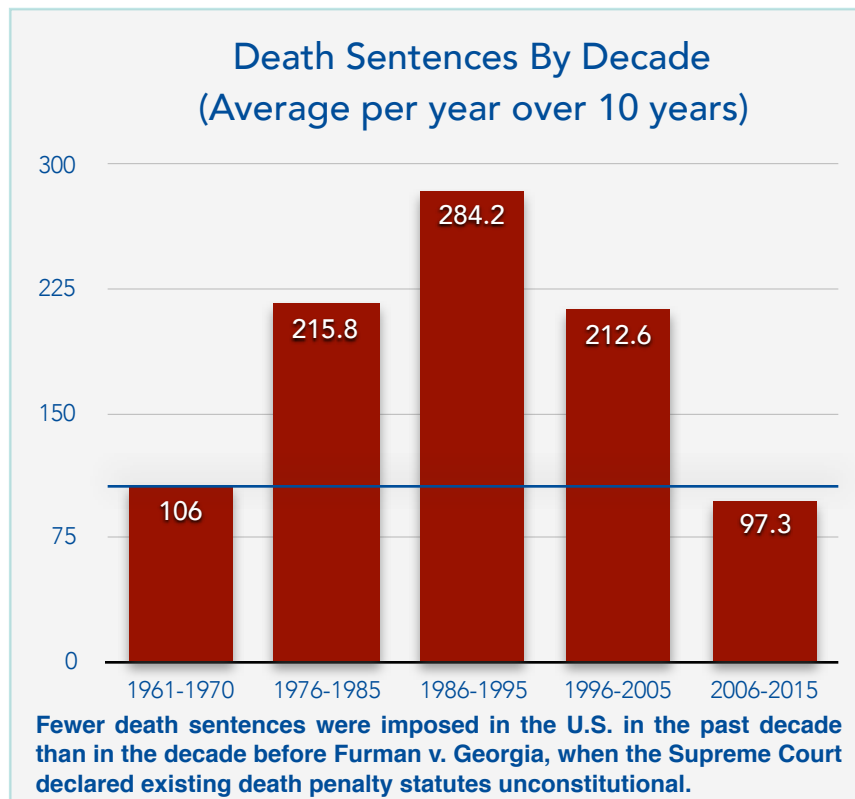
1972 decision in *Furman v. Georgia* declaring all existing death penalty statutes unconstitutional. New death sentences were 84% below the 315 death sentences imposed during the peak death-sentencing year of 1996 (see graph, *Death Sentences by Year*, on page 1).

This was the fifth consecutive year in which fewer than 100 death sentences were imposed in the U.S. **The country has now imposed fewer death sentences in the past ten years than in the decade of the 1960s leading up to the Furman decision** (see graph, *Death Sentences by Decade*, below).

Outlier practices in 3 states, **California (14)**, **Florida (9)**, and **Alabama (6)** accounted for more than half of all new death sentences in the country. 13 of the California death verdicts were concentrated in 4 Southern California counties, each of which ranks among the 15 U.S. counties with the highest number of death sentences since 2010. Riverside County, California, by itself imposed 8 death sentences, 16% of all the new death sentences in the nation and more than were imposed by any state but Florida. 63% of the new death sentences (31) came from the tiny 2% of counties responsible for more than half of all the death-sentenced inmates in the United States.

Death Row By State (7/1/15)	2015
California	746
Florida	400
Texas	265
Alabama	195
Pennsylvania	183
N. Carolina	156
Ohio	146
Arizona	124
Georgia	84
Louisiana	83
Nevada	78
Tennessee	72
US Government	62
Oklahoma	50
Mississippi	48
S. Carolina	44
Missouri	31
Arkansas	36
Oregon	35
Kentucky	34
Delaware	17
Indiana	14
Connecticut*	12
Idaho	11
Nebraska	10
Kansas	9
Utah	9
Washington	9
Virginia	8
US Military	6
S. Dakota	3
Colorado	3
Montana	2
New Mexico*	2
New Hampshire	1
Wyoming	1
<b>Total</b>	<b>2,984</b>

\*abolished death penalty data from NAACP Legal Defense and Educational Fund



More than 20% of death sentences imposed in the U.S. since 2010 have been the product of non-unanimous jury recommendations of death – a practice barred in all states but Florida, Alabama, and Delaware. Those states collectively imposed 16 death sentences this year. If they had required unanimous jury death verdicts, as in every other death penalty state, 3 would have been imposed. **More than a quarter of all U.S. death sentences in 2015 were cases in which juries did not unanimously recommend death.**

Arizona (3) and Oklahoma (3) were the only other states to impose more than two new death sentences in 2015. Even states that conducted executions exhibited signs of the death penalty's continuing decline, imposing half as many new death sentences as the number of executions they carried out. **Texas imposed only two new death sentences in 2015,**<sup>1</sup> the fewest ever under its current death penalty statute and 96% below its peak total of 48 in 1999.

**18 death penalty states imposed no death sentences in 2015,** including 3 – **Georgia, Missouri, and Virginia** – that had conducted executions. Juries in **Colorado and Washington** imposed life sentences after protracted capital trials in 4 high-profile cases, and neither state imposed any death sentences this year. **Other death penalty states that imposed no death sentences in 2015 were: Idaho, Indiana, Kentucky, Montana, Nebraska, New Hampshire, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Wyoming.**



## EXECUTIONS

**Executions dropped by 20%** compared to 2014, from 35 to 28, marking the first time in 24 years that fewer than 30 executions were carried out in the United States. It was 12th time in the past 16 years that the number of executions has declined.

The number of states conducting executions also continued to decline, and executions were concentrated in fewer and fewer states. Only 6 states carried out any executions in 2015, the fewest number since 1988, and 70% below the 20 states that executed inmates in 1999. Three states, **Texas** (13), **Missouri** (6), and **Georgia** (5) accounted for 86% of the country's executions in 2015 – and just four states, **Texas** (23), **Missouri** (16), **Florida** (10), and **Georgia** (7) have conducted 89% of all U.S. executions in the past two

***In 2015, only 6 states carried out executions, the fewest number of states in more than a quarter century.***

years.

At least 70 death-row prisoners with execution dates in 2015 received **stays, reprieves, or commutations**, 2.5 times the number who were executed.

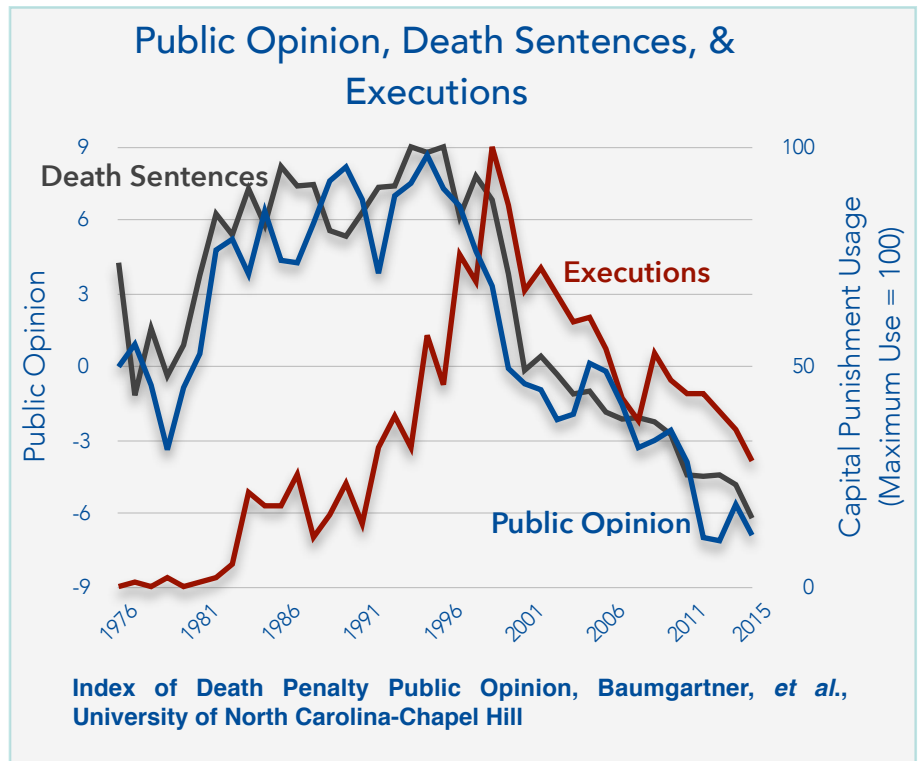
<sup>1</sup>A Bexar County, TX, jury returned a verdict of death for a third defendant, Mark Anthony Gonzalez, on October 20. However, whether he is formally sentenced to death is dependent upon the outcome of a hearing on his mental competency, which the trial court has scheduled for January 2016.

Three-fifths (60%) of those executed in 2015 were black or Latino. Only 6 of the 28 executions (21%) involved cases in which black victims had been murdered, even though generally almost half of murder victims in the U.S. are black. 29% of the executions (8) involved interracial murders of at least one white victim.

**PUBLIC OPINION AND THE DEATH PENALTY**

Support for the death penalty, as measured by public opinion polls, continued to fall in 2015. While a 56-61% majority of respondents to 2015 polls by [Gallup](#) and the [Pew Research Center](#) reported that they supported the death penalty in the abstract, those figures were close to 40-year lows and were nearly 20 percentage points below peak levels of support for the death penalty in the 1980s and 1990s. In the Gallup poll, opposition to the death penalty was at the highest levels since its 1972 poll, taken in the months leading to the Supreme Court’s decision overturning existing death penalty statutes.

The 2015 [American Values Survey](#) by the Public Religion Research Institute reported that, when asked the policy question which sentence did they prefer as punishment for people convicted of murder, a majority of Americans favored life without parole over the death penalty.



Polls in areas historically considered death penalty hotbeds also revealed dramatic changes in public attitudes. A report by the [Kinder Institute for Urban Research](#) at Rice University found that only 28% of respondents in Harris County (Houston) – which has executed more prisoners than any other county in the United States – say they now prefer the death penalty to life without parole as punishment for first-degree murder. And a survey by [SoonerPoll.com](#), taken in the wake of Oklahoma’s execution scandals, found that an 18-percentage-point majority of Oklahomans would support abolition of the death penalty if capital punishment were replaced with the alternative sanction of life without parole, plus a requirement that the inmates pay restitution to victims’ families.

A new index of death penalty public opinion, based upon a comprehensive [University of North Carolina analysis](#) of nearly 500 national public opinion surveys on the death penalty, documented the close relationship between the historical drop in public support for the death penalty and steep nationwide declines in executions and new death sentences.

## DEATH ROW NATIONWIDE

The number of people on **death row** continued to decline, **dropping below 3,000** for the first time since the Spring of 1995, according to quarterly surveys by the NAACP Legal Defense and Educational Fund. As of July 1, 2015, there were 2,984 inmates on death rows across the country. The total population on death row has decreased every year since 2001. In 2000, 3,670 inmates were under a sentence of death. About 57% of death row is made up of minorities. California (746) has the largest death row, followed by Florida (400) and Texas (265).

At the start of the year, 3 states had inmates on death row, but had barred the death penalty for future cases (New Mexico, Connecticut, and Maryland). This year, outgoing Governor Martin O'Malley commuted the death sentences of Maryland's four remaining death-row inmates. In August, the Connecticut Supreme Court declared executions of death-row inmates under the state's now-repealed death penalty to be a violation of its state constitution. Nebraska legislatively repealed its death penalty statute over the veto of Governor Pete Ricketts. Proponents of capital punishment succeeded in suspending the

***"If the Commonwealth of Pennsylvania is going to take the irrevocable step of executing a human being, its capital sentencing system must be infallible. Pennsylvania's system is riddled with flaws, making it error prone, expensive, and anything but infallible."***

*—Governor Tom Wolf, announcing moratorium on executions in Pennsylvania*

repeal, pending a voter referendum in November 2016, and the status of the state's death row inmates remains uncertain. Pennsylvania Governor Tom Wolf declared a moratorium on executions, joining Colorado, Oregon, and Washington as states in which governors have put executions on hold.

## INNOCENCE AND THE DEATH PENALTY IN 2015

### EXONERATIONS IN 2015

Six former death row prisoners were [exonerated in 2015](#), one each from Alabama, Arizona, Florida, Georgia, Mississippi, and Texas. They collectively spent more than a century on death row, and an average of 19 years in prison as a result of their wrongful convictions. Since 1973, [156 men and women](#) from 26 states have been exonerated from death row. Police and prosecutorial misconduct continued to plague wrongful capital convictions, significantly contributing to at least 12 of the past 14 death-row exonerations. This year's innocence cases also highlight persistent problems with racial bias, manipulation of witnesses, inaccurate forensic testimony, and incompetent defense.



**Debra Milke** was exonerated in Arizona on March 23, 2015, when a Phoenix judge dismissed all charges against her as a result of “egregious” police and prosecutorial misconduct. Milke spent 23 years on death row for allegedly arranging to have her 4-year-old son killed so she could collect insurance. The only evidence linking her to the murder was the testimony of a police detective with a long history of misconduct, including lying under oath. The state courts found the misconduct of the prosecution in withholding evidence so pervasive that they [barred a retrial of Milke](#).

**Anthony Ray Hinton** was released from prison on April 3, after spending nearly 30 years on **Alabama’s** death row. Hinton was wrongly convicted of the 1985 murders of two restaurant workers based on the testimony of a state forensic examiner who said the bullets in the two murders had come from a gun found in Hinton’s house. In 2002, three top firearms examiners testified that the bullets could not be matched to Hinton’s gun, yet the state continued to seek his execution for another 13 years. In 2014, the U.S. Supreme Court unanimously held that Hinton had been provided substandard representation and returned his case to the state. Prosecutors decided not to retry Hinton after the state’s new experts said they also could not link the bullets to Hinton’s gun



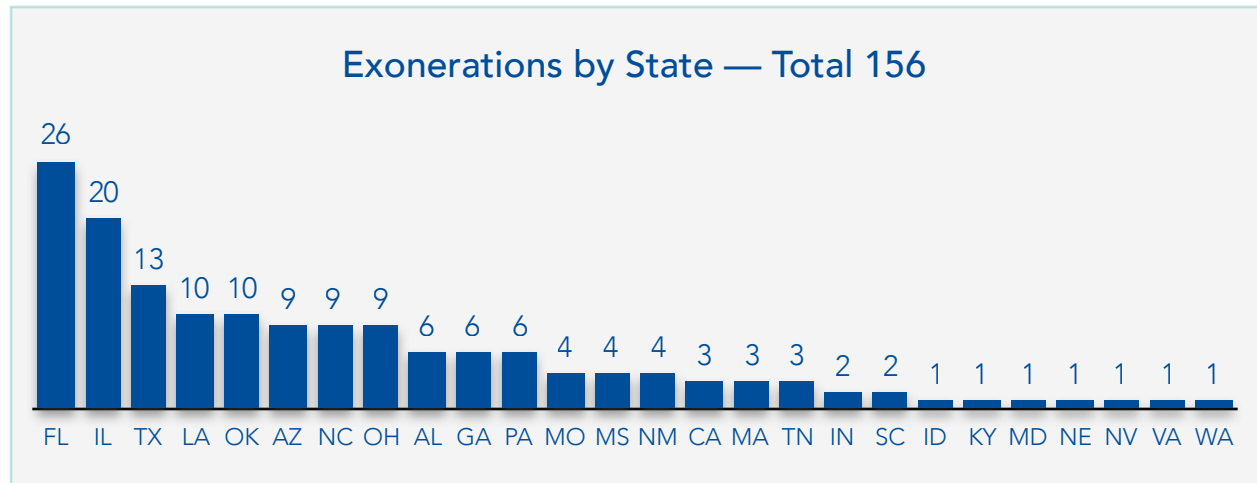
On April 21, **Mississippi** prosecutors dropped all charges against **Willie Manning for the murder of two black women** in an apartment complex. The Mississippi Supreme court had ruled he was entitled to a new trial because prosecutors had failed to disclose key exculpatory evidence to the defense. Manning’s innocence of the apartment murders almost did not come to light, as he came within hours of being executed for another double homicide that the evidence now suggests he also did not commit. He was granted a stay only after the FBI sent separate letters to the court disclosing flaws in both its ballistics and hair comparison testimony against Manning.

**Alfred Brown** was released from death row in **Texas** on June 8 after Harris County prosecutors dismissed all charges against him. Brown had been sentenced to death in 2005 for the murders of a Houston police officer and a store clerk during a robbery, but the Texas Court of Criminal Appeals overturned his conviction because prosecutors had failed to disclose a phone record that supported his alibi. The time of the phone call established that Brown could not have been at the store when the murder occurred.



[Lawrence William Lee](#) also was exonerated on June 8, when all charges against him were dismissed in Georgia for a triple murder committed during a home robbery. Lee had spent more than 27 years in prison, and more than 20 of those on death row. The state court overturned Lee’s conviction, finding a combination of failures by his trial lawyer and a “full spectrum of prosecutorial misconduct.”

On October 12, [Derral Hodgkins](#) became Florida’s 26th death-row exoneree—by far the most in the nation—after the Florida Supreme Court acquitted Hodges of all charges in the stabbing death of his former girlfriend based on insufficient evidence. The Court said the case against Hodgkins was completely circumstantial: no eyewitnesses placed him at the crime scene near the time of the murder; none of the 21 sets of fingerprints lifted from the crime scene matched his; and no evidence linked him to a bloody bottle found at the scene.



**EXECUTIONS AND NEAR EXECUTIONS DESPITE SERIOUS DOUBTS AS TO GUILT**

Even though executions in 2015 were at historic lows, significant doubts about the guilt of some of those who were put to death persisted. [Lester Bower](#) was executed on June 3 in Texas despite a reviewing court’s conclusion that “the new evidence produced by the defendant could conceivably have produced a different result at trial...[but] it does not prove by clear and convincing evidence that the defendant is actually innocent.” Similarly, [Marcus Johnson](#) was executed on November 19 in Georgia despite the trial court’s concerns that the evidence in his case “does not foreclose all doubt respecting the defendant’s guilt.”

[Richard Glossip](#) was nearly executed in **Oklahoma** even though serious questions remained as to his guilt. He was convicted solely on the testimony of Justin Sneed, who confessed to the crime and implicated Glossip in exchange for a plea deal that spared himself the death penalty. Glossip barely escaped execution, not because of his potential innocence, but because Oklahoma discovered it was about to use an unauthorized drug.

## OTHER QUESTIONABLE EXECUTIONS UNDERSCORE SIGNIFICANT DEATH PENALTY PROBLEMS

The death penalty is supposed to be reserved for the worst of the worst crimes and the worst of the worst offenders. However, the executions that were carried out in 2015 underscored that, as administered today, it instead is often directed at those with the most crippling mental and emotional disabilities. Two-thirds of the 28 people executed in 2015 exhibited symptoms of severe mental illness, intellectual disability, the debilitating effects of extreme trauma and abuse, or some combination of the three. If not themselves constitutionally ineligible for the death penalty, their severe mental or emotional disabilities made them functionally indistinguishable from those whom the Supreme Court has said cannot be executed.

[Andrew Brannan](#), a decorated Vietnam veteran with a diagnosis of Post-traumatic Stress Disorder and a 100% mental disability recognized by the Veterans Administration, was the first person executed in 2015. In a bizarre incident, he killed a **Georgia** state trooper during a routine traffic stop after begging the officer to shoot him. He had been hospitalized at least twice for serious mental illness, probably caused and/or exacerbated by PTSD. At the time of the murder, he was living in the woods, without electricity or running water, in what was described as “a primitive homemade shack reminiscent of a bunker in Vietnam.” He was 66 years old when Georgia executed him.

Missouri executed [Cecil Clayton](#), a 74-year-old mentally ill man suffering from hallucinations, delusions, and dementia. Clayton literally had a hole in his head from a sawmill accident and was missing 20% of his prefrontal cortex – the part of the brain involved in impulse control, problem solving, and social behavior. After the accident, Clayton began experiencing violent impulses, schizophrenia, and paranoia so severe that he checked himself into a mental hospital. He had IQ of 71, which would have qualified him for a diagnosis of intellectual disability had it occurred before he reached age 18. Multiple doctors had found Clayton incompetent to be executed.

Missouri and Texas executed numerous other prisoners who exhibited clear symptoms of serious mental illness. Among them was **Andre Cole**, a black man who was sentenced to death by an all-white St. Louis County jury, who suffered from what a doctor described as “prominent symptoms of psychosis.” **Richard Strong**, whom Missouri executed over the dissents of 4 U.S. Supreme Court Justices, was psychotic and suffered from numerous mental disorders including PTSD, major depression, and schizotypal personality disorder. Texas executed **Kent Sprouse** and **Manuel Garza** despite extensive evidence of psychosis, as well as **Daniel Lopez**, who had attempted suicide multiple times beginning at age 10, refused a plea offer for a life sentence, waived his appeals, and volunteered to be executed.

States also executed a number of death-row prisoners who had presented significant evidence that, because of their intellectual disability, they were ineligible for the death penalty. Indeed, in the case of [Warren Hill](#), even the state’s mental health experts unanimously agreed that he was intellectually disabled. Although a **Georgia** state trial judge agreed that Hill had proven his disability by a preponderance of the evidence – the standard of proof in almost every state – Georgia required proving intellectual disability “beyond a reasonable doubt.” After the state courts held that Hill had not met that uniquely high burden

of proof and the federal courts declined to intercede, the Georgia board of pardons denied clemency and Georgia executed an intellectually disabled man.

**Virginia** also executed a likely intellectually disabled man after proceedings that had denied him a fair adjudication of his disability. [Alfredo Prieto](#), a foreign national diagnosed with severe PTSD and organic brain injury, had an IQ between 66 and 73. Virginia denied Prieto's claim of intellectual disability, however, applying a strict and scientifically invalid IQ cutoff score that the U.S. Supreme Court later rejected in another case. Prieto was executed while his appeal of the state's execution process was still pending before the U.S. Supreme Court and despite a ruling by the Inter-American Commission on Human Rights that his execution without a proper determination of intellectual disability would violate international human rights law.

Several death-row prisoners who presented significant evidence of intellectual disability were executed in **Texas** in 2015. They included: **Charles Ladd**, whose IQ tested at 67 at age 13 and who had been described by a psychiatrist employed by the state as "[rather obviously retarded](#)"; **Juan Garcia**, who was 18 years old at the time of his offense and had an IQ score of 75; and **Derrick Dewayne Charles**, who had been hospitalized at least twice as a child as a result of mental illness and had been described as placing "in the intellectually deficient range of intelligence" with a "strong possibility" of organic brain damage. **Missouri** attempted to execute [Ernest Johnson](#), despite strong lifelong evidence of intellectual disability. On the day of his scheduled execution, however, the U.S. Supreme Court [granted him a stay](#) to permit him to pursue an appeal arguing that a tumor, lesions, and scarring in his brain create a substantial risk that he will suffer seizures and extreme pain if executed with the lethal injection drug pentobarbital.

The **Georgia** execution of **Kelly Gissendaner** and **Oklahoma's** aborted attempt to execute **Richard Glossip** highlighted issues of proportionality and fairness in the manner states apply the death penalty. In those cases, states sought to execute defendants who had not themselves committed the killing, while sparing the life of the actual killer in exchange for his self-interested cooperation with the prosecution.

These two cases also highlighted continuing serious problems in the manner in which states carry out executions. **Georgia** initially postponed **Gissendaner's** execution on March 2, just hours before it was scheduled to take place, when correctional officials became concerned that the lethal injection chemicals provided by its anonymous supplier appeared cloudy. **Oklahoma** stopped **Glossip's** execution moments before it was scheduled to take place after prison officials learned that the state's anonymous supplier of lethal injection drugs had substituted an unauthorized execution drug for the drug mandated by state law. It was later discovered that **Oklahoma** had illegally executed **Charles Warner** months before with the same unauthorized drug.

On December 8, a nurse assigned to the execution of **Brian Terrell** took an hour to place the IVs. Unable to find a vein in his right arm, she inserted the IV in Terrell's right hand as he winced several times. Terrell – who has consistently asserted his innocence – raised his head and mouthed "Didn't do it" just before the execution chemicals were administered.



## ACTIVITY IN THE STATES

On June 29, the Supreme Court decided [\*Glossip v. Gross\*](#), a challenge brought by **Oklahoma** death-row prisoners to that state's use of the chemical midazolam as part of its three-drug execution protocol. In a 5-4 vote, the Court permitted future executions under Oklahoma's protocol, deferring to the lower court's preliminary findings about the risks of midazolam and holding that the prisoners had not identified any "known and available alternative method" of execution that had a lower risk of pain.

Though the majority opinion was constitutionally narrow, it was accompanied by a [sweeping dissent](#) by Justices Stephen Breyer and Ruth Bader Ginsburg questioning the constitutionality of the death penalty and inviting briefing on whether the punishment, as administered, still comports with contemporary societal values. Among the issues Justice Breyer stressed was the growing abandonment of the death penalty in law and practice. He wrote that a majority of states had now either abolished the death penalty in law or had not executed anyone in at least 8 years.

On May 28, 2015, the **Nebraska** unicameral legislature overrode the veto of Governor Pete Ricketts and [repealed the state's death penalty law](#). Death penalty proponents successfully petitioned to suspend the repeal law pending the outcome of a voter referendum on the issue, which is scheduled for November 2016.

In **Delaware**, the state senate passed a bill to repeal Delaware's death penalty for future offenses. Calling the death penalty "[an instrument of imperfect justice](#)," **Gov. Jack Markell** said he will sign the bill if it passes the House, where it is currently tabled in committee. **Montana** legislation to repeal the death penalty fell one vote short in the state house, with a 50-50 tie vote.

On February 13, **Pennsylvania Gov. Tom Wolf** announced that he would reprieve all executions, [imposing a moratorium](#) until a study on the death penalty is completed and reforms enacted. One week later, **Oregon's** new **Governor, Kate Brown**, announced that she would [continue to enforce the moratorium](#) imposed by former Gov. John Kitzhaber in 2011.

Following the *Glossip* decision, the **Connecticut** Supreme Court ruled the [death penalty unconstitutional](#) under Connecticut's state constitution. In the 4-3 decision, the Court said that, because of the **prospective repeal** of the death penalty in 2012 and "the state's near total moratorium on carrying out executions over the past fifty-five years, capital punishment has become incompatible with contemporary standards of decency in Connecticut." As a result, the Court said, it "now violates the state constitutional prohibition against excessive and disproportionate punishments." The ruling applied to the prisoners who remained on the state's death-row after the repeal bill became law.

**Maryland Governor Martin O'Malley** [commuted the death sentences](#) of the four inmates who remained on that state's death row after the legislature had prospectively abolished capital punishment in 2013. They are now sentenced to life without parole.

**Missouri Governor Jay Nixon** [commuted the death sentence](#) of **Kimber Edwards** to life without parole on October 2. Edwards had consistently professed his innocence after giving what his lawyers said was a coerced confession. His case was tainted by persistent evidence of racial bias: Edwards was one of 7 black men on death row from St. Louis County, which studies suggested has disproportionately imposed the death penalty against black

defendants, and he had been sentenced to death by an all-white jury after prosecutors used their discretionary strikes to remove potential black jurors.

With American pharmaceutical companies [refusing to sell medicines](#) to states for use in executions and demanding that states return drugs improperly obtained for executions, and with European Union regulations banning export of pharmaceuticals for executions in the U.S., legislators in a number of states introduced [new bills](#) to change state execution practices. These bills ran the gamut from adopting new methods of execution or making secret the identity of execution drug suppliers to abolishing the death penalty altogether.

In March, **Utah** adopted a law to reinstate [the firing squad](#) as its method of execution if lethal injection was declared unconstitutional. **Oklahoma** followed in April with a law making [asphyxiation with nitrogen gas](#) the state's first alternative method of execution. **Arkansas** chose to change its form of lethal injection, legislatively adopting a new execution protocol that would allow corrections officials to **choose between a single drug and a three-drug execution**, while providing anonymity to drug suppliers. Although legal challenges to the constitutionality of this statute had been filed and were already scheduled to proceed to trial, **Governor Asa Hutchinson** issued death warrants scheduling 8 executions. The **Arkansas** Supreme Court [stopped the executions](#) to permit the challenge to proceed, and has [called for briefing](#) on the execution secrecy provisions.

Execution secrecy was a major issue in a number of death penalty states as executions went awry or states engaged in questionable practices in attempting to obtain execution drugs. **Texas** enacted legislation [making the identity of its execution drug suppliers a state secret](#) and **North Carolina** enacted a [law imposing secrecy regarding lethal drugs and allowing non-physicians to carry out executions](#).

Despite warnings from the **Food and Drug Administration** that it was illegal to do so, several states [attempted to import lethal injection drugs](#) from Harris Pharma, a company in India with a questionable history. The FDA seized execution drugs at airports in **Arizona** and **Texas**, and Federal Express refused to deliver a shipment of drugs that was headed for **Nebraska**, saying it lacked proper paperwork to be brought into the country.

The FDA also warned **Ohio** that it would be illegal for the state to import drugs the state intended to use in executions. Because of the unavailability of lethal injection drugs and problems with its state execution procedures, **Gov. John Kasich** [postponed all executions](#) in the state until at least 2017.

While prosecutors [defended the constitutionality](#) of **Georgia's** execution secrecy provisions, its legislators passed a law requiring the Board of Pardons and Paroles to [provide a public explanation of its reasons whenever it commuted a death sentence](#). Proponents of the bill, which was introduced shortly after a controversial commutation in 2014, argued it was needed to instill transparency in the clemency process. However, the law did not require the Board to provide its reasons for rejecting clemency applications, and the Board did not explain why it denied clemency in Georgia's 5 executions in 2015.

Secrecy provisions facilitated **Oklahoma's** execution of [Charles Warner](#), in violation of its state law. The state executed Warner on January 15 – and nearly executed Richard Glossip in September – with an unauthorized chemical that its anonymous supplier had substituted for the execution drug required by the state. **Gov. Mary Fallin** postponed the Glossip execution moments before it was scheduled to occur when she was informed that the

supplier had sent the state the wrong drug. After the errors were disclosed, Oklahoma's **Attorney General Scott Pruitt** asked a federal court to [stay all executions](#) in the state until an investigation into the matter could be completed, and with the consent of the parties, the federal district court indefinitely postponed the executions. **Department of Corrections Director Robert Patton** resigned and **State Penitentiary Warden Anita Trammell** retired, as a grand jury investigation got underway.

Several other courts imposed [judicial moratoria on executions](#). A **Montana** state court effectively [halted executions](#) in the state, ruling that the lethal injection drug the state intended to use in executions was not an "ultra fast-acting barbiturate," as required under Montana law. A challenge to **Mississippi's** lethal injection procedures has also put all executions in that state on hold.

In **California**, death penalty proponents and **Gov. Jerry Brown** reached a consent agreement in June that the state would propose a new execution protocol. In November, the state issued [a single-drug protocol](#) to permit corrections officials to choose between one of 4 potential execution drugs. Also in November, a federal appeals court in [Jones v. Davis](#) reversed a district court ruling that California's death penalty was unconstitutional. The reversal was on procedural grounds and the appeals court did not address the merits of the district court ruling.

In **Louisiana**, former Caddo Parish prosecutor **Marty Stroud** [apologized](#) for his role in the wrongful conviction of **Glenn Ford** and said that the state should provide compensation to Ford. The state denied the terminally ill Ford's application for compensation and he died on June 29. With the prosecutor's office in the spotlight for allegations of racially discriminatory jury selection practices and historic overuse of the death penalty, [Caddo Parish voters](#) elected a black District Attorney who was not associated with the current administration.

As of December 2015, 18 states plus the District of Columbia have abolished the death penalty. Eight other states (including Nebraska, where a legislative abolition is pending a referendum) have not executed anyone in at least 10 years and 4 more have not executed anyone in 9 years. By the standard presented by Justice Breyer in *Glossip*, 30 states have abolished the death penalty in law or practice.

## NOTABLE VOICES FROM 2015

A broad range of voices of expressed concerns in 2015 about the appropriateness of the death penalty and the manner in which it is administered in the United States. Among them:

---

*"Let us remember the Golden Rule .... Let us treat others with the same passion and compassion with which we want to be treated.... This conviction has led me, from the beginning of my ministry, to advocate at different levels for the global abolition of the death penalty. I am convinced that this way is the best, since every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes."*

—**Pope Francis, address to joint session of the United States Congress**

---

*“For us, the story of Marathon Monday 2013 should not be defined by the actions or beliefs of the defendant, but by the resiliency of the human spirit and the rallying cries of this great city. We can never replace what was taken from us, but we can continue to get up every morning and fight another day. ... We believe that now is the time to turn the page, end the anguish, and look toward a better future – for us, for Boston, and for the country.*

**—Bill and Denise Richard, urging federal prosecutors to take death off the table in the case of the United States vs. Dzhokhar Tsarnaev**

---

*“In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. ...*

*“For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment.”*

**—Justice Stephen Breyer, *Glossip v. Gross***

---

*“I have not traditionally been opposed to the death penalty in theory, but in practice it’s deeply troubling.”*

**—President Barack Obama**

---

*“I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. ... I apologize to Glenn Ford for all the misery I have caused him and his family.”*

**—Former prosecutor Marty Stroud, apologizing for his role in sending an innocent man, Glenn Ford, to 30 years on Louisiana’s death row.**

---

*“i am all for justice and accountability, but death penalty is wrong. in 20 yrs it will go the same as opposition to gay marriage. @ABC”*

**—Tweet by Matthew Dowd, commentator and former consultant to George W. Bush**

---

*“We ... don’t know for sure whether Richard Glossip is innocent or guilty. That is precisely the problem. If we keep executing defendants in cases like this, where the evidence of guilt is tenuous and untrustworthy, we will keep killing innocent people.”*

**-Sen. Tom Coburn, U.S. Senator for Oklahoma (2005-2015) and U.S. Representative for Oklahoma’s Second Congressional District from (1995-2001)**

**-Barry Switzer, Head Football Coach, The University of Oklahoma (1973-1988)**

**-John W. Raley, Jr., U.S. Attorney, Eastern District of Oklahoma (1990-1997)**

**-Barry Scheck, Co-Director of the Innocence Project**

**-Samuel Gross, Editor, National Registry of Exonerations**

---

## CONCLUSION

Death penalty use declined dramatically in the United States in 2015, falling significantly below the already historically low levels of 2014, and its use was concentrated in a very small number of states and counties. New death sentences reached their lowest levels in the modern era of the U.S. death penalty, dropping a third below 2014's historic low. The number of executions was the fewest in 24 years, and the six states carrying out executions were the fewest to do so in 27 years. The size of death row nationwide declined for the fifteenth straight year, and fell below 3,000 for the first time since 1995.

More than 85% of the executions were in just three states – Texas, Missouri, and Georgia. Adding Florida, four states accounted for 93% of executions this year and 89% of executions the past two years. Nearly two-thirds of all new death sentences came from the same 2% of counties that are collectively responsible for more than half of the nation's death row, and one county – Riverside, California – by itself accounted for 16% of all new death sentences in the country. The isolated practices of Florida and Alabama, which permit judges to impose death sentences when juries do not unanimously agree to death, produced 25% of all death sentences nationwide this year.

Executions were put on hold or remained on hold in many states, partly because of the difficulties in obtaining lethal injection drugs or in establishing acceptable protocols for lethal injections. The governor of Pennsylvania joined governors in Washington, Oregon, and Colorado in declaring moratoria on executions in their states, and a new governor in Oregon agreed to continue the moratorium in that state.

The traditional problems with the death penalty persisted in 2015. Six more people who had been on death row were exonerated of all charges, bringing to 156 the number of death-sentenced men and women exonerated since 1973. The executions that were conducted this year reflected continuing concerns that the legal process is systemically unable to protect from execution individuals with serious intellectual disabilities and crippling mental illness.

Experience continues to demonstrate that the problems in the administration of the death penalty in the United States are not easily fixed and are even more severe in the dwindling numbers of jurisdictions in which it is most aggressively pursued. Most years do not show the same dramatic declines in every measure that we have seen in 2015, but the overall pattern and long-term trend have been away from the death penalty. Even states that executed prisoners in 2015 show signs of diminished use of the death penalty: Texas imposed only two new death sentences; Georgia and Virginia, none. Two Justices of the Supreme Court this year issued an historic call for reassessment of the constitutionality of America's death penalty. And as a majority of U.S. states have abolished the death penalty or have not carried out executions in more than nine years, questions continue to mount as to whether the death penalty serves any compelling purpose.



**DEATH PENALTY INFORMATION CENTER ■ WASHINGTON, DC**

202-289-2275 (Main) ■ 202-289-4022 (Media)

dpic@deathpenaltyinfo.org ■ [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)

*The Death Penalty Information Center is a non-profit organization serving the media and the public with information and analysis on capital punishment. The Center provides in-depth reports, conducts briefings for journalists, promotes informed discussion, and serves as a resource to those working on this issue. Robert Dunham, DPIC's Executive Director, wrote this report with assistance from DPIC's staff. Further sources for facts and quotations are available upon request. The Center is funded through the generosity of individual donors and foundations, including the MacArthur Justice Center, the Open Society Foundations, Atlantic Philanthropies, and the Proteus Action League. The views expressed in this report are those of DPIC and do not necessarily reflect the opinions of its donors.*

**921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—**

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(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.

(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.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
  - (c) The defendant knowingly created a great risk of death to many persons.
  - (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
  - (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
  - (f) The capital felony was committed for pecuniary gain.
  - (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
  - (h) The capital felony was especially heinous, atrocious, or cruel.
  - (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
  - (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
  - (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
  - (l) The victim of the capital felony was a person less than 12 years of age.
  - (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
  - (n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.
  - (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.
  - (p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.
- (6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:
- (a) The defendant has no significant history of prior criminal activity.
  - (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
  - (c) The victim was a participant in the defendant's conduct or consented to the act.
  - (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
  - (e) The defendant acted under extreme duress or under the substantial domination of another person.
  - (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
  - (g) The age of the defendant at the time of the crime.
  - (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.



(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

**History.**—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368; s. 10, ch. 88-381; s. 3, ch. 90-112; s. 1, ch. 91-270; s. 1, ch. 92-81; s. 1, ch. 95-159; s. 5, ch. 96-290; s. 1, ch. 96-302; s. 7, ch. 2005-28; s. 2, ch. 2005-64; s. 27, ch. 2008-238; s. 25, ch. 2010-117; s. 1, ch. 2010-120.

**Note.**—Former s. 919.23.

**921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—**

(1) **FINDINGS.**—The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life.

(2) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony under s. 893.135, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(3) **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 (6);
- (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.

(4) **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 (6), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082, and that person shall be ineligible for parole.

(5) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review and disposition rendered by the Supreme Court of Florida within 2 years after

the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(6) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under a sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least 1 year of imprisonment.

(c) The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.

(d) The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.

(e) The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.

(f) The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.

(g) The defendant:

1. Intentionally killed the victim;

2. Intentionally inflicted serious bodily injury which resulted in the death of the victim; or

3. Intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.

(h) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(i) The defendant committed the offense after planning and premeditation.

(j) The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

(7) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.

(d) The defendant was under extreme duress or under the substantial domination of another person.

(e) The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.

(f) The age of the defendant at the time of the offense.


(g) The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(8) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's

death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

**History.**—s. 2, ch. 90-112; s. 2, ch. 92-81; s. 6, ch. 96-290; s. 1837, ch. 97-102; s. 10, ch. 99-188; s. 26, ch. 2000-320; s. 1, ch. 2002-212; s. 19, ch. 2005-128.

 KeyCite Red Flag - Severe Negative Treatment  
Abrogated by Hurst v. Florida, U.S.Fla., January 12, 2016

921 So.2d 538  
Supreme Court of Florida.  
STATE of Florida, Petitioner,  
v.  
Alfredie **STEELE**, Respondent.

No. SC04-802.

Oct. 12, 2005.

As Revised on Denial of Rehearing Feb. 2, 2006.

### Synopsis

**Background:** In first-degree murder prosecution, defendant filed motion to preclude imposition of death penalty. The Circuit Court, Pasco County, Lynn Tepper, J., denied motion, but required state to provide advance notice of aggravating factors and mandated submission of special verdict form to jury. State petitioned for writ of certiorari. The District Court of Appeal, 872 So.2d 364, denied petition in part, granted it in part, quashed trial court order in part and remanded, and certified questions.

**Holdings:** On review of certified questions, the Supreme Court, Cantero, J. held that:

[1] trial court did not violate clearly established principle of law in requiring state to provide advance notice of aggravating factors on which it intended to rely, and

[2] order requiring majority of jurors to agree on existence of particular statutory aggravating factor constituted departure from essential requirements of law.

Certified questions answered; decision quashed; remanded with directions.

Wells, J., specially concurred with opinion in which Cantero and Bell, JJ., joined.

Pariente, C.J., concurred in part and dissented in part with opinion in which Anstead, J., joined.

West Headnotes (11)

[1] **Criminal Law** 🔑 Extent of Review as Determined by Mode Thereof

Standard of review applicable to pretrial petitions for writ of certiorari, namely, whether challenged order constituted departure from essential requirements of law, applied to District Court of Appeal's review of state's petition for writ of certiorari, filed in course of first-degree murder prosecution, seeking review of trial court's order requiring it to provide advance notice of aggravating factors and mandating submission of special verdict form to jury.

Cases that cite this headnote

<sup>[2]</sup> **Sentencing and Punishment** 🔑 Notice of sentencing factors

Trial court does not violate a clearly established principle of law in requiring the state to provide advance notice of aggravating factors on which it intends to rely in a capital murder prosecution. West's F.S.A. § 921.141(5)(a–n).

2 Cases that cite this headnote

<sup>[3]</sup> **Sentencing and Punishment** 🔑 Notice of sentencing factors

Whether to require the state to provide notice of aggravating factors upon which it intends to rely in a capital murder prosecution is within the trial court's discretion. West's F.S.A. § 921.141(5)(a–n).

1 Cases that cite this headnote

<sup>[4]</sup> **Sentencing and Punishment** 🔑 Notice of sentencing factors

Imposition of requirement that state provide notice of aggravating factors upon which it intends to rely in a capital murder prosecution did not constitute miscarriage of justice, where state was already required, under discovery rules, to disclose names of witnesses, statements, test results, and other information about its case; requirement that state provide list of aggravators to be established during penalty phase was not substantial or substantive additional burden. West's F.S.A. § 921.141(5)(a–n); West's F.S.A. RCrP Rule 3.220(b)(1).

1 Cases that cite this headnote

<sup>[5]</sup> **Sentencing and Punishment** 🔑 Notice of sentencing factors

Requirement that state provide notice of aggravating factors upon which it intends to rely in a capital murder prosecution was not inequitable, despite fact that defendant in such a prosecution would not be required to notify state of mitigating factors, where state's obligation to prove one or more statutory aggravators beyond reasonable doubt was different in kind from defendant's decision whether to present mitigation; capital defendants were not required to prove any mitigating factor to obtain life sentence, and were not limited to proof of statutory mitigating factors. West's F.S.A. § 921.141(5)(a–n).

6 Cases that cite this headnote

- <sup>16]</sup> **Sentencing and Punishment** 🔑 Aggravating circumstances in general  
**Sentencing and Punishment** 🔑 Degree of proof

To obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating factor, whereas to obtain a life sentence the defendant need not prove any mitigating factors at all. West's F.S.A. § 921.141(5)(a–n).

3 Cases that cite this headnote

- <sup>17]</sup> **Sentencing and Punishment** 🔑 Failure to give notice or make disclosure

In a capital murder prosecution, the trial court cannot prohibit the state from relying at sentencing on an aggravating factor that was either not disclosed to the defendant or disclosed beyond the deadline; any violation of the disclosure requirement at most justifies a continuance to allow the defendant to rebut or impeach the state's evidence. West's F.S.A. § 921.141(5)(a–n).

Cases that cite this headnote

- <sup>18]</sup> **Sentencing and Punishment** 🔑 **Unanimity**

Jury may recommend a sentence of death so long as a majority concludes that at least one aggravating factor exists; however, nothing in the applicable statute, the standard jury instructions, or the standard verdict form requires a majority of the jury to agree on which aggravating factors exist. West's F.S.A. § 921.141(2, 3).

11 Cases that cite this headnote

- <sup>19]</sup> **Sentencing and Punishment** 🔑 Verdict or Recommendation of Jury

Trial court's order requiring special verdict form in penalty phase of capital murder prosecution, requiring majority of jurors to agree that particular statutory aggravating factor applied in order to recommend sentence of death, constituted departure from essential requirements of law, where such order imposed substantive burden on state not found in applicable statute and not constitutionally required, and had potential to unduly influence trial court's own independent sentencing determination. West's F.S.A. § 921.141(2, 3), (5)(a–n).

12 Cases that cite this headnote

- <sup>110]</sup> **Sentencing and Punishment** 🔑 Effect of recommendation

Capital sentencing court must independently determine the existence of aggravating and mitigating factors, and the

weight to be given each. West's F.S.A. § 921.141(3).

3 Cases that cite this headnote

||| **Sentencing and Punishment** 🔑 Verdict or Recommendation of Jury

Constitutionally-required finding that at least one aggravating factor exists is implicit in a jury's recommendation of a sentence of death, under state's capital sentencing scheme. U.S.C.A. Const.Amend. 6; West's F.S.A. § 921.141.

6 Cases that cite this headnote

### Attorneys and Law Firms

\*539 Charles J. Crist, Jr., Attorney General, Tallahassee, FL, and Candance M. Sabella, \*540 Assistant Attorney General, Chief of Capital Appeals, Tampa, FL, for Petitioner.

Robert Dillinger, Public Defender and Joy Goodyear, Assistant Public Defender, Sixth Judicial Circuit, Dade City, FL, for Respondent.

### Opinion

CANTERO, J.

In this case, we consider two issues resulting from the United States Supreme Court's decision concerning capital sentencing in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002): whether a trial court may require the state to notify the defendant of the aggravating factors on which it intends to rely, and whether a trial court may require the jury to specify each aggravating factor it finds, and the vote as to each.

In *Ring*, the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609, 122 S.Ct. 2428 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The effect of that decision on Florida's capital sentencing scheme remains unclear. In Florida, to recommend a sentence of death for the crime of first-degree murder, a majority of the jury must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance listed in the capital sentencing statute. *See* § 921.141(2)(a), Fla. Stat. (2004). It must also find that any aggravating circumstances outweigh any mitigating circumstances, also listed in the statute, that may exist. *See* § 921.141(2)(b), Fla. Stat. (2004). Since *Ring*, this Court has not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. *See, e.g., Windom v. State*, 886 So.2d 915, 936–38 (Fla.2004) (Cantero, J., specially concurring) (explaining the post-*Ring* jurisprudence of the Court and the lack of consensus about whether *Ring* applies in Florida). *Cf. Johnson v. State*, 904 So.2d 400 (Fla.2005) (holding that *Ring* does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. This case is an example. The Second District Court of Appeal certified to us two questions of great public importance:

- (1) Does a trial court depart from the essential requirements of law, in a death penalty case, by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors?
- (2) Does a trial court depart from the essential requirements of law, in a death penalty case, by using a penalty phase



special verdict form that details the jurors' determination concerning aggravating factors found by the jury?

*State v. Steele*, 872 So.2d 364, 365 (Fla. 2d DCA 2004). We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we answer “no” to the first question and “yes” to the second. We hold that under current law, a trial judge presiding over a case in which the death penalty is possible does not depart from the essential requirements of law by requiring the State to provide pretrial notice of the aggravators it intends to prove in the penalty phase. We also hold, however, that a judge *does* depart from the essential requirements of law by requiring a majority of jurors to agree that a particular aggravator applies. Such a requirement imposes a substantive burden on the state not contained in the statute and not required by *Ring*.

## I. FACTS AND PROCEDURAL HISTORY

The defendant, Alfredie **Steele**, was indicted for first-degree murder with a firearm, \*541 a crime for which the potential sentence is death. He filed a motion to have Florida's capital sentencing scheme declared unconstitutional under *Ring*. In a hearing on the motion, the trial court and respective counsel discussed *Ring*'s potential effect on Florida's capital sentencing statute. Defense counsel acknowledged that in considering challenges based on *Ring*, this Court had not reversed any death sentences or held Florida's capital sentencing scheme constitutionally infirm.

The trial judge denied the motion to preclude imposition of the death penalty, but did impose several requirements to address concerns with Florida's scheme that our post-*Ring* decisions had left unresolved. The court required the State to provide advance notice of the aggravating factors on which it intended to rely if the case reached a penalty phase. The court also stated that she would submit to the jury a penalty-phase interrogatory verdict form that would require jurors to specify each aggravator found and the vote for that aggravator. The court's subsequent order ruled that the jury would be required to find each aggravator by majority vote.

The State filed a petition for a writ of certiorari with the Second District Court of Appeal, challenging the requirements of pretrial notice and a penalty-phase special verdict. The district court granted the petition in part and denied it in part. The court quashed that portion of the order requiring advance notice of the aggravating factors, relying on this Court's precedent holding that the list of aggravators provided in section 921.141(5), Florida Statutes (2004), is sufficient, and that *Ring* does not require specific pretrial notice. See *Steele*, 872 So.2d at 365. However, the court denied the petition as to the trial court's requirement of specific findings of aggravators on the verdict form. It concluded that “Florida law does not specifically prohibit a trial judge from using a special verdict form such as the one ordered here.” *Id.* Anticipating that its ruling “could affect many cases that may ultimately be reviewed by” this Court, the court certified the foregoing questions of great public importance. *Id.* Its mandate was stayed pending our review.

## II. ANALYSIS

<sup>[1]</sup> This case comes to us on review of the district court's ruling on a petition for a writ of certiorari challenging a pretrial order in the circuit court. In certifying the two questions of great public importance, the district court appropriately applied the standard of review applicable to pretrial petitions for writ of certiorari—that is, whether the order constitutes a departure from the essential requirements of law. We have stated that

the phrase “departure from the essential requirements of law” should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari.

\*542 *Combs v. State*, 436 So.2d 93, 95–96 (Fla.1983); *see also Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla.2003) (noting that “the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error”); *State v. Pettis*, 520 So.2d 250, 254 (Fla.1988) (concluding that although a pretrial ruling was in error, “we cannot say that the ruling was a departure from the essential requirements of law”).

We now consider whether the trial court departed from the essential requirements of law in (A) requiring the State to provide pretrial notice of the aggravators on which it would rely; and (B) requiring a special jury verdict form in which, before the jury could recommend a sentence of death, a majority would have to agree that a specific aggravator applied. Finally, in section (C), we compare the current scheme in Florida to those in the other states that impose the death penalty, and suggest revisions to our statute that would render Florida’s scheme consistent with that of every other death penalty state.

### A. Pretrial Notice of Aggravating Factors

The first certified question asks, Does a trial court depart from the essential requirements of law, in a death penalty case, by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors? The State argues that requiring advance notice of alleged aggravating factors conflicts with our prior holdings that advance notice of aggravators is not required. The State also argues that advance notice is unnecessary in light of the information provided through reciprocal discovery.

The State is correct that we have consistently held that the lack of notice of specific aggravating circumstances does not render a death sentence invalid. *See Sireci v. State*, 399 So.2d 964, 970 (Fla.1981), *overruled on other grounds as recognized in Rutherford v. State*, 545 So.2d 853, 856 (Fla.1989). In *Hitchcock v. State*, 413 So.2d 741, 746 (Fla.1982), we concluded that because “[t]he statutory language limits aggravating factors to those listed, ... there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove.” We reaffirmed this principle both before *Ring*, *see Cox v. State*, 819 So.2d 705, 725 (Fla.2002); *Vining v. State*, 637 So.2d 921, 927 (Fla.1994), and after, *see Kormondy v. State*, 845 So.2d 41, 54 (Fla.), *cert. denied*, 540 U.S. 950, 124 S.Ct. 392, 157 L.Ed.2d 283 (2003); *Lynch v. State*, 841 So.2d 362, 378 (Fla.), *cert. denied*, 540 U.S. 867, 124 S.Ct. 189, 157 L.Ed.2d 123 (2003). In *Kormondy*, in fact, we noted that “*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.” 845 So.2d at 54. In concluding that requiring the State to provide advance notice of aggravators constitutes a departure from the essential requirements of law, the district court relied on our statement in *Vining* that there “is no reason to require” the notice, and on our reiteration in *Kormondy*, after *Ring*, that notice was not required. *Steele*, 872 So.2d at 365. But that is not the precise question here.

The question we address in this case is really the other side of the coin from the one we addressed in *Kormondy*, *Vining*, and other cases. In those cases, the defendants alleged that, to comply with constitutional requirements, judges *must* require the State to provide notice of the aggravating factors on which it intends to rely. We rejected that argument. Here, on the other hand, we consider whether a judge *may* require such notice without \*543 violating a clearly established principle of law.

<sup>[2]</sup> <sup>[3]</sup> Although it is clear that no statute, rule of procedure, or decision of this Court or the United States Supreme Court compels a trial court to require advance notice of aggravating factors, it is equally clear that none prohibits it, either. Moreover, the justification for it is stronger now than when we decided *Hitchcock* and *Sireci*. At the time we decided those cases, the capital sentencing statute contained only six aggravators. Since then, the Legislature has added eight more. *See* § 921.141(5)(i), Fla. Stat. (2004) (murder was cold, calculated, and premeditated); § 921.141(5)(j) (victim was law enforcement officer engaged in performance of duties); § 921.141(5)(k) (victim was elected or appointed public official engaged in performance of duties); § 921.141(5)(l) (victim was less than twelve years of age); § 921.141(5)(m) (victim was especially vulnerable because of advanced age or because defendant stood in position of familial or custodial authority); § 921.141(5)(n) (perpetrator was criminal street gang member). Other aggravators have been given broader scope. For example, the aggravating factor in section 921.141(5)(a) now applies to defendants who commit murder while on probation or community control, not merely while under a sentence of imprisonment. *See* ch. 96–290, § 5, Laws of Fla. (adding

community controllees); ch. 91–270, § 1, Laws of Fla. (adding probationers). Also, aggravated child abuse and elder abuse have been made crimes qualifying a capital defendant for the “prior violent felony” aggravator in section 921.141(5)(d). *See* ch. 96–302, § 1, Laws of Fla. (adding elder abuse); ch. 95–159, § 1, Laws of Fla. (adding aggravated child abuse). Thus, the notice provided by the list of aggravators in the statute is broader, and therefore less specific, than when we addressed the issue in *Hitchcock* and *Sireci*. Because of the expansion in available aggravating circumstances, as well as the absence of any express prohibition on requiring advance notice of aggravators, we conclude that a trial court does not violate a clearly established principle of law in requiring the State to provide such notice. Whether to require the State to provide notice of alleged aggravators is within the trial court’s discretion.

<sup>141</sup> Nor does the requirement of advance notice constitute a miscarriage of justice. Under Florida’s broad discovery rule, the State already must disclose the names of witnesses, statements, test results, and other information about its case. *See* Fla. R.Crim. P. 3.220(b)(1). A list of the aggravators the State plans to establish during the penalty phase does not impose a substantial-or substantive-additional burden.

<sup>151</sup> <sup>161</sup> The State argues that a notice requirement is inequitable because the defense is not required to notify the State of mitigating circumstances. We note substantive differences, however, between proving aggravating circumstances and proving mitigators. To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance, whereas to obtain a life sentence the defendant need not prove any mitigating circumstances at all. *Cf. Henyard v. State*, 689 So.2d 239, 249–50 (Fla.1996) (holding that a jury is not compelled to recommend death where aggravating factors outweigh mitigating factors). Moreover, the defendant may invoke “[t]he existence of any other factors in the defendant’s background that would mitigate against the imposition of the death penalty.” § 921.141(6)(h), Fla. Stat. (2004); *see also Ford v. State*, 802 So.2d 1121, 1138 (Fla.2001) (“We adopted the [U.S. Supreme Court’s] definition of a mitigating circumstance: ‘any aspect of a defendant’s \*544 character or record and any of the circumstances of the offense’ that reasonably may serve as a basis for imposing a sentence less than death”) (Pariente, J., concurring in result only) (quoting *Campbell v. State*, 571 So.2d 415, 419 n. 4 (Fla.1990), *receded from in part by Trease v. State*, 768 So.2d 1050 (Fla.2000)). The State, on the other hand, is limited to the specific aggravating factors listed in section 921.141(5). *See Miller v. State*, 373 So.2d 882, 885 (Fla.1979) (noting that “[t]he aggravating circumstances specified in the [Florida] statute are exclusive, and no others may be used for that purpose”) (citing *Purdy v. State*, 343 So.2d 4, 7 (Fla.1977)). Therefore, even if it could be required, pretrial notice of specific nonstatutory mitigation could prove unwieldy. Nevertheless, because in this case the State did not request pretrial notice of the mitigating factors on which the defendant would rely (instead arguing that the State should not be required to provide notice), we need not decide here whether a trial judge’s refusal to require reciprocal discovery would violate the essential requirements of the law.

<sup>171</sup> For these reasons, our answer to the first certified question is “no.” A trial judge does not depart from the essential requirements of the law by requiring the State to provide notice of the aggravators on which it intends to rely. We add, however, that under current law the trial court cannot prohibit the State from relying on an aggravator that was either undisclosed or disclosed beyond the deadline. As counsel for the respondent acknowledged at oral argument, any violation will at most justify a continuance to allow the defendant to rebut or impeach the State’s evidence.

### B. Special Verdict on Aggravating Factors

The second certified question asks, Does a trial court depart from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors’ determination concerning aggravating factors found by the jury? Again, because of the narrow standard of review, we must determine whether the order violates a clearly established principle of law resulting in a miscarriage of justice.

We begin to answer this question by reviewing the applicable law. Section 921.141 does not require jury findings on aggravating circumstances, and we have held that *Ring* does not require special verdicts on aggravators. *See Kormondy*, 845 So.2d at 54. Nevertheless, the trial court ruled that jurors would receive a special verdict form on which they would specify the aggravators they found to exist and the vote on each aggravator. The court established this procedure to protect against reversal of a death sentence based on *Ring*, to obtain the jury’s guidance in fulfilling the court’s independent statutory duty to consider and weigh the proposed aggravators, and to facilitate appellate review.

The preliminary special interrogatory verdict form the trial court prepared requires the jury to record its vote on each aggravating circumstance submitted. In its order, the court required that, as to each aggravating circumstance alleged, the jury determine by majority vote whether a particular aggravator existed. The court noted that it would develop jury instructions later. The district court, in declining to quash the order, observed that “Florida law does not specifically prohibit a trial judge from using a special verdict form such as the one ordered here.” *Steele*, 872 So.2d at 365.

The State argues that the special verdict conflicts with Florida’s capital sentencing \*545 statute and the standard jury instructions, which only require that, to recommend a sentence of death, a majority of the jury conclude that at least one aggravating circumstance exists—not necessarily the same one. Thus, the State contends, the trial court’s special verdict imposes an extra statutory requirement for imposition of the death penalty. The State also argues that because we have held that a special verdict is not required and have not ruled any aspect of Florida’s capital sentencing statute unconstitutional under *Ring*, the trial court’s action constituted a departure from the essential requirements of law. We think the State’s argument well taken.

Section 921.141, Florida Statutes (2004), establishes the obligations of the judge and jury concerning aggravating circumstances during a capital penalty phase:

(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.

(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.

§ 921.141(2)-(3), Fla. Stat. (2004). Consistent with these provisions, the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so, to weigh any aggravators against any mitigating circumstances. *See* Fla. Std. Jury Instr. (Crim.) 7.11, at 132–33. The instructions also provide that the jury’s advisory sentence need not be **unanimous**, that a majority vote is necessary for a death recommendation, and that a vote of six or more jurors is necessary for a life recommendation. *See id.* at 133.

<sup>181</sup> <sup>191</sup> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on *which* aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the “avoiding a lawful arrest” aggravator applies, *see* § 921.141(5)(e), while three others believe that only the “committed for pecuniary gain” aggravator applies, *see* § 921.141(5)(f), because seven jurors believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury’s majority (or **unanimous**) conclusion that a particular aggravator applies, or \*546 until the Legislature amends the statute (see our discussion at section C below), the court’s order imposes a substantive burden on the state not found in the statute and not constitutionally required.

<sup>101</sup> Even if they did not impose an additional substantive burden, specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could unduly influence the trial court’s own determination of how to

sentence the defendant. Under section 921.141(3), Florida Statutes, the trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. See *Blackwelder v. State*, 851 So.2d 650, 653 (Fla.2003) (reminding judges of their duty to independently weigh aggravating and mitigating circumstances and noting that a “sentencing order should reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors and the weight each should receive”); *Bouie v. State*, 559 So.2d 1113, 1116 (Fla.1990) (holding that a trial court order must reflect the independent determination of the existence and weight of aggravating and mitigating circumstances). Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice. Even assuming such a requirement was properly the province of the trial court, jury instructions about specific findings would have to be accompanied by clear directions about their effect, if any, on the trial court’s own findings in determining the sentence. Such directions are more appropriately crafted in a rules proceeding than in an individual capital case.

<sup>[11]</sup> The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*. The Court in *Ring* concluded that under Arizona’s capital sentencing scheme, aggravating factors operate as the “functional equivalent of an element of a greater offense.” 536 U.S. at 609, 122 S.Ct. 2428 (quoting *Apprendi*, 530 U.S. at 494 n. 19, 120 S.Ct. 2348). Therefore, the Court held, the Sixth Amendment required that they be found by the jury. *Id.* Even if *Ring* did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of “an element of a greater offense.” *Id.* That finding would be that at least one aggravator exists—not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury’s recommendation of a sentence of death. Our interpretation of *Ring* is consistent with the United States Supreme Court’s assessment of Florida’s capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250–51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, “a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved.” In requiring the jury to consider by majority vote each particular aggravator submitted rather than merely specifying whether one or more aggravators exist, the trial court in this case imposed a greater burden than the one the Supreme Court imposed in reviewing Arizona’s judge-only capital sentencing scheme in *Ring*. *But cf.* \*547 *State v. Timmons*, 209 Ariz. 403, 103 P.3d 315, 318 (Ct.App.2005) (observing that in *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003), the Arizona Supreme Court construed the United States Supreme Court decision in *Ring* as requiring a jury finding on each aggravating factor supporting a death sentence).<sup>1</sup>

Allowing a trial court to require jury findings on individual aggravators also creates a potential inconsistency in capital sentencing proceedings. The State would face different burdens for obtaining a sentence of death in different courts, or even in the same court before different judges. Innovation regarding the jury’s penalty-phase determinations cannot be accomplished with such an ad hoc approach. One critical concern reflected in the United States Supreme Court’s capital sentencing jurisprudence is consistency. See, e.g., *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (stating that the principle that the death penalty cannot be arbitrarily or capriciously imposed requires a State to “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death’”) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion)); see also *Barclay*, 463 U.S. at 960, 103 S.Ct. 3418 (Stevens, J., concurring in the judgment) (“A constant theme of our cases ... has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner.”). In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court upheld the Florida capital sentencing scheme still in use today, rejecting a claim that our appellate review process is “ineffective or arbitrary.” *Id.* at 258, 96 S.Ct. 2960. Were we to permit the special penalty-phase verdict ordered in this case, the disparity in procedures from case to case could result in a determination that the State is administering section 921.141 arbitrarily, contrary to the Eighth Amendment’s ban on cruel and unusual punishments.

We cannot predict all the consequences of approving the trial court’s order, but we are unwilling to approve ad hoc innovations to a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional. See, e.g., *Hildwin*, 490 U.S. at 640–41, 109 S.Ct. 2055; *Spaziano v. Florida*, 468 U.S. 447, 467, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Barclay*, 463 U.S. at 958, 103 S.Ct. 3418; *Proffitt*, 428 U.S. at 259, 96 S.Ct. 2960; *Kormondy*,

845 So.2d at 54; *State v. Dixon*, 283 So.2d 1, 11 (Fla.1973). Moreover, any special verdict on aggravators would have to be accompanied by clear instructions on how these changes affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death. To maintain consistency in our capital sentencing procedures, any changes should be made systematically.<sup>2</sup> Therefore, unless and until a material change occurs in section 921.141, the decisional law, the applicable rules of procedure, or the standard instructions and verdict \*548 form, a trial court departs from the essential requirements of law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances.

We therefore answer "yes" to the second certified question. We hold that a trial court departs from the essential requirements of law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury.

### C. The Need for Legislative Action

Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some **unanimity** in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, *at least*, a **unanimous** jury finding of aggravators. Of these, 24 states require by statute *both* that the jury **unanimously** agree on the existence of aggravators *and* that it **unanimously** recommend the death penalty.<sup>3</sup> Three states require by statute **unanimity** only as to the jury's finding of aggravators.<sup>4</sup> Seven more states have judicially imposed a requirement *at least* that the aggravators be determined **unanimously**.<sup>5</sup> \*549 Of these seven states, five (all except Alabama and Kentucky) require that *both* the aggravators *and* the recommendation of death be **unanimous**. Alabama and Kentucky require only that the aggravators be determined **unanimously**. Although Missouri law is less clear, it appears that a jury at least must **unanimously** find the aggravators. *See Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir.1999); *State v. Thompson*, 134 S.W.3d 32, 32–33 (Mo.2004); Mo. R.Crim. P. 29.01(a).

That leaves Utah and Virginia. In those states, the jury need not find each aggravator **unanimously**, but the jury must **unanimously** recommend the death penalty. *See* Utah Code Ann. § 76–3–207(5)(b) (2003); *State v. Carter*, 888 P.2d 629, 655 (Utah 1995) (concluding there is no requirement that the jury find separately and **unanimously** each aggravator relied on in imposing the death penalty); Va.Code Ann. § 19.2–264.4D (2004); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 791–92 (1979) (concluding it is not necessary for jurors to specify that they found an aggravator or aggravators **unanimously**). Finally, the federal government, when imposing the death penalty, also requires a **unanimous** jury. *See* 18 U.S.C. § 3593(d) (2000).

Many courts and scholars have recognized the value of **unanimous** verdicts. For example, the Connecticut Supreme Court has stated:

[W]e perceive a special need for jury **unanimity** in capital sentencing. Under ordinary circumstances, the requirement of **unanimity** induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury **unanimity** is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a **unanimous** verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

*State v. Daniels*, 207 Conn. 374, 542 A.2d 306, 315 (1988) (citations omitted); *see also Andres v. United States*, 333 U.S. 740, 749, 68 S.Ct. 880, 92 L.Ed. 1055 (1948) (upholding lower court's interpretation of a federal statute to require jury **unanimity** as to both guilt and punishment and reasoning that such a requirement "is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system"); Elizabeth F. Loftus & Edith

Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 Colum. L.Rev. 1425, 1428 (1984) (reviewing Reid Hastie et al., *Inside the Jury* (1983)) (review of an empirical study indicating that “behavior in juries asked to reach a **unanimous** verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict”).

\*550 The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

### III. CONCLUSION

To reiterate our holdings in this case, we conclude that a trial court does not depart from the essential requirements of law in requiring the State to specify the aggravating circumstances it intends to prove in the penalty phase of a capital case, but does depart from the essential requirements of law in using a penalty-phase special verdict form detailing jurors’ determinations on aggravating circumstances. The certified questions ask whether each determination constitutes a departure from the essential requirements of law. We answer the first certified question in the negative and the second in the affirmative. The Second District reached opposite conclusions, granting the State’s petition for certiorari as to the advance notice of aggravators but denying certiorari relief regarding the special verdict. We therefore quash the Second District decision and remand with directions to deny certiorari on the portion of the trial court order requiring notice of aggravators but grant certiorari and quash the portion of the order requiring the special verdict form.

It is so ordered.

WELLS, LEWIS, QUINCE, and BELL, JJ., concur.

WELLS, J., specially concurs with an opinion, in which CANTERO and BELL, JJ., concur.

PARIENTE, C.J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.

WELLS, J., specially concurring.

I write specially to state my view that there is a need for legislative reassessment and revision of Florida’s capital punishment statute in light of developments in Florida’s sentencing laws and federal constitutional law.

The development in Florida’s sentencing law to which I refer is the 1994 revision to section 775.082(1), Florida Statutes, which now provides that the alternative sentence to the death sentence of section 921.141 is life imprisonment without eligibility of parole. Prior to this revision, the alternative sentence was life imprisonment with eligibility for parole after twenty-five years. Additionally, section 944.275, Florida Statutes (2004), (gain time) was amended to mandate no gain time for life imprisonment sentences. Life has been mandated to mean life. Our statistics reflect that we are having fewer defendants sentenced to death. I conclude that confidence in this sentencing revision has caused state attorneys and juries to have more confidence in life sentences, and this is partially the reason for the reduction in death sentences.

Also in 1994, Congress adopted the Federal Death Penalty Act, 18 U.S.C. §§ 3591–97 (2000). In section 3593, Congress established capital penalty phase procedures. Congress had the advantage of drawing upon the experience of the states which had adopted death penalty statutes in the 1970s. These procedures had been vetted through very substantial litigation in the state and federal courts with many decisions by the United States Supreme Court. The federal act was sustained against several constitutional attacks \*551 in *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

Two important procedures under the federal act are relevant to the present discussion. The federal act requires notice to the defendant setting forth aggravating factors that the government proposes to prove as justification for a sentence of death. The federal act also requires that a decision for a death sentence be made by a **unanimous** jury. 18 U.S.C. §§ 3593–94 (2000).

In 1999 through 2000, there were further developments in sentencing laws in respect to construction of federal constitutional rights to jury determinations stemming from the Sixth Amendment to the United States Constitution. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Jones*. These cases were followed by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which made the *Apprendi* analysis applicable to Arizona’s capital sentencing statute. It is *Ring* that was the cause of the trial judge’s concern in this case.

In 2004, the Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and very recently, in 2005, the Supreme Court has decided *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). These cases have additional analysis of the Sixth Amendment right to a jury determination in criminal sentencing.

In *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002) (Wells, J., concurring), and *Bottoson v. Moore*, 824 So.2d 115, 122 (Fla.2002) (Wells, J., dissenting), I have stated my opinion that this Court is bound by the present Florida capital sentencing statute, which was upheld against various constitutional attacks in the United States Supreme Court prior to *Ring*. The Supreme Court has not receded from any of those cases. That continues to be my opinion. However, I do believe these Supreme Court decisions have brought about a need for the Legislature to undertake an assessment and revision of Florida’s statute.

In *Ring*, the United States Supreme Court noted that of the thirty-eight states that have the death penalty, there were twenty-nine states in which the sentencing jury generally had the sentencing responsibility; there were five states in which the judge had the sole sentencing responsibility; and there were four “hybrid” states, including Florida, in which the jury rendered an advisory sentence but the judge ultimately decided on the sentence. *Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. 2428. Approximately three years later, no states have “judge-only” capital sentencing. In thirty-three states, as well as the federal system, the jury is now generally responsible for imposing a death sentence.<sup>6</sup> Five states, including Florida, have hybrid capital sentencing systems.<sup>7</sup> In the other hybrid \*552 sentencing states, there has been legislative revision since the *Ring* decision.<sup>8</sup> Where a special jury finding has not previously been required, it was added in response to *Ring*.<sup>9</sup> I believe the excellent research set out in Justice Cantero’s majority opinion, with which I agree, further demonstrates the real need to address this issue, as Justice Cantero writes.

I believe that the federal statute’s procedures could serve as a model for the Florida revision since those procedures do not appear to have *Apprendi–Ring* problems. By the Florida Legislature enacting this revision, Florida’s statute would clearly be in compliance with the United States Constitution and be consistent with the changes in sentencing which the Legislature has enacted since Florida’s death penalty was reestablished in the 1970s.

CANTERO and BELL, JJ., concur.

PARIENTE, C.J., concurring in part and dissenting in part.

I concur in Parts II.A. and II.C. of the majority opinion but dissent as to Part II.B. Initially, and independent of the certified \*553 questions, I concur wholeheartedly in the majority’s call for legislative reevaluation of Florida’s capital sentencing scheme to determine whether jurors should be required to **unanimously** decide whether death should be imposed as well as make **unanimous** findings on the existence of aggravating factors. I also agree with Justice Wells that the Legislature should look to the federal death penalty as a model in requiring both advance notice of aggravating factors and **unanimity** in the jury’s decision for death.

Turning to the certified questions, I agree that the advance notice of aggravating factors required by the trial court does not



constitute a departure from the essential requirements of law. However, I would also conclude that requiring the jury to specify its findings and vote on each aggravating factor submitted during the penalty phase is permissible, and certainly not a departure from the essential requirements of law resulting in a miscarriage of justice. While findings on individual aggravators are not mandated under our rules of procedure or substantive law, neither do the rules and statutes prohibit the use of a special verdict. Rather than cause a miscarriage of justice, a special verdict on aggravating circumstances promotes justice by enhancing juror fact-finding, conveying useful information to the sentencing court, and facilitating appellate review. It is also in accord with the report of the Criminal Court Steering Committee to our Court.<sup>10</sup>

In our first decision addressing the effect of *Ring* on Florida's capital sentencing scheme, I suggested that we "immediately" require trial judges to "utilize special verdicts that require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator." *Bottoson v. Moore*, 833 So.2d 693, 723 (Fla.2002) (Pariente, J., concurring in result only). I explained the benefits of obtaining this type of information from a penalty-phase jury:

By requiring a special verdict on aggravating circumstances, this Court will not only assist trial judges in administering section 921.141, but also enhance the quality of our own constitutionally mandated review of death sentences in a manner that anticipates the likely effect of *Ring* and its progeny. First, the special verdict would serve to facilitate our determination of harmless error during appellate review. Second, the additional procedure would assist in the jury override situation because this Court would know whether the jury's life recommendation was based on a finding of no aggravators or on a determination that the mitigators outweighed the aggravators. Finally, a special verdict form would help to ensure that this Court does not run afoul of the Eighth Amendment by affirming a death sentence based on an invalid aggravator—i.e. in this context, an aggravator not properly found by the jury. See *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (holding that an Eighth Amendment violation occurred when, under Florida's sentencing scheme, a trial judge weighed an invalid aggravating factor).

By acting prospectively, we can act to ensure that future verdicts comply with our state constitutional requirements ... as well as the Sixth Amendment dictates of *Ring*. These additional findings through special verdicts will also facilitate our appellate review and enhance \*554 the integrity of the death penalty verdicts.

*Id.* at 724–25 (footnotes omitted).

In *Huggins v. State*, 889 So.2d 743 (Fla.2004), *cert. denied*, 545 U.S. 1107, 125 S.Ct. 2546, 162 L.Ed.2d 280 (2005), we reviewed a case in which the trial court, in a penalty phase conducted shortly after *Ring*, submitted a special verdict form requiring the jurors to determine the existence of each aggravating circumstance submitted and record the vote on each. See *id.* at 776–77 (Pariente, C.J., dissenting). The jurors found that each aggravator submitted to them was established beyond a reasonable doubt. The jury's vote on the existence of the aggravators was **unanimous**, which in my view satisfies the requirements of *Ring*. See *id.* at 777; see also *Butler v. State*, 842 So.2d 817, 835–40 (Fla.2003) (Pariente, J., concurring in part and dissenting in part) (dissenting from affirmance of death sentence in part because eleven-to-one death recommendation without findings on aggravators did not reflect **unanimous** finding of death-qualifying aggravating circumstance). Similarly, in *Floyd v. State*, 913 So.2d 564 (Fla. 2005), and *Simmons v. State*, No. SC04–19 (Fla. oral argument held Apr. 5, 2005), now under review in this Court, the trial court submitted a special verdict form listing the proposed aggravating factors, each of which the jury found to exist by a **unanimous** vote. The transcript in *Simmons* demonstrates that directions on completing the special verdict can be easily incorporated into the final penalty-phase jury instructions.<sup>11</sup> Both the special verdict and the accompanying jury instructions provide further support for my belief that jury findings on aggravators serve to enhance the fact-finding process, assist the trial court, and facilitate appellate review.

The special verdict ordered by the trial court in this case is in accord both with my suggestions in *Bottoson* and with the special verdict used by the trial courts in *Huggins* and *Simmons*. The trial court's reasons for using the special verdict were the same as those I pointed to in *Bottoson*: to comply with *Ring*, to provide guidance to the trial court in imposing sentence, and to facilitate appellate review. The greater clarity that jury findings on aggravating \*555 circumstances will bring can only benefit both the trial court in fulfilling its statutory duties and this Court in reviewing sentences of death.

The majority expresses concern that the special verdict may confuse the jury as to its role. I am confident that the trial court in this case would instruct the jury that its findings on aggravators are distinct from its advisory sentence. To alleviate any concern that a juror may recommend death even if he or she has not found an aggravator to exist, the court could instruct the jury that a juror may recommend death only after finding the existence of one or more aggravating circumstances. In the vast

majority of cases, as in *Huggins*, *Floyd*, and *Simmons*, jurors will agree on the existence of one or more aggravators, satisfying *Ring*.<sup>12</sup>

The majority also expresses concern that jury findings in one case but not in another may lead the United States Supreme Court to conclude that our death penalty is being arbitrarily and capriciously applied. I agree that it would be better if this Court mandates the use of special verdicts in all death penalty cases so that the usage will be uniform. But I disagree that allowing special verdicts until we have promulgated a rule could result in an unconstitutional application of the death penalty. So long as juries are correctly instructed as to their role in making a death recommendation, there can be no constitutional defect in obtaining additional information from the jury regarding its findings on aggravating circumstances. In fact, findings on aggravators should lead to affirmance of death sentences where the absence of findings would necessitate reversal. In *Bottoson*, I pointed to an example in which we could not tell whether, in recommending life imprisonment, the jury concluded that no aggravating circumstances existed, and another in which it was impossible to determine whether the jury relied on an aggravator improperly found by the trial court in imposing death. See 833 So.2d at 724 nn. 64–65 (Pariente, J., concurring in result only). Both questions would be answered by the special verdict ordered in this case. Thus, the lack of findings on aggravators can only inure to defendants' benefit in the event of a death override or an aggravator struck on appeal. The fact that findings are made in some cases but not others, thereby going beyond what is constitutionally required and providing a stronger foundation for a harmless error determination, does not render the capital sentencing scheme arbitrary or capricious.

I acknowledge that requiring the jury to make a finding and record the vote on each individual aggravator goes beyond *Ring*'s requirement that the jury find at least one aggravator that renders the defendant eligible for death. Also, although jury findings on aggravators are not expressly required by our statute, these findings are not statutorily prohibited. The special verdict enhances juror fact-finding, informs trial court sentencing, and facilitates appellate review. For these reasons, and because special verdicts are not specifically prohibited under section 921.141 or our rules of procedure, the trial court's requirement of a special verdict in this case does not, in my view, constitute a \*556 departure from the essential requirements of law resulting in a miscarriage of justice.

ANSTEAD, J., concurs.

## All Citations

921 So.2d 538, 31 Fla. L. Weekly S74

## Footnotes

- <sup>1</sup> We note that after *Ring*, Arizona amended its capital sentencing statute to require jury findings on individual aggravators. See Ariz.Rev.Stat. § 13–703.01(E) (Supp.2003), as amended by 2002 Ariz. Sess. Laws 5th Spec. Sess., ch. 1, § 3.
- <sup>2</sup> We note that, at the request of the Court, the Committee on Standard Jury Instructions in Criminal Cases and the Criminal Court Steering Committee have filed reports recommending amendments to the standard penalty-phase instructions and verdict form. We will give these recommendations careful consideration.
- <sup>3</sup> The following states require a **unanimous** finding on aggravators, as well as a **unanimous** recommendation of death, pursuant to their respective sentencing statutes: **Arizona** (Ariz.Rev.Stat. § 13–703.01(E), (H) (Supp.2003)); **Arkansas** (Ark.Code Ann. § 5–4–603(a) (Michie 1997)); **California** (Cal.Penal Code § 190.4(a)-(b) (West 1999)); **Colorado** (Colo.Rev.Stat. § 18–1.3–1201(2)(a) (2004)); **Georgia** (Ga.Code Ann. § 17–10–31.1(c) (2004)); **Idaho** (Idaho Code § 19–2515(3)(b) (Michie Supp.2003)); **Illinois** (720 Ill. Comp. Stat. Ann., § 5/9–1(g) (West Supp.2005)); **Kansas** (Kan.Stat. Ann. § 21–4624(e) (Supp.2004)); **Louisiana** (La.Code Crim. Proc. Ann. art. 905.7 (West 1997)); *State v. Sonnier*, 402 So.2d 650, 657 (La.1981)); **Maryland** (Md.Code Ann., Crim. Law, § 2–303(i) (Supp.2004)); *Baker v. State*, 367 Md. 648, 790 A.2d 629, 636 (2002)); *Metheny v. State*, 359 Md. 576, 755 A.2d 1088, 1097 (2000)); **Mississippi** (Miss.Code Ann. § 99–19–103 (1999)); **New Hampshire** (N.H.Rev.Stat. Ann. § 630:5(IV) (1996)); **New Mexico** (N.M. Stat. Ann. § 31–20A–3 (Michie 2000)); **New York** (N.Y.Crim. Proc. Law § 400.27(7)(b), (10) (Supp.2003)); **Oklahoma** (Okla. Stat. tit. 21, § 701.11 (2002)); **Ohio** (Ohio Rev.Code Ann. § 2929.03(B), (D) (Supp.2005); (Ohio R.Crim. P. 31)); **Oregon** (Or.Rev.Stat. § 163.150(1)(b)-(e) (2003)); **Pennsylvania** (42

Pa. Cons.Stat. § 9711(c)(1)(iv) (Supp.2005)); **South Carolina** (S.C.Code Ann. § 16–3–20(C) (Supp.2001)); **South Dakota** (S.D. Codified Laws §§ 23A–26–1, 23A–27A–4) (1998)); **Tennessee** (Tenn.Code Ann. § 39–13–204(g) (2003)); **Texas** (Tex.Code Crim. Proc. Ann. art. 37.071(2) (Supp.2004)); **Washington** (2005 Wash. Laws ch. 68, § 4; Wash. Rev.Code §§ 10.95.060, 10.95.080 (2002)); and **Wyoming** (Wyo.Stat. Ann. § 6–2–102(d)(ii) (2005)).

<sup>4</sup> These are **Montana** (Mont.Code Ann. § 46–1–401(1)(b), (3); 46–18–301 (2003)); **Nebraska** (Neb.Rev.Stat. § 29–2520(4)(f) (2003)); **Delaware** (Del.Code Ann. tit. 11, § 4209(d)(1) (Supp.2004)).

<sup>5</sup> Of these seven states, two judicially require both a **unanimous** jury finding of aggravators and a **unanimous** recommendation of death. These are **Connecticut** (*State v. Reynolds*, 264 Conn.1, 836 A.2d 224, 313 (2003) (quoting *State v. Ross*, 230 Conn. 183, 646 A.2d 1318, 1352 (1994))) and **Nevada** (*Geary v. State*, 114 Nev.100, 952 P.2d 431, 433 (1998)). Five judicially require only a **unanimous** jury finding of aggravators. These are **Alabama** (*McNabb v. State*, 887 So.2d 998 (Ala.2004); *McGriff v. State*, 908 So.2d 1024, 1037 (Ala.2004)); **Indiana** (*State v. Barker*, 809 N.E.2d 312, 316 (Ind.2004)); **Kentucky** (*Soto v. Commonwealth*, 139 S.W.3d 827, 871 (Ky.2004), *cert. denied*, 544 U.S. 931, 125 S.Ct. 1670, 161 L.Ed.2d 495 (2005)); **New Jersey** (*State v. Nelson*, 173 N.J.417, 803 A.2d 1, 15–16 (2002)); *State v. Bey*, 112 N.J. 123, 548 A.2d 887, 905 (1988)); **North Carolina** (*State v. McKoy*, 327 N.C.31, 394 S.E.2d 426, 428 (1990)). However, in two of these states, a **unanimous** recommendation of death is required by statute. See N.J. Stat. Ann. § 2C:11–3 (West Supp.2003); N.C. Gen.Stat. § 15A–2000 (2001).

<sup>6</sup> Since *Ring*, three states in addition to Arizona have revised their capital sentencing laws to become jury sentencing states: Colorado (Colo.Rev.Stat. § 18–1.3–1201 (2004)); Idaho (Idaho Code § 19–2515 (Supp.2003)); and Indiana (Ind.Code Ann. § 35–50–2–9 (2004)). Colorado and Idaho were formerly judge sentencing states; Indiana was formerly a hybrid capital sentencing state. See *Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. 2428. In the federal system, the jury determines whether to sentence a defendant to death. See 18 U.S.C. § 3594 (2000) (“Upon a recommendation ... that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly.”).

<sup>7</sup> See Ala.Code §§ 13A–5–45, 13A–5–46, 13A–5–47 (1994); Del.Code Ann., tit. 11, § 4209 (Supp.2004); § 921.141, Fla. Stat. (2004); Mont.Code Ann. §§ 46–18–301, 46–1–401 (2003); Neb.Rev.Stat. §§ 29–2520, 29–2521 (2003).

Alabama’s statute provides: “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.” Ala.Code § 13A–5–46(e)(1) (2004). However, the Alabama Supreme Court has recently stated: “*Ring* requires that this subsection be applied in these terms: If the jury determines that no aggravating circumstance as defined in § 13A–5–49 exists, the jury must return a verdict, binding on the trial court, assessing the penalty of life imprisonment without parole.” *McGriff v. State*, 908 So.2d 1024, 1038 (Ala.2004). In the remaining three hybrid states, not including Florida, the respective statutes clearly provide that an aggravating circumstance must be found by the jury before the death penalty can be imposed. See Del.Code Ann., tit. 11, § 4209(c)(3)(b)(1) (Supp.2004) (“The jury shall report to the Court its finding on the question of the existence of statutory aggravating circumstances.”); Mont.Code Ann. § 46–1–401(1)–(3) (2003) (prohibiting death sentence unless jury makes finding beyond reasonable doubt on verdict form that aggravating circumstances exist); Neb.Rev.Stat. § 29–2520(4)(f) (2003) (“The jury at the aggravation hearing shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance.”).

<sup>8</sup> Nebraska changed from a judge-only sentencing state shortly after *Ring*. 2002 Neb. Laws 3d *Special Sess.*, *LB1*; see also Marc R. Shapiro, *Re-Evaluating the Role of the Jury in Capital Cases After Ring v. Arizona*, 59 N.Y.U. Ann. Sur. Am. L. 633, 651 (2004). Montana changed its capital sentencing scheme in 2001, prior to the *Ring* decision. 2001 Mont. Laws 524; see also Shapiro, *supra*, at 647.

<sup>9</sup> Arizona reacted to *Ring* by amending its laws shortly after the decision, which now require complete jury participation in making findings regarding aggravators and determining the sentence. 2002 Ariz. Sess. Laws 5th S.S., Ch. 1. In 2002, Delaware slightly changed the jury’s role from an advisory one to a requirement that the jury determine the existence of at least one aggravating circumstance. 73 Del. Laws, ch. 423 (2002); see also Shapiro, *supra*, at 651. In 2002, Indiana moved from a hybrid structure to give complete jury control in imposing the death penalty. 2002 Indiana Acts, P.L. 117–2002, sec. 2. In 2002, Nebraska amended its statute to provide a requirement that the jury find at least one aggravating circumstance at the penalty phase, shifting away from its former requirement of a three-judge sentencing panel system. 2002 Neb. Laws 3d *Special Sess.*, *LB 1*; see also Shapiro, *supra*, at 651. Colorado amended its law in 2002, and Idaho in 2003, to provide for jury instead of judge imposition of the death penalty. 2002 Colo. Sess. Laws, 3d Ex.Sess. ch. 1; 2003 Idaho Session Laws, ch. 19. In 2003, Nevada eliminated a panel of judges in favor of a jury for the purpose of making the sentencing decision in cases where the defendant pled guilty. 2003 Nev. Stat. ch. 366. In Alabama, although the legislature did not act immediately, the Alabama Supreme Court interpreted the statute so that it would comply with *Ring*, requiring that the jury find at least one aggravating circumstance before the court could impose the death penalty. *McGriff*.

<sup>10</sup> See Report of the Criminal Court Steering Committee (Oct. 5, 2005) (on file with the Supreme Court of Florida).

- <sup>11</sup> The trial court's instructions to the jury in *Simmons* were as follows:  
We have a verdict form for your consideration, and I want to go over that with you. I think the lawyers, one of the lawyers, or both, mentioned the way we have it set up in two sections. The first section relates to aggravating factors. The instruction is "Check all appropriate," in other words, any of these that you find exist, check those boxes: No. 1, A majority of the jury, by a vote of blank to blank, find the following aggravating circumstance has been established beyond a reasonable doubt: The defendant has been previously convicted of a felony involving the threat of violence to some person; No. 2, a majority of the jury, by a vote of blank to blank, find the following aggravating circumstance has been established beyond a reasonable doubt: The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, or an attempt to commit sexual battery, or kidnapping, or both; No. 3, a majority of the jury, by a vote of blank to blank, find the following aggravating circumstance has been established beyond a reasonable doubt: The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.  
A separate section, advisory sentence, we the jury, find as follows as to this case, as to the defendant in this case: (check only one of these boxes), No. 1, a majority of the jury, by a vote of blank to blank, advise and recommend to the court that it impose the death sentence upon Eric Simmons; No. 2, the jury advises and recommends to the court that it impose a sentence of life imprisonment upon Eric Simmons without possibility of parole.  
*Simmons*, No. SC04-19, Record at 4656-58.
- <sup>12</sup> For reasons I have previously explained, I would instruct jurors that in order to recommend a sentence of death, they must **unanimously** conclude that at least one aggravating circumstance exists. *See Davis v. State*, 859 So.2d 465, 485-86 (Fla.2003) (Pariente, J., dissenting); *Butler*, 842 So.2d at 835-40 (Pariente, J., concurring in part and dissenting in part); *Bottoson*, 833 So.2d at 723 n. 63 (Pariente, J., concurring in result only).

## 7.11 PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

*Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. Give bracketed language if the case has been remanded for a new penalty proceeding. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). In addition, give the jury other appropriate general instructions.*

1. a. **Ladies and gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree. [An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial to decide what sentence should be imposed.] Consequently, you will not concern yourselves with the question of [his] [her] guilt.**

*Give 1b at beginning of penalty proceedings before the jury that found the defendant guilty.*

- b. **Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree.**

*For murders committed prior to May 25, 1994, the penalties were different; therefore, for crimes committed before that date, the following instruction should be modified to comply with the statute in effect at the time the crime was committed. If the jury inquires whether the defendant will receive credit for time served against a sentence of life without possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently. See Green v. State, 907 So. 2d 489, 496 (Fla. 2005).*

2. **The punishment for this crime is either death or life imprisonment without the possibility of parole. The decision as to which punishment shall be imposed rests with the judge of this court; however, the law requires that you, the jury, provide an advisory sentence as to which punishment should be imposed upon the defendant.**

*Give in all cases before taking evidence in penalty proceedings.*

**The State and the defendant may now present evidence relative to the nature of the crime and the character, background or life of the defendant. You are instructed that**

*Give only to the jury that found the defendant guilty.*

**this evidence when considered with the evidence you have already heard**

*Give only to a new penalty phase jury.*

**this evidence**

**is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.**

*Give after the taking of evidence and argument.*

**It is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of First Degree Murder. You must follow the law that will now be given to you and provide an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist. The**

definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to provide me with an advisory sentence as to which punishment should be imposed—life imprisonment without the possibility of parole or the death penalty.

*Give only in cases where mitigation was presented to the jury by the defendant and not where mitigation was waived.*

Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

*Give only to the jury that found the defendant guilty.*

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings.

*Give only to a new penalty phase jury.*

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that has been presented to you in these proceedings.

*Weighing the evidence.*

It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

*Credibility of witnesses.*

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Did the witness' testimony agree with the other testimony and other evidence in the case?
6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?
7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?
8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

9. Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?

10. Does the witness have a general reputation for [dishonesty] [truthfulness]?

*Law enforcement witness.*

The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.

*Expert witnesses.*

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

*Accomplices and Informants.*

You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [or] [her] testimony with more caution than the testimony of other witnesses.

*Child witness.*

You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

*Give only if the defendant did not testify.*

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

*Give only if the defendant testified.*

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

*Witness talked to lawyer.*

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.

*Give in all cases.*

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

*Rules for deliberation.*

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.
2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence] and these instructions.
3. Your recommendation must not be based upon the fact that you feel sorry for anyone, or are angry at anyone.
4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.
5. The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the court, and must not hold that against either party.
6. Your recommendation should not be influenced by feelings of prejudice, or by racial or ethnic bias, or by sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.
7. During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case. Until you have reached an advisory sentence, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].
8. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

*Aggravating circumstances. § 921.141(5), Fla. Stat.*

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an



abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in providing an advisory sentence to the court.

*Give only to the jury that found the defendant guilty.*

**It is to the evidence introduced during the guilt phase of this trial and in this proceeding, and to it alone, that you are to look for that proof.**

*Give only to a new penalty phase jury.*

**It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.**

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

**The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence:**

*Give only those aggravating circumstances for which evidence has been presented.*

- 1. The capital felony was committed by a person previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**
- 2. The defendant was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to the person].**

*Because the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court shall instruct the jury of the following, as applicable:*

*Give 2a or 2b as applicable.*

- a. The crime of (previous crime) is a capital felony.**
- b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.**
- 3. The defendant knowingly created a great risk of death to many persons.**
- 4. The capital felony was committed while the defendant was**

**[engaged]  
[an accomplice]**

**in**

**[the commission of]  
[an attempt to commit]  
[flight after committing or attempting to commit]**

any

*Check § 921.141(5)(d), Fla. Stat., for any change in list of offenses.*

[robbery].

[sexual battery].

[aggravated child abuse].

[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].

[arson].

[burglary].

[kidnapping].

[aircraft piracy].

[unlawful throwing, placing or discharging of a destructive device or bomb].

5. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
6. The capital felony was committed for financial gain.
7. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
8. The capital felony was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

9. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. The victim of the capital felony was a law enforcement officer engaged in the performance of [his] [her] official duties.
11. The victim of the capital felony was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the capital felony was related, in whole or in part, to the victim’s official capacity.
12. The victim of the capital felony was a person less than 12 years of age.
13. The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

*With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.*

14. The capital felony was committed by a criminal street gang member.
15. The capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.
16. The capital felony was committed by a person subject to  
[a domestic violence injunction issued by a Florida judge],  
[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],  
[a protection order issued from [another state] [the District of Columbia] [an Indian  
tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the capital felony was [the person] [a [spouse] [child] [sibling]  
[parent]of the person] who obtained the [injunction] [protective order].

*Merging aggravating factors.*

*Give the following paragraph if applicable. When it is given, you must also give the jury an example specifying each potentially duplicitous aggravating circumstance. See Castro v. State, 597 So. 2d 259 (Fla. 1992).*

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

*Mitigating circumstances. § 921.141(6), Fla. Stat.*

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

**Among the mitigating circumstances you may consider are:**

*Give only those mitigating circumstances for which evidence has been presented.*

1. **The defendant has no significant history of prior criminal activity.**

*If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:*

**Conviction of (previous crime) is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. **The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.**
3. **The victim was a participant in the defendant's conduct or consented to the act.**
4. **The defendant was an accomplice in the capital felony committed by another person and [his] [her] participation was relatively minor.**
5. **The defendant acted under extreme duress or under the substantial domination of another person.**
6. **The capacity of the defendant to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**
7. **The age of the defendant at the time of the crime.**
8. **The existence of any other factors in the defendant's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

*Victim impact evidence. Give 1, or 2, or 3, or all as applicable.*

You have heard evidence about the impact of this homicide on the

1. family,
2. friends,
3. community

of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

*Recommended sentence.*

The sentence that you recommend must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the jury can recommend a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory sentence.

If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be:

A majority of the jury by a vote of \_\_\_\_\_, to \_\_\_\_\_ advise and recommend to the court that it impose the death penalty upon (defendant).

**On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:**

**The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole.**

**When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court. There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the makeup of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation.**

**You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.**

#### **Comment**

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So. 2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], 1998 [723 So. 2d 123], 2009 [22 So. 3d 17], and 2014.

KeyCite Yellow Flag - Negative Treatment

Not Followed on State Law Grounds Flowers v. State, Miss., November 13, 2014

122 S.Ct. 2428  
Supreme Court of the United States

Timothy Stuart RING, Petitioner,

v.

ARIZONA.

No. 01-488.

Argued April 22, 2002.

Decided June 24, 2002.

Defendant was convicted before the Superior Court, Maricopa County, No. CR95-01754(A), Gregory H. Martin, J., of first-degree murder, conspiracy to commit armed robbery, armed robbery, and he appealed. The Arizona Supreme Court, 200 Ariz. 267, 25 P.3d 1139, affirmed. Defendant petitioned for writ of certiorari which was granted. The Supreme Court, Justice Ginsburg, held that Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511.

Reversed and remanded.

Justice Scalia filed concurring opinion in which Justice Thomas joined.

Justice Kennedy filed concurring opinion.

Justice Breyer filed opinion concurring in the judgment.

Justice O'Connor filed dissenting opinion in which Chief Justice Rehnquist joined.

West Headnotes (3)

[1] **Jury** ⇨ Death penalty

Capital defendants, no less than non-capital defendants, are entitled under the Sixth Amendment to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. U.S.C.A. Const.Amend. 6.

1483 Cases that cite this headnote

[2] **Jury** ⇨ Statutory provisions

**Sentencing and Punishment** ⇨ Procedure

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. U.S.C.A. Const.Amend. 6; A.R.S. § 13-703, subds. C, G.

2139 Cases that cite this headnote

[3] **Jury** ⇌ Death penalty

Sixth Amendment right to a jury trial precludes procedure whereby a sentencing judge, sitting without a jury, finds an aggravating circumstance necessary for imposition of the death penalty. U.S.C.A. Const.Amend. 6.

1551 Cases that cite this headnote

**West Codenotes**

**Held Unconstitutional**

A.R.S. § 13-703(C)

**Validity Called into Doubt**

Colo.Rev.Stat. § 16-11-103; Idaho Code § 19-2515; Mont.Code Ann. § 46-18-301; Neb.Rev.Stat. § 29-2520; Ala.Code §§ 13A-5-46, 13A-5-47; Del.Code Ann., Tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ind.Code Ann. § 35-50-2-9.

**\*\*2429 \*584 Syllabus \***

At petitioner Ring's Arizona trial for murder and related offenses, the jury deadlocked on premeditated murder, but found Ring guilty of felony murder occurring in the course of armed robbery. Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made by a judge conducting a separate sentencing hearing. The judge at that stage must determine the existence or nonexistence of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances." The death sentence may be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Following such a hearing, Ring's trial judge sentenced him to death. Because the jury had convicted Ring of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was, *inter alia*, the victim's actual killer. See *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140. Citing accomplice testimony at the sentencing hearing, the judge found that Ring was the killer. The judge then found two aggravating factors, one of them, that the offense was committed for pecuniary gain, as well as one mitigating factor, Ring's minimal criminal record, and ruled that the latter did not call for leniency.

On appeal, Ring argued that Arizona's capital sentencing scheme violates the Sixth Amendment's jury trial guarantee by entrusting to a judge the finding of a fact raising the defendant's maximum penalty. See *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311; *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. The State responded that this Court had upheld Arizona's system in *Walton v. Arizona*, 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511, and had stated in *Apprendi* that *Walton* remained good law. The Arizona Supreme Court observed that *Apprendi* and *Jones* cast doubt on *Walton's* continued viability and found that the *Apprendi* majority's interpretation of Arizona law, 530 U.S., at 496-497, 120 S.Ct. 2348, was wanting. Justice O'CONNOR's *Apprendi* dissent, *id.*, at 538, 120 S.Ct. 2348, the Arizona court noted, correctly described how capital sentencing works in that State: A defendant cannot receive a death sentence unless the judge makes the factual determination that a statutory aggravating factor exists. Nevertheless, recognizing that it was bound by the Supremacy Clause to apply *Walton*, a decision this Court had not overruled, the Arizona court rejected Ring's constitutional \*585 attack.



**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

It then upheld **\*\*2430** the trial court's finding on the pecuniary gain aggravating factor, reweighed that factor against Ring's lack of a serious criminal record, and affirmed the death sentence.

*Held:* *Walton* and *Apprendi* are irreconcilable; this Court's Sixth Amendment jurisprudence cannot be home to both. Accordingly, *Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647–649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense,” *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury. Pp. 2437–2443.

(a) In upholding Arizona's capital sentencing scheme against a charge that it violated the Sixth Amendment, the *Walton* Court ruled that aggravating factors were not “elements of the offense”; they were “sentencing considerations” guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047. *Walton* drew support from *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704, in which the Court held there was no constitutional bar to an appellate court's finding that a defendant killed, attempted to kill, or intended to kill, as *Enmund, supra*, required for imposition of the death penalty in felony-murder cases. If the Constitution does not require that the *Enmund* finding be proved as an element of the capital murder offense or that a jury make that finding, *Walton* stated, it could not be concluded that a State must denominate aggravating circumstances “elements” of the offense or commit to a jury only, and not to a judge, determination of the existence of such circumstances. 497 U.S., at 649, 110 S.Ct. 3047. Subsequently, the Court suggested in *Jones* that any fact (other than prior conviction) that increases the maximum penalty for a crime must be submitted to a jury, 526 U.S., at 243, n. 6, 119 S.Ct. 1215, and distinguished *Walton* as having characterized the finding of aggravating facts in the context of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the sentencing range's ceiling, 526 U.S., at 251, 119 S.Ct. 1215. Pp. 2437–2439.

(b) In *Apprendi*, the sentencing judge's finding that racial animus motivated the petitioner's weapons offense triggered application of a state “hate crime enhancement” that doubled the maximum authorized sentence. This Court held that the sentence enhancement violated *Apprendi*'s right to a jury determination whether he was guilty of every element of the crime with which he was charged, beyond a reasonable doubt. 530 U.S., at 477, 120 S.Ct. 2348. That right attached not only to *Apprendi*'s weapons offense but also to the “hate crime” aggravating circumstance. *Id.*, at 476, 120 S.Ct. 2348. The dispositive question, the Court said, is one not of form, but of effect. *Id.*, at 494, 120 S.Ct. 2348. If a State makes an increase in a defendant's **\*586** authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. See *id.*, at 482–483, 120 S.Ct. 2348. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Id.*, at 483, 120 S.Ct. 2348. *Walton* could be reconciled with *Apprendi*, the Court asserted: The key distinction was that an Arizona first-degree murder conviction carried a maximum sentence of death; once a jury has found the defendant guilty of all the elements of an offense which carries death as its maximum penalty, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. 530 U.S., at 497, 120 S.Ct. 2348. In dissent in *Apprendi*, Justice O'CONNOR described as “demonstrably untrue” the majority's assertion that the jury makes all the findings necessary to expose **\*\*2431** the defendant to a death sentence. Such a defendant, she emphasized, cannot receive a death sentence unless a judge makes the critical factual determination that a statutory aggravating factor exists. *Id.*, at 538, 120 S.Ct. 2348. *Walton*, Justice O'CONNOR's dissent insisted, if followed, would have required the Court to uphold *Apprendi*'s sentence. 530 U.S., at 537, 120 S.Ct. 2348. Pp. 2439–2440.

(c) Given the Arizona Supreme Court's finding that the *Apprendi* dissent's portrayal of Arizona's capital sentencing law was precisely right, and recognizing that the Arizona court's construction of the State's own law is authoritative, see *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508, this Court is persuaded that *Walton*, in relevant part, cannot survive *Apprendi*'s reasoning. In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's ruling that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one of effect, not form. 530 U.S., at 494, 120 S.Ct. 2348. In effect, the required finding of an aggravated circumstance exposed Ring

to a greater punishment than that authorized by the guilty verdict. *Ibid.* The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *id.*, at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See *ibid.* Arizona's argument based on the *Walton* distinction between an offense's elements and sentencing factors is rendered untenable by *Apprendi's* \*587 repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question "who decides," judge or jury. See, e.g., 530 U.S., at 492, 120 S.Ct. 2348. Arizona further urges that aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination because death is different: States have constructed elaborate sentencing procedures in death cases because of constraints this Court has said the Eighth Amendment places on capital sentencing, see, e.g., *id.*, at 522–523, 120 S.Ct. 2348 (THOMAS, J., concurring). Apart from the Eighth Amendment provenance of aggravating factors, however, Arizona presents no specific reason for excepting capital defendants from the constitutional protections extended to defendants generally, and none is readily apparent. *Id.*, at 539, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). In various settings, the Court has interpreted the Constitution to require the addition of an element or elements to the definition of a crime in order to narrow its scope. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561–562, 115 S.Ct. 1624, 131 L.Ed.2d 626. If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. The Sixth Amendment jury trial right does not turn on the relative rationality, fairness, or efficiency of potential factfinders. *Apprendi*, 530 U.S., at 498, 120 S.Ct. 2348 (SCALIA, J., concurring). In any event, the superiority of judicial factfinding in capital cases is far from evident, given that the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances \*\*2432 in capital cases by entrusting those determinations to the jury. Although *stare decisis* is of fundamental importance to the rule of law, this Court has overruled prior decisions where, as here, the necessity and propriety of doing so has been established. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132. Pp. 2440–2443.

200 Ariz. 267, 25 P.3d 1139, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 2443. KENNEDY, J., filed a concurring opinion, *post*, p. 2445. BREYER, J., filed an opinion concurring in the judgment. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post*, p. 2448.

#### Attorneys and Law Firms

\*588 Andrew D. Hurwitz, Phoenix, AZ, for petitioner.

Janet Napolitano, Phoenix, AZ, for respondent.

#### Opinion

Justice GINSBURG delivered the opinion of the Court.

This case concerns the Sixth Amendment right to a jury trial in capital prosecutions. In Arizona, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.

[1] In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "element[s] of the offense of capital murder." *Id.*, at 649, 110 S.Ct. 3047. Ten years later, however, we

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that the Sixth Amendment does not permit a defendant to be “expose[d] ... to a penalty \*589 exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Id.*, at 483, 120 S.Ct. 2348. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as “sentencing factor[s].” *Id.*, at 492, 120 S.Ct. 2348.

*Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

I

[2] At the trial of petitioner Timothy Ring for murder, armed robbery, and related charges, the prosecutor presented evidence sufficient to permit the jury to find the facts here recounted. On November 28, 1994, a Wells Fargo armored van pulled up to the Dillard's department store at Arrowhead Mall in Glendale, Arizona. Tr. 57, 60–61 (Nov. 14, 1996). Courier Dave Moss left the van to pick up money inside the store. *Id.*, at 61, 73–74. When he returned, the van, and its driver, John Magoch, were gone. *Id.*, at 61–62.

Later that day, Maricopa County Sheriff's Deputies found the van—its doors \*\*2433 locked and its engine running—in the parking lot of a church in Sun City, Arizona. *Id.*, at 99–100 (Nov. 13, 1996). Inside the vehicle they found Magoch, dead from a single gunshot to the head. *Id.*, at 101. According to Wells Fargo records, more than \$562,000 in cash and \$271,000 in checks were missing from the van. *Id.*, at 10 (Nov. 18, 1996).

Prompted by an informant's tip, Glendale police sought to determine whether Ring and his friend James Greenham were involved in the robbery. The police investigation revealed that the two had made several expensive cash purchases in December 1994 and early 1995. *E.g.*, *id.*, at 153–156 (Nov. 14, 1996); *id.*, at 90–94 (Nov. 21, 1996). Wiretaps \*590 were then placed on the telephones of Ring, Greenham, and a third suspect, William Ferguson. *Id.*, at 19–21 (Nov. 18, 1996).

In one recorded phone conversation, Ring told Ferguson that Ring might “cu[t] off” Greenham because “[h]e's too much of a risk”: Greenham had indiscreetly flaunted a new truck in front of his ex-wife. State's Exh. 49A, pp. 11–12. Ring said he could cut off his associate because he held “both [Greenham's] and mine.” *Id.*, at 11. The police engineered a local news broadcast about the robbery investigation; they included in the account several intentional inaccuracies. Tr. 3–5, 13–14 (Nov. 19, 1996). On hearing the broadcast report, Ring left a message on Greenham's answering machine to “remind me to talk to you tomorrow and tell you about what was on the news tonight. Very important, and also fairly good.” State's Exh. 55A, p. 2.

After a detective left a note on Greenham's door asking him to call, Tr. 115–118 (Nov. 18, 1996), Ring told Ferguson that he was puzzled by the attention the police trained on Greenham. “[H]is house is clean,” Ring said; “[m]ine, on the other hand, contains a very large bag.” State's Exh. 70A, p. 7.

On February 14, 1995, police furnished a staged reenactment of the robbery to the local news, and again included deliberate inaccuracies. Tr. 5 (Nov. 19, 1996). Ferguson told Ring that he “laughed” when he saw the broadcast, and Ring called it “humorous.” State's Exh. 80A, p. 3. Ferguson said he was “not real worried at all now”; Ring, however, said he was “slightly concern[ed]” about the possibility that the police might eventually ask for hair samples. *Id.*, at 3–4.

Two days later, the police executed a search warrant at Ring's house, discovering a duffel bag in his garage containing more than \$271,000 in cash. Tr. 107–108, 111, 125 (Nov. 20, 1996). They also found a note with the number “575,995” on it, followed by the word “splits” and the letters “F,” “Y,” and “T.” *Id.*, at 127–130. The prosecution asserted that \*591 “F” was Ferguson, “Y” was “Yoda” (Greenham's nickname), and “T” was Timothy Ring. *Id.*, at 42 (Dec. 5, 1996).

Testifying in his own defense, Ring said the money seized at his house was startup capital for a construction company he and Greenham were planning to form. *Id.*, at 10–11 (Dec. 3, 1996). Ring testified that he made his share of the money as a confidential informant for the Federal Bureau of Investigation and as a bail bondsman and gunsmith. *Id.*, at 162, 166–167, 180 (Dec. 2, 1996). But an FBI agent testified that Ring had been paid only \$458, *id.*, at 47 (Nov. 20, 1996), and other evidence showed that Ring had made no more than \$8,800 as a bail bondsman, *id.*, at 48–51 (Nov. 21, 1996); *id.*, at 21 (Nov. 25, 1996).

The trial judge instructed the jury on alternative charges of premeditated murder and felony murder. The jury deadlocked on premeditated murder, with 6 of 12 jurors voting to acquit, but convicted Ring of felony murder occurring in the course of armed robbery. See Ariz.Rev.Stat. Ann. § 13–1105(A) and (B) (West 2001) (“A person commits first degree murder if ... [a]cting either alone or with one or more other persons the person **\*\*2434** commits or attempts to commit ... [one of several enumerated felonies] ... and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person. ... Homicide, as prescribed in [this provision] requires no specific mental state other than what is required for the commission of any of the enumerated felonies.”).

As later summed up by the Arizona Supreme Court, “the evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch.” 200 Ariz. 267, 280, 25 P.3d 1139, 1152 (2001). Although clear evidence connected Ring to the robbery's proceeds, nothing submitted at trial put him at the scene of the robbery. See *ibid.* Furthermore, “[f]or all we know from the trial evidence,” the Arizona court stated, “[Ring] did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains **\*592** why the jury found [Ring] guilty of felony, but not premeditated, murder.” *Ibid.*

Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense “is punishable by death or life imprisonment as provided by § 13–703.” Ariz.Rev.Stat. Ann. § 13–1105(C) (West 2001). The cross-referenced section, § 13–703, directs the judge who presided at trial to “conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances ... for the purpose of determining the sentence to be imposed.” § 13–703(C) (West Supp.2001). The statute further instructs: “The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.” *Ibid.*

At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated “aggravating circumstances”<sup>1</sup> and any “mitigating circumstances.” **\*593**<sup>2</sup> The State's law authorizes the judge to sentence the defendant **\*\*2435** to death only if there is at least one aggravating circumstance and “there are no mitigating circumstances sufficiently substantial to call for leniency.” § 13–703(F).

Between Ring's trial and sentencing hearing, Greenham pleaded guilty to second-degree murder and armed robbery. He stipulated to a 27½ year sentence and agreed to cooperate with the prosecution in the cases against Ring and Ferguson. Tr. 35–37 (Oct. 9, 1997).

Called by the prosecution at Ring's sentencing hearing, Greenham testified that he, Ring, and Ferguson had been planning the robbery for several weeks before it occurred. According to Greenham, Ring “had I guess taken the role as leader because he laid out all the tactics.” *Id.*, at 39. On the day of the robbery, Greenham said, the three watched the armored van pull up to the mall. *Id.*, at 45. When Magoch opened the door to smoke a cigarette, Ring shot him with a rifle equipped with a homemade silencer. *Id.*, at 42, 44–45. Greenham then pushed Magoch's body aside and drove the van away. *Id.*, at 45. At Ring's direction, Greenham drove to the church parking lot, where he and Ring transferred the money to Ring's truck. *Id.*, at 46, 48. Later, Greenham recalled, as the three robbers were dividing up the money, **\*594** Ring upbraided him and Ferguson for “forgetting to congratulate [Ring] on [his] shot.” *Id.*, at 60.

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

On cross-examination, Greenham acknowledged having previously told Ring's counsel that Ring had nothing to do with the planning or execution of the robbery. *Id.*, at 85–87. Greenham explained that he had made that prior statement only because Ring had threatened his life. *Id.*, at 87. Greenham also acknowledged that he was now testifying against Ring as “pay back” for the threats and for Ring's interference in Greenham's relationship with Greenham's ex-wife. *Id.*, at 90–92.

On October 29, 1997, the trial judge entered his “Special Verdict” sentencing Ring to death. Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was Magoch's actual killer or if he was “a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.” App. to Pet. for Cert. 46a–47a; see *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (Eighth Amendment requires finding that felony-murder defendant killed or attempted to kill); *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (qualifying *Enmund*, and holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a “major participat[ant] in the felony committed” and who demonstrated “reckless indifference to human life”).

Citing Greenham's testimony at the sentencing hearing, the judge concluded that Ring “is the one who shot and killed Mr. Magoch.” App. to Pet. for Cert. 47a. The judge also found that Ring was a major participant in the robbery and that armed robbery “is unquestionably a crime which carries with it a grave risk of death.” *Ibid.*

The judge then turned to the determination of aggravating and mitigating circumstances. See § 13–703. He found two aggravating factors. First, the judge determined that Ring committed the offense in expectation of receiving something \*595 of “pecuniary value,” as described in § 13–703; “[t]aking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result.” App. to Pet. for Cert. 49a. Second, the judge found that the offense was committed “in an especially heinous, cruel or depraved manner.” *Ibid.* In support of this finding, he cited Ring's comment, as reported by Greenham at the sentencing hearing, expressing pride in his marksmanship. *Id.*, at 49a–50a. The judge found one nonstatutory mitigating factor: Ring's “minimal” criminal record. \*\*2436 *Id.*, at 52a. In his judgment, that mitigating circumstance did not “call for leniency”; he therefore sentenced Ring to death. *Id.*, at 53a.

On appeal, Ring argued that Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty. See *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The State, in response, noted that this Court had upheld Arizona's system in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and had stated in *Apprendi* that *Walton* remained good law.

Reviewing the death sentence, the Arizona Supreme Court made two preliminary observations. *Apprendi* and *Jones*, the Arizona high court said, “raise some question about the continued viability of *Walton*.” 200 Ariz., at 278, 25 P.3d, at 1150. The court then examined the *Apprendi* majority's interpretation of Arizona law and found it wanting. *Apprendi*, the Arizona court noted, described Arizona's sentencing system as one that “ ‘requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,’ and not as a system that ‘permits a judge to determine the existence of a factor which makes a crime a capital offense.’ ” 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 496–497, 120 S.Ct. 2348). Justice O'CONNOR's *Apprendi* dissent, the Arizona court noted, squarely rejected \*596 the *Apprendi* majority's characterization of the Arizona sentencing scheme: “A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.” 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 538, 120 S.Ct. 2348).

After reciting this Court's divergent constructions of Arizona law in *Apprendi*, the Arizona Supreme Court described how capital sentencing in fact works in the State. The Arizona high court concluded that “the present case is precisely as described in Justice O'Connor's dissent [in *Apprendi* ]—Defendant's death sentence required the judge's factual findings.” 200 Ariz., at 279, 25 P.3d,

at 1151. Although it agreed with the *Apprendi* dissent's reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled. It therefore rejected Ring's constitutional attack on the State's capital murder judicial sentencing system. 200 Ariz., at 280, 25 P.3d, at 1152.

The court agreed with Ring that the evidence was insufficient to support the aggravating circumstance of depravity, *id.*, at 281–282, 25 P.3d, at 1153–1154, but it upheld the trial court's finding on the aggravating factor of pecuniary gain. The Arizona Supreme Court then reweighed that remaining factor against the sole mitigating circumstance (Ring's lack of a serious criminal record), and affirmed the death sentence. *Id.*, at 282–284, 25 P.3d, at 1154–1156.

We granted Ring's petition for a writ of certiorari, 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002), to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*. See, e.g., *United States v. Promise*, 255 F.3d 150, 159–160 (C.A.4 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* “perplexing”); *Hoffman v. Arave*, 236 F.3d 523, 542 (C.A.9 2001) (“*Apprendi* may \*597 raise some doubt about *Walton*.”); *People v. Kaczmarek*, 318 Ill.App.3d 340, 351–352, 251 Ill.Dec. 953, 741 N.E.2d 1131, 1142 (2000) (“[W]hile it appears *Apprendi* extends greater constitutional protections \*\*2437 to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to second-guess that decision here.”). We now reverse the judgment of the Arizona Supreme Court.

## II

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing Ariz.Rev.Stat. § 13–703). This was so because, in Arizona, a “death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.” 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13–703). The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,<sup>3</sup> made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.<sup>4</sup>

\*598 As earlier indicated, see *supra*, at 2432, 2436, this is not the first time we have considered the constitutionality of Arizona's capital sentencing system. In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Id.*, at 648, 110 S.Ct. 3047 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640–641, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*)). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors “elements of the offense”; in both States, they ranked as “sentencing considerations” guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

*Walton* drew support from *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), in which the Court held there was no constitutional bar to an appellate court's finding that a defendant killed, attempted to kill, or intended to kill, \*\*2438 as *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), required for imposition of the death penalty in felony-murder cases. The *Enmund* finding could be made by a court, *Walton* maintained, because it entailed no “‘element of the crime of capital murder’”; it “only place[d] ‘a substantive limitation on sentencing.’” \*599 497 U.S., at 649, 110 S.Ct. 3047 (quoting *Cabana*, 474 U.S., at 385–386, 106 S.Ct. 689). “If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding,” *Walton* stated, “we cannot conclude that a State is required to denominate aggravating circumstances ‘elements’ of the offense or permit only a jury to determine the existence of such circumstances.” 497 U.S., at 649, 110 S.Ct. 3047.

In dissent in *Walton*, Justice STEVENS urged that the Sixth Amendment requires “a jury determination of facts that must be established before the death penalty may be imposed.” *Id.*, at 709, 110 S.Ct. 3047. Aggravators “operate as statutory ‘elements’ of capital murder under Arizona law,” he reasoned, “because in their absence, [the death] sentence is unavailable.” *Id.*, at 709, n. 1, 110 S.Ct. 3047. “If th[e] question had been posed in 1791, when the Sixth Amendment became law,” Justice STEVENS said, “the answer would have been clear,” for “[b]y that time,

“the English jury’s role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant’s state of mind. By the time the Bill of Rights was adopted, the jury’s right to make these determinations was unquestioned.” *Id.*, at 710–711, 110 S.Ct. 3047 (quoting White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial, 65 Notre Dame L.Rev. 1, 10–11 (1989)).

\*600 *Walton* was revisited in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In that case, we construed the federal carjacking statute, 18 U.S.C. § 2119 (1994 ed. and Supp. V), which, at the time of the criminal conduct at issue, provided that a person possessing a firearm who “takes a motor vehicle ... from the person or presence of another by force and violence or by intimidation ... shall—(1) be ... imprisoned not more than 15 years ..., (2) if serious bodily injury ... results, be ... imprisoned not more than 25 years ..., and (3) if death results, be ... imprisoned for any number of years up to life ....” The question presented in *Jones* was whether the statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.” 526 U.S., at 229, 119 S.Ct. 1215.

The carjacking statute, we recognized, was “susceptible of [both] constructions”; we adopted the one that avoided “grave and doubtful constitutional questions.” *Id.*, at 239, 119 S.Ct. 1215 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909)). Section 2119, we held, established three separate offenses. Therefore, the facts—causation of serious bodily injury or death—necessary to trigger the escalating maximum penalties fell within the jury’s province to decide. See *Jones*, 526 U.S., at 251–252, 119 S.Ct. 1215. Responding to the dissenting opinion, the *Jones* Court restated succinctly the principle animating its view that the carjacking statute, if read to define \*\*2439 a single crime, might violate the Constitution: “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.*, at 243, n. 6, 119 S.Ct. 1215.

*Jones* endeavored to distinguish certain capital sentencing decisions, including *Walton*. Advancing a “careful reading of *Walton’s* rationale,” the *Jones* Court said: *Walton* “characterized \*601 the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available.” 526 U.S., at 251, 119 S.Ct. 1215.

Dissenting in *Jones*, Justice KENNEDY questioned the Court’s account of *Walton*. The aggravating factors at issue in *Walton*, he suggested, were not merely circumstances for consideration by the trial judge in exercising sentencing discretion within a statutory range of penalties. “Under the relevant Arizona statute,” Justice KENNEDY observed, “*Walton* could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment.” 526 U.S., at 272, 119 S.Ct. 1215 (citation omitted). *Jones*, Justice KENNEDY concluded, cast doubt—needlessly in his view—on the vitality of *Walton*:

“If it is constitutionally impermissible to allow a judge’s finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge’s finding may increase the maximum punishment for murder from imprisonment to death.

In fact, *Walton* would appear to have been a better candidate for the Court's new approach than is the instant case." 526 U.S., at 272, 119 S.Ct. 1215.

One year after *Jones*, the Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The defendant-petitioner in that case was convicted of, *inter alia*, second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. See *id.*, at 469–470, 120 S.Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that Apprendi's crime had been motivated by racial animus. That finding triggered application of New Jersey's "hate crime enhancement," which doubled Apprendi's maximum authorized sentence. The judge sentenced Apprendi to 12 years in prison, 2 years over the maximum that would have applied but for the enhancement.

\*602 We held that Apprendi's sentence violated his right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*, at 477, 120 S.Ct. 2348 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. New Jersey, the Court observed, "threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race." *Apprendi*, 530 U.S., at 476, 120 S.Ct. 2348. "Merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Ibid.*

The dispositive question, we said, "is one not of form, but of effect." *Id.*, at 494, 120 S.Ct. 2348. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. See *id.*, at 482–483, 120 S.Ct. 2348. A defendant may not be "expose [d] \*\*2440 ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483, 120 S.Ct. 2348; see also *id.*, at 499, 120 S.Ct. 2348 (SCALIA, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.").

*Walton* could be reconciled with *Apprendi*, the Court finally asserted. The key distinction, according to the *Apprendi* Court, was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." 530 U.S., at 497, 120 S.Ct. 2348 (emphasis deleted) (quoting \*603 *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n. 2, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (SCALIA, J., dissenting)).

The *Apprendi* dissenters called the Court's distinction of *Walton* "baffling." 530 U.S., at 538, 120 S.Ct. 2348 (opinion of O'CONNOR, J.). The Court claimed that "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Ibid.* That, the dissent said, was "demonstrably untrue," for a "defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Ibid.* *Walton*, the *Apprendi* dissenters insisted, if properly followed, would have required the Court to uphold Apprendi's sentence. "If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed." 530 U.S., at 537, 120 S.Ct. 2348 (opinion of O'CONNOR, J.).

The Arizona Supreme Court, as we earlier recounted, see *supra*, at 2436, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in Justice O'CONNOR's dissent precisely right: "Defendant's death sentence required the judge's factual findings." 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, see *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.



In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the \*604 only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," *Apprendi*, 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See \*\*2441 § 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting).

Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra*, at 2437-2438; Tr. of Oral Arg. 28-29. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable;<sup>5</sup> *Apprendi* repeatedly instructs \*605 in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. See, e.g., 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19, 120 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."); *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); see also *id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

Even if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, Arizona further urges, aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination. As Arizona's counsel maintained at oral argument, there is no doubt that \*606 "[d]eath is different." Tr. of Oral Arg. 43. States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 21-25 (citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*)); see also *Maynard v. Cartwright*, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); \*\*2442 *Apprendi*, 530 U.S., at 522-523, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes.").

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." *Id.*, at 539, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence." *Ibid.*

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561–562, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (suggesting that addition to federal gun possession statute of “express jurisdictional element” requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause); *Brandenburg \*607 v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (First Amendment prohibits States from “proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (Due Process Clause of Fourteenth Amendment requires “actual knowledge of the duty to register or proof of the probability of such knowledge” before ex-felon may be convicted of failing to register presence in municipality). If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.

Arizona suggests that judicial authority over the finding of aggravating factors “may ... be a better way to guarantee against the arbitrary imposition of the death penalty.” Tr. of Oral Arg. 32. The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be

“an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. ... 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. It has never been efficient; but it has always been free.” *Apprendi*, 530 U.S., at 498, 120 S.Ct. 2348 (SCALIA, J., concurring).

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances \*608 in capital cases by entrusting those determinations to the jury.<sup>6</sup>

Although “the doctrine of *stare decisis* is of fundamental importance to the rule of \*\*2443 law[,]’ ... [o]ur precedents are not sacrosanct.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987)). “[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.” 491 U.S., at 172, 109 S.Ct. 2363. We are satisfied that this is such a case.

[3] \*609 For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647–649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense,” *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.

\* \* \*

“The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.” *Duncan v. Louisiana*, 391 U.S. 145, 155–156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.

We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.<sup>7</sup>

*It is so ordered.*

\*610 Justice SCALIA, with whom Justice THOMAS joins, concurring.

The question whether *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), survives our decision in \*\*2444 *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), confronts me with a difficult choice. What compelled Arizona (and many other States) to specify particular “aggravating factors” that must be found before the death penalty can be imposed, see 1973 Ariz. Sess. Laws ch. 138, § 5 (originally codified as Ariz.Rev.Stat. § 13–454), was the line of this Court’s cases beginning with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*). See *Walton*, 497 U.S., at 659–660, 110 S.Ct. 3047 (SCALIA, J., concurring in part and concurring in judgment). In my view, that line of decisions had no proper foundation in the Constitution. *Id.*, at 670, 110 S.Ct. 3047 (“[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed” (quoting *Gardner v. Florida*, 430 U.S. 349, 371, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (REHNQUIST, J., dissenting))). I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

On the other hand, as I wrote in my dissent in *Almendarez–Torres v. United States*, 523 U.S. 224, 248, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

The quandary is apparent: Should I continue to apply the last-stated principle when I know that the only reason the fact is essential is that this Court has mistakenly said that the Constitution *requires* state law to impose such “aggravating \*611 factors”? In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez–Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather “every finding of fact underlying the sentencing decision,” including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment. 497 U.S., at 647, 110 S.Ct. 3047 (emphasis added). But even if the point had been put with greater clarity in *Walton*, I think I still would have approved the Arizona scheme—I would have favored the States’ freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.

Since *Walton*, I have acquired new wisdom that consists of two realizations—or, to put it more critically, have discarded old ignorance that consisted of the failure to realize two things: First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event. Some States, for example, already had aggravating-factor requirements for capital murder (*e.g.*, murder of a peace officer, see 1965 N.Y. Laws p. 1022 (originally codified at N.Y. Penal Law § 1045)) when *Furman* was decided. When such a State has added aggravating factors, are the new ones the *Apprendi*-exempt product of *Furman*, and the old ones not? And even as to those States that did not previously have aggravating-factor requirements, who is to say that their adoption of a new one today—or, for that matter, even their retention of old ones adopted immediately post-*Furman*—is still the product of that case, and not of a changed social belief that murder *simpliciter* does not deserve death?

\*\*2445 Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal \*612 legislatures to adopt “sentencing factors” determined by judges that increase punishment beyond what is authorized by the jury’s verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, see *Apprendi, supra*, at 523, 120 S.Ct. 2348 (O’CONNOR, J., dissenting), cause me to believe that our people’s traditional

belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Accordingly, *whether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.

I add one further point, lest the holding of today's decision be confused by the separate concurrence. Justice BREYER, who refuses to accept *Apprendi*, see 530 U.S., at 555, 120 S.Ct. 2348 (BREYER, J., dissenting); see also *Harris v. United States*, ante, 536 U.S., at 569, 122 S.Ct. 2406, 153 L.Ed.2d 524 (BREYER, J., concurring in part and concurring in judgment), nonetheless concurs in today's judgment because he "believe[s] that jury sentencing in capital cases is mandated by the Eighth Amendment." *Post*, at 2446 (opinion concurring in judgment). While I am, as always, pleased to travel in Justice BREYER's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, \*613 more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which Justice BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.

Justice KENNEDY, concurring.

Though it is still my view that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of *Apprendi* would allow *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), to stand. It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes "the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, supra, at 494, 120 S.Ct. 2348. When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.

This is not to say *Apprendi* should be extended without caution, for the States' settled expectations deserve our respect. A sound understanding of the Sixth Amendment will allow States to respond to the needs and realities of criminal justice administration, and *Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing. I agree with the Court, however, that *Apprendi* and *Walton* cannot stand together as the law.

\*\*2446 With these observations I join the opinion of the Court.

Justice BREYER, concurring in the judgment.

## I

Given my views in *Apprendi v. New Jersey*, 530 U.S. 466, 555, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (dissenting opinion), and *Harris v. United States*, \*614 ante, 536 U.S., at 569, 122 S.Ct. 2406, 153 L.Ed.2d 524 (BREYER, J., concurring in part and concurring in judgment), I cannot join the Court's opinion. I concur in the judgment, however, because I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.

## II

This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Otherwise, the constitutional prohibition against “cruel and unusual punishments” would forbid its use. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*). Justice STEVENS has written that those safeguards include a requirement that a jury impose any sentence of death. *Harris v. Alabama*, 513 U.S. 504, 515–526, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (dissenting opinion); *Spaziano v. Florida*, 468 U.S. 447, 467–490, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (STEVENS, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). Although I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view, and with the related views of others upon which it in part relies, see *Gregg, supra*, at 190, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Cf. *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late”). I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.

I am convinced by the reasons that Justice STEVENS has given. These include (1) his belief that retribution provides the main justification for capital punishment, and (2) his assessment of the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end.

As to the first, I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to \*615 incapacitate offenders, or to rehabilitate criminals. Studies of deterrence are, at most, inconclusive. See, e.g., Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, p. A1 (during last 20 years, homicide rate in death penalty States has been 48% to 101% higher than in non-death-penalty States); see also Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J.Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification).

As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes. See, e.g., Sorensen & Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J.Crim. L. & C. 1251, 1256 (2000) (studies find average repeat murder rate of .002% among murderers whose death sentences were commuted); Marquart & Sorensen, A National Study of the \*\*2447 *Furman*—Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L.Rev. 5, 26 (1989) (98% did not kill again either in prison or in free society). But see *Roberts v. Louisiana*, 428 U.S. 325, 354, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (White, J., dissenting) (“[D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not”). And rehabilitation, obviously, is beside the point.

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to “the community's moral sensibility,” *Spaziano*, 468 U.S., at 481, 104 S.Ct. 3154 (STEVENS, J., concurring in part and dissenting in part), because they “reflect more accurately the composition and experiences of the community as a whole,” *id.*, at 486, 104 S.Ct. 3154. Hence they are more likely to “express the conscience \*616 of the community on the ultimate question of life or death,” *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and better able to determine in the particular case the need for retribution, namely, “an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Gregg, supra*, at 184, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

Nor is the fact that some judges are democratically elected likely to change the jury's comparative advantage in this respect. Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether,

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

given the community's views, capital punishment is appropriate in the particular case at hand. See *Harris*, 513 U.S., at 518–519, 115 S.Ct. 1031 (STEVENS, J., dissenting); see also J. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 405–406 (Feb. 11, 2002) (hereinafter *A Broken System*) (finding that judges who override jury verdicts for life are especially likely to commit serious errors); cf. Epstein & King, *The Rules of Inference*, 69 U. Chi. L.Rev. 1 (2002) (noting dangers in much scholarly research but generally approving of Liebman).

The importance of trying to translate a community's sense of capital punishment's appropriateness in a particular case is underscored by the continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, “cruel and unusual.” Those who make this claim point, among other things, to the fact that death is not reversible, and to death sentences imposed upon those whose convictions proved unreliable. See, e.g., Weinstein, *The Nation's Death Penalty Foes Mark a Milestone Crime: Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed*, *Los Angeles Times*, Apr. 10, 2002, p. A16; G. Ryan, Governor of Illinois, *Report of Governor's Commission \*617 on Capital Punishment 7–10* (Apr. 15, 2002) (imposing moratorium on Illinois executions because, post-*Furman*, 13 people have been exonerated and 12 executed); see generally Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L.Rev.* 21, 27 (1987).

They point to the potentially arbitrary application of the death penalty, adding that the race of the victim and socio-economic factors seem to matter. See, e.g., U.S. General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* 5 (Feb.1990) (synthesis of 28 studies shows “pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty”); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, *Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 *Cornell L.Rev.* 1638, 1661 (1998) (evidence of race-of-victim disparities in 90% of States studied and of race-of-defendant disparities in \*\*2448 55%); *McCleskey v. Kemp*, 481 U.S. 279, 320–345, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (Brennan, J., dissenting); see also, e.g., D. Baldus, G. Woodworth, G. Young, & A. Christ, *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973–1999): A Legal and Empirical Analysis* 95–100 (Oct. 10, 2001) (death sentences almost five times more likely when victim is of a high socio-economic status).

They argue that the delays that increasingly accompany sentences of death make those sentences unconstitutional because of “the suffering inherent in a prolonged wait for execution.” *Knight v. Florida*, 528 U.S. 990, 994, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (BREYER, J., dissenting from denial of certiorari) (arguing that the Court should consider the question); see, e.g., *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (STEVENS, J., respecting denial of certiorari); Bureau of Justice Statistics, *Capital Punishment 2000*, pp. 12, 14 (rev.2002) (average delay is 12 years, with 52 people waiting more than 20 years and some more than 25).

\*618 They point to the inadequacy of representation in capital cases, a fact that aggravates the other failings. See, e.g., Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *Yale L.J.* 1835 (1994) (describing many studies discussing deficient capital representation).

And they note that other nations have increasingly abandoned capital punishment. See, e.g., San Martin, *U.S. Taken to Task Over Death Penalty*, *Miami Herald*, May 31, 2001, p. 1 (United States is only Western industrialized Nation that authorizes the death penalty); Amnesty International Website *Against the Death Penalty, Facts and Figures on the Death Penalty (2002)* <http://www.web.amnesty.org/rmp/dplibrary.nsf> (since *Gregg*, 111 countries have either abandoned the penalty altogether, reserved it only for exceptional crimes like wartime crimes, or not carried out executions for at least the past 10 years); DeYoung, *Group Criticizes U.S. on Detainee Policy; Amnesty Warns of Human Rights Fallout*, *Washington Post*, May 28, 2002, p. A4 (the United States rates fourth in number of executions, after China, Iran, and Saudi Arabia).

Many communities may have accepted some or all of these claims, for they do not impose capital sentences. See *A Broken System*, App. B, Table 11A (more than two-thirds of American counties have never imposed the death penalty since *Gregg* (2,064 out of 3,066), and only 3% of the Nation's counties account for 50% of the Nation's death sentences (92 out of 3,066)).

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

Leaving questions of arbitrariness aside, this diversity argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not “cruel,” “unusual,” or otherwise unwarranted.

For these reasons, the danger of unwarranted imposition of the penalty cannot be avoided unless “the decision to impose the death penalty is made by a jury rather than by a single governmental official.” *Spaziano*, 468 U.S., at 469, 104 S.Ct. 3154 \*619 (STEVENS, J., concurring in part and dissenting in part); see *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (Eighth Amendment prohibits excessive or disproportionate punishment). And I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.

Justice O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

I understand why the Court holds that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), is irreconcilable with *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Yet in choosing which to overrule, I would choose *Apprendi*, not *Walton*.

\*\*2449 I continue to believe, for the reasons I articulated in my dissent in *Apprendi*, that the decision in *Apprendi* was a serious mistake. As I argued in that dissent, *Apprendi's* rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases. See 530 U.S., at 524–552, 120 S.Ct. 2348. Indeed, the rule directly contradicts several of our prior cases. See *id.*, at 531–539, 120 S.Ct. 2348 (explaining that the rule conflicts with *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and *Walton, supra*). And it ignores the “significant history in this country of ... discretionary sentencing by judges.” 530 U.S., at 544, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). The Court has failed, both in *Apprendi* and in the decision announced today, to “offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the ‘increase in the maximum penalty’ rule is not required by the Constitution.” *Id.*, at 539, 120 S.Ct. 2348.

Not only was the decision in *Apprendi* unjustified in my view, but it has also had a severely destabilizing effect on our criminal justice system. I predicted in my dissent that the decision would “unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or \*620 in part on the authority of [*Apprendi*].” *Id.*, at 551, 120 S.Ct. 2348. As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*.<sup>1</sup> These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide. See *ibid.* (O'CONNOR, J., dissenting) (“In 1998 ... federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts”). The number of second or successive habeas corpus petitions filed in the federal courts also increased by 77% in 2001, a phenomenon the Administrative Office of the United States Courts attributes to prisoners bringing *Apprendi* claims. Administrative Office of the U.S. Courts, 2001 Judicial Business 17. This Court has been similarly overwhelmed by the aftershocks of *Apprendi*. A survey of the petitions for certiorari we received in the past year indicates that 18% raised *Apprendi*-related claims.<sup>2</sup> It is simply beyond dispute that *Apprendi* threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary.

The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. See *ante*, at 2442–2443, n. 6 (identifying Colorado, Idaho, Montana, and Nebraska as having sentencing schemes like Arizona's). There are 168 prisoners on death row in these States, Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. (Spring 2002), each of whom \*621 is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their

**Ring v. Arizona, 536 U.S. 584 (2002)**

122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594...

direct appeals, they will be barred from taking advantage of today's holding \*\*2450 on federal collateral review. See 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Nonetheless, the need to evaluate these claims will greatly burden the courts in these five States. In addition, I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination, see *ante*, at 2443, n. 6, may also seize on today's decision to challenge their sentences. There are 629 prisoners on death row in these States. Criminal Justice Project, *supra*.

By expanding on *Apprendi*, the Court today exacerbates the harm done in that case. Consistent with my dissent, I would overrule *Apprendi* rather than *Walton*.

**All Citations**

536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, 70 USLW 4666, 02 Cal. Daily Op. Serv. 5594, 2002 Daily Journal D.A.R. 7047, 15 Fla. L. Weekly Fed. S 464

**Footnotes**

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The aggravating circumstances, enumerated in Ariz.Rev.Stat. Ann. § 13–703(G) (West Supp.2001), are:
  - “1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
  - “2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
  - “3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
  - “4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
  - “5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
  - “6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
  - “7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
  - “8. The defendant has been convicted of one or more other homicides, as defined in § 13–1101, which were committed during the commission of the offense.
  - “9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
  - “10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.”
- 2 The statute enumerates certain mitigating circumstances, but the enumeration is not exclusive. “The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death ....” § 13–703(H).
- 3 “In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ....”
- 4 Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490–491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting “the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation” (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) (“[I]t has never [been] suggested that jury sentencing is constitutionally required.”). He does not question the Arizona



Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment “has not ... been construed to include the Fifth Amendment right to ‘presentment or indictment of a Grand Jury’ ”).

5 In *Harris v. United States*, ante, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524, a majority of the Court concludes that the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence. See ante, at 2419 (plurality opinion) (“The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. [A] finding [that triggers a mandatory minimum sentence] restrain[s] the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.”); ante, at 2420 (BREYER, J., concurring in part and concurring in judgment) (“[T]he Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).”).

6 Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. See Ark.Code Ann. § 5–4–602 (1993); Cal.Penal Code Ann. § 190.3 (West 1999); Conn. Gen.Stat. § 53a–46a (2001); Ga.Code Ann. § 17–10–31.1 (Supp.1996); Ill. Comp. Stat. Ann., ch. 720, § 5/9–1(d) (West 1993); Kan. Stat. Ann. § 21–4624(b) (1995); Ky.Rev.Stat. Ann. § 532.025(1)(b) (1993); La.Code Crim. Proc. Ann., Art. § 905.1 (West 1997); Md. Ann.Code, Art. 27, § 413(b) (1996); Miss.Code Ann. § 99–19–101 (1973–2000); Mo.Rev.Stat. §§ 565.030, 565.032 (1999 and Supp.2002); Nev.Rev.Stat. Ann. § 175.552 (Michie 2001); N.H.Rev.Stat. Ann. § 630:5(II) (1996); N.J. Stat. Ann. § 2C:11–3(c) (Supp.2001); N.M. Stat. Ann. § 31–20A–1 (2000); N.Y.Crim. Proc. Law § 400.27 (McKinney Supp.2001–2002); N.C. Gen.Stat. § 15A–2000 (1999); Ohio Rev.Code Ann. § 2929.03 (West 1997); Okla. Stat., Tit. 21, § 701.10(A) (Supp.2001); Ore.Rev.Stat. Ann. § 163.150 (1997); 42 Pa. Cons.Stat. § 9711 (Supp.2001); S.C.Code Ann. § 16–3–20(B) (1985); S.D. Codified Laws § 23A–27A–2 (1998); Tenn.Code Ann. § 39–13–204 (Supp.2000); Tex.Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp.2001); Utah Code Ann. § 76–3–207 (Supp.2001); Va.Code Ann. § 19.2–264.3 (2000); Wash. Rev.Code § 10.95.050 (1990); Wyo. Stat. Ann. § 6–2–102 (2001).

Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. See Colo.Rev.Stat. § 16–11–103 (2001) (three-judge panel); Idaho Code § 19–2515 (Supp.2001); Mont.Code Ann. § 46–18–301 (1997); Neb.Rev.Stat. § 29–2520 (1995).

Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See Ala.Code §§ 13A–5–46, 13A–5–47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind.Code Ann. § 35–50–2–9 (Supp.2001).

7 We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict. See *Neder v. United States*, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance).

1 This data was obtained from a Westlaw search conducted May 31, 2002, in the United States Courts of Appeals database using the following search terms: “ ‘Apprendi v. New Jersey’ & Title [‘U.S.’ or ‘United States’].”

2 Specific counts are on file with the Clerk of the Court.

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

HURST *v.* FLORIDA

## CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 14–7505. Argued October 13, 2015—Decided January 12, 2016

Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” Fla. Stat. §775.082(1). In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. §921.141(1). Next, the jury, by majority vote, renders an “advisory sentence.” §921.141(2). Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death. §921.141(3).

A Florida jury convicted petitioner Timothy Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and the judge again found the facts necessary to sentence Hurst to death. The Florida Supreme Court affirmed, rejecting Hurst’s argument that his sentence violated the Sixth Amendment in light of *Ring v. Arizona*, 536 U. S. 584, in which this Court found unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death.

*Held:* Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Pp. 4–10.

(a) Any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U. S. 466, 494. Applying *Apprendi* to the capital punishment context, the *Ring* Court had little difficulty concluding that an Arizona judge’s inde-

## Syllabus

pendent factfinding exposed Ring to a punishment greater than the jury's guilty verdict authorized. 536 U. S., at 604. *Ring's* analysis applies equally here. Florida requires not the jury but a judge to make the critical findings necessary to impose the death penalty. That Florida provides an advisory jury is immaterial. See *Walton v. Arizona*, 497 U. S. 639, 648. As with Ring, Hurst had the maximum authorized punishment he could receive increased by a judge's own factfinding. Pp. 4–6.

(b) Florida's counterarguments are rejected. Pp. 6–10.

(1) In arguing that the jury's recommendation necessarily included an aggravating circumstance finding, Florida fails to appreciate the judge's central and singular role under Florida law, which makes the court's findings necessary to impose death and makes the jury's function advisory only. The State cannot now treat the jury's advisory recommendation as the necessary factual finding required by *Ring*. Pp. 6–7.

(2) Florida's reliance on *Blakely v. Washington*, 542 U. S. 296, is misplaced. There, this Court stated that under *Apprendi*, a judge may impose any sentence authorized "on the basis of the facts . . . admitted by the defendant," 542 U. S., at 303. Florida alleges that Hurst's counsel admitted the existence of a robbery, but *Blakely* applied *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial, while Florida has not explained how Hurst's alleged admissions accomplished a similar waiver. In any event, Hurst never admitted to either aggravating circumstance alleged by the State. Pp. 7–8.

(3) That this Court upheld Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U. S. 638, and *Spaziano v. Florida*, 468 U. S. 447, does not mean that *stare decisis* compels the Court to do so here, see *Alleyne v. United States*, 570 U. S. \_\_\_, \_\_\_ (SOTOMAYOR, J., concurring). Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. Those decisions are thus overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty. Pp. 8–9.

(4) The State's assertion that any error was harmless is not addressed here, where there is no reason to depart from the Court's normal pattern of leaving such considerations to state courts. P. 10.

147 So. 3d 435, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and KAGAN, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 14–7505

TIMOTHY LEE HURST, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
FLORIDA

[January 12, 2016]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst’s judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.

We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.

I

On May 2, 1998, Cynthia Harrison’s body was discovered in the freezer of the restaurant where she worked—bound, gagged, and stabbed over 60 times. The restaurant safe was unlocked and open, missing hundreds of dollars. The State of Florida charged Harrison’s co-worker, Timothy Lee Hurst, with her murder. See 819 So. 2d 689, 692–694 (Fla. 2002).

During Hurst’s 4-day trial, the State offered substantial

## Opinion of the Court

forensic evidence linking Hurst to the murder. Witnesses also testified that Hurst announced in advance that he planned to rob the restaurant; that Hurst and Harrison were the only people scheduled to work when Harrison was killed; and that Hurst disposed of blood-stained evidence and used stolen money to purchase shoes and rings.

Hurst responded with an alibi defense. He claimed he never made it to work because his car broke down. Hurst told police that he called the restaurant to let Harrison know he would be late. He said she sounded scared and he could hear another person—presumably the real murderer—whispering in the background.

At the close of Hurst’s defense, the judge instructed the jury that it could find Hurst guilty of first-degree murder under two theories: premeditated murder or felony murder for an unlawful killing during a robbery. The jury convicted Hurst of first-degree murder but did not specify which theory it believed.

First-degree murder is a capital felony in Florida. See Fla. Stat. §782.04(1)(a) (2010). Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. §775.082(1). “A person who has been convicted of a capital felony shall be punished by death” only if an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” *Ibid.* “[O]therwise such person shall be punished by life imprisonment and shall be ineligible for parole.” *Ibid.*

The additional sentencing proceeding Florida employs is a “hybrid” proceeding “in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.” *Ring v. Arizona*, 536 U. S. 584, 608, n. 6 (2002). First, the sentencing judge conducts an evidentiary hearing before a jury. Fla. Stat. §921.141(1) (2010). Next, the jury renders an “advisory sentence” of life or death without specifying the factual basis of its recom-

## Opinion of the Court

mentation. §921.141(2). “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.” §921.141(3). If the court imposes death, it must “set forth in writing its findings upon which the sentence of death is based.” *Ibid.* Although the judge must give the jury recommendation “great weight,” *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*), the sentencing order must “reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors,” *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (*per curiam*).

Following this procedure, Hurst’s jury recommended a death sentence. The judge independently agreed. See 819 So. 2d, at 694–695. On postconviction review, however, the Florida Supreme Court vacated Hurst’s sentence for reasons not relevant to this case. See 18 So. 3d 975 (2009).

At resentencing in 2012, the sentencing judge conducted a new hearing during which Hurst offered mitigating evidence that he was not a “major participant” in the murder because he was at home when it happened. App. 505–507. The sentencing judge instructed the advisory jury that it could recommend a death sentence if it found at least one aggravating circumstance beyond a reasonable doubt: that the murder was especially “heinous, atrocious, or cruel” or that it occurred while Hurst was committing a robbery. *Id.*, at 211–212. The jury recommended death by a vote of 7 to 5.

The sentencing judge then sentenced Hurst to death. In her written order, the judge based the sentence in part on her independent determination that both the heinous-murder and robbery aggravators existed. *Id.*, at 261–263. She assigned “great weight” to her findings as well as to the jury’s recommendation of death. *Id.*, at 271.

## Opinion of the Court

The Florida Supreme Court affirmed 4 to 3. 147 So. 3d 435 (2014). As relevant here, the court rejected Hurst’s argument that his sentence violated the Sixth Amendment in light of *Ring*, 536 U. S. 584. *Ring*, the court recognized, “held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment.” 147 So. 3d, at 445. But the court considered *Ring* inapplicable in light of this Court’s repeated support of Florida’s capital sentencing scheme in pre-*Ring* cases. 147 So. 3d, at 446–447 (citing *Hildwin v. Florida*, 490 U. S. 638 (1989) (*per curiam*)); see also *Spaziano v. Florida*, 468 U. S. 447, 457–465 (1984). Specifically, in *Hildwin*, this Court held that the Sixth Amendment “does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” 490 U. S., at 640–641. The Florida court noted that we have “never expressly overruled *Hildwin*, and did not do so in *Ring*.” 147 So. 3d, at 446–447.

Justice Pariente, joined by two colleagues, dissented from this portion of the court’s opinion. She reiterated her view that “*Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury.” *Id.*, at 450 (opinion concurring in part and dissenting in part).

We granted certiorari to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*. 575 U. S. \_\_\_\_ (2015). We hold that it does, and reverse.

## II

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .” This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable

## Opinion of the Court

doubt. *Alleyne v. United States*, 570 U. S. \_\_\_\_, \_\_\_\_ (2013) (slip op., at 3). In *Apprendi v. New Jersey*, 530 U. S. 466, 494 (2000), this Court held that any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” that must be submitted to a jury. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U. S. 296 (2004), sentencing guidelines, *United States v. Booker*, 543 U. S. 220 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U. S. \_\_\_\_ (2012), mandatory minimums, *Alleyne*, 570 U. S., at \_\_\_\_, and, in *Ring*, 536 U. S. 584, capital punishment.

In *Ring*, we concluded that Arizona’s capital sentencing scheme violated *Apprendi*’s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U. S., at 591. Under state law, “Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.” *Id.*, at 592. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.*, at 592–593. Ring’s judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.

The Court had little difficulty concluding that “the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury’s guilty verdict.” *Id.*, at 604 (quoting *Apprendi*, 530 U. S., at 494; alterations omitted). Had Ring’s judge not engaged in any factfinding, Ring would have received a life sentence. *Ring*, 536 U. S., at 597. Ring’s death sentence therefore violated his right to have a jury find the facts behind his punishment.

The analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s. Like Arizona at the time of *Ring*, Florida does not require the jury to



## Opinion of the Court

make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. §921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: “It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.” *Walton v. Arizona*, 497 U. S. 639, 648 (1990); accord, *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) (“[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely”).

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.

## III

Without contesting *Ring*’s holding, Florida offers a bevy of arguments for why Hurst’s sentence is constitutional. None holds water.

## A

Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst’s sentencing jury recommended a death sentence, it “necessarily included a finding of an aggravating circumstance.” Brief for Respondent 44. The State contends that this finding quali-

## Opinion of the Court

fied Hurst for the death penalty under Florida law, thus satisfying *Ring*. “[T]he additional requirement that a judge *also* find an aggravator,” Florida concludes, “only provides the defendant additional protection.” Brief for Respondent 22.

The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until “findings *by the court* that such person shall be punished by death.” Fla. Stat. §775.082(1) (emphasis added). The trial court *alone* must find “the facts . . . [t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” §921.141(3); see *Steele*, 921 So. 2d, at 546. “[T]he jury’s function under the Florida death penalty statute is advisory only.” *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

## B

Florida launches its second salvo at Hurst himself, arguing that he admitted in various contexts that an aggravating circumstance existed. Even if *Ring* normally requires a jury to hear all facts necessary to sentence a defendant to death, Florida argues, “*Ring* does not require jury findings on facts defendants have admitted.” Brief for Respondent 41. Florida cites our decision in *Blakely v. Washington*, 542 U. S. 296 (2004), in which we stated that under *Apprendi*, a judge may impose any sentence authorized “on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U. S., at 303 (emphasis deleted). In light of *Blakely*, Florida points to various instances in which Hurst’s counsel allegedly admitted the existence of a robbery. Florida contends that these “ad-

## Opinion of the Court

missions” made Hurst eligible for the death penalty. Brief for Respondent 42–44.

*Blakely*, however, was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial. See 542 U. S., at 310–312. Florida has not explained how Hurst’s alleged admissions accomplished a similar waiver. Florida’s argument is also meritless on its own terms. Hurst never admitted to either aggravating circumstance alleged by the State. At most, his counsel simply refrained from challenging the aggravating circumstances in parts of his appellate briefs. See, e.g., Initial Brief for Appellant in No. SC12–1947 (Fla.), p. 24 (“not challeng[ing] the trial court’s findings” but arguing that death was nevertheless a disproportionate punishment).

## C

The State next argues that *stare decisis* compels us to uphold Florida’s capital sentencing scheme. As the Florida Supreme Court observed, this Court “repeatedly has reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century.” *Bottoson v. Moore*, 833 So. 2d 693, 695 (2002) (*per curiam*) (citing *Hildwin*, 490 U. S. 638; *Spaziano*, 468 U. S. 447). “In a comparable situation,” the Florida court reasoned, “the United States Supreme Court held:

‘If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’” *Bottoson*, 833 So. 2d, at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989)); see also 147 So. 3d, at 446–447 (case below).

## Opinion of the Court

We now expressly overrule *Spaziano* and *Hildwin* in relevant part.

*Spaziano* and *Hildwin* summarized earlier precedent to conclude that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Hildwin*, 490 U. S., at 640–641. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton*, 497 U. S. 639—could not “survive the reasoning of *Apprendi*.” 536 U. S., at 603. *Walton*, for its part, was a mere application of *Hildwin*’s holding to Arizona’s capital sentencing scheme. 497 U. S., at 648.

“Although “the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]” . . . [o]ur precedents are not sacrosanct.’ . . . [W]e have overruled prior decisions where the necessity and propriety of doing so has been established.” *Ring*, 536 U. S., at 608 (quoting *Patterson v. McLean Credit Union*, 491 U. S. 164, 172 (1989)). And in the *Apprendi* context, we have found that “*stare decisis* does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.” *Alleyne*, 570 U. S., at \_\_\_\_ (SOTOMAYOR, J., concurring) (slip op., at 2); see also *United States v. Gaudin*, 515 U. S. 506, 519–520 (1995) (overruling *Sinclair v. United States*, 279 U. S. 263 (1929)); *Ring*, 536 U. S., at 609 (overruling *Walton*, 497 U. S., at 639); *Alleyne*, 570 U. S., at \_\_\_\_ (slip op., at 15) (overruling *Harris v. United States*, 536 U. S. 545 (2002)).

Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.

## Opinion of the Court

## D

Finally, we do not reach the State's assertion that any error was harmless. See *Neder v. United States*, 527 U. S. 1, 18–19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See *Ring*, 536 U. S., at 609, n. 7.

\* \* \*

The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*So ordered.*

BREYER, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

No. 14–7505

TIMOTHY LEE HURST, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
FLORIDA

[January 12, 2016]

JUSTICE BREYER, concurring in the judgment.

For the reasons explained in my opinion concurring in the judgment in *Ring v. Arizona*, 536 U. S. 584, 613–619 (2002), I cannot join the Court’s opinion. As in that case, however, I concur in the judgment here based on my view that “the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.” *Id.*, at 614; see *id.*, at 618 (“[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless ‘the decision to impose the death penalty is made by a jury rather than by a single government official’” (quoting *Spaziano v. Florida*, 468 U. S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part))). No one argues that Florida’s juries actually sentence capital defendants to death—that job is left to Florida’s judges. See Fla. Stat. §921.141(3) (2010). Like the majority, therefore, I would reverse the judgment of the Florida Supreme Court.

ALITO, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 14–7505

TIMOTHY LEE HURST, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
FLORIDA

[January 12, 2016]

JUSTICE ALITO, dissenting.

As the Court acknowledges, “this Court ‘repeatedly has reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century.’” *Ante*, at 8. And as the Court also concedes, our precedents hold that “‘the Sixth Amendment *does not* require that the specific findings authorizing the imposition of the sentence of death be made by the jury.’” *Ante*, at 9 (quoting *Hildwin v. Florida*, 490 U. S. 638, 640–641 (1989) (*per curiam*); emphasis added); see also *Spaziano v. Florida*, 468 U. S. 447, 460 (1984). The Court now reverses course, striking down Florida’s capital sentencing system, overruling our decisions in *Hildwin* and *Spaziano*, and holding that the Sixth Amendment *does* require that the specific findings authorizing a sentence of death be made by a jury. I disagree.

I

First, I would not overrule *Hildwin* and *Spaziano* without reconsidering the cases on which the Court’s present decision is based. The Court relies on later cases holding that any fact that exposes a defendant to a greater punishment than that authorized by the jury’s guilty verdict is an element of the offense that must be submitted to a jury. *Ante*, at 5. But there are strong reasons to question whether this principle is consistent with the original understanding of the jury trial right. See *Alleyne v. United*

ALITO, J., dissenting

*States*, 570 U. S. \_\_\_, \_\_\_–\_\_\_ (2013) (ALITO, J., dissenting) (slip op., at 1–2). Before overruling *Hildwin* and *Spaziano*, I would reconsider the cases, including most prominently *Ring v. Arizona*, 536 U. S. 584 (2002), on which the Court now relies.

Second, even if *Ring* is assumed to be correct, I would not extend it. Although the Court suggests that today's holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us. In *Ring*, the jury found the defendant guilty of felony murder and did no more. It did not make the findings required by the Eighth Amendment before the death penalty may be imposed in a felony-murder case. See *id.*, at 591–592, 594; *Enmund v. Florida*, 458 U. S. 782 (1982); *Tison v. Arizona*, 481 U. S. 137 (1987). Nor did the jury find the presence of any aggravating factor, as required for death eligibility under Arizona law. *Ring, supra*, at 592–593. Nor did it consider mitigating factors. And it did not determine whether a capital or noncapital sentence was appropriate. Under that system, the jury played *no* role in the capital sentencing process.

The Florida system is quite different. In Florida, the jury sits as the initial and primary adjudicator of the factors bearing on the death penalty. After unanimously determining guilt at trial, a Florida jury hears evidence of aggravating and mitigating circumstances. See Fla. Stat. §921.141(1) (2010). At the conclusion of this separate sentencing hearing, the jury may recommend a death sentence only if it finds that the State has proved one or more aggravating factors beyond a reasonable doubt and only after weighing the aggravating and mitigating factors. §921.141(2).

Once the jury has made this decision, the trial court performs what amounts, in practical terms, to a reviewing function. The judge duplicates the steps previously per-



ALITO, J., dissenting

formed by the jury and, while the court can impose a sentence different from that recommended by the jury, the judge must accord the jury's recommendation "great weight." See *Lambrix v. Singletary*, 520 U. S. 518, 525–526 (1997) (recounting Florida law and procedure). Indeed, if the jury recommends a life sentence, the judge may override that decision only if "the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*). No Florida trial court has overruled a jury's recommendation of a life sentence for more than 15 years.

Under the Florida system, the jury plays a critically important role. Our decision in *Ring* did not decide whether this procedure violates the Sixth Amendment, and I would not extend *Ring* to cover the Florida system.

## II

Finally, even if there was a constitutional violation in this case, I would hold that the error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U. S. 18, 24 (1967). Although petitioner attacks the Florida system on numerous grounds, the Court's decision is based on a single perceived defect, *i.e.*, that the jury's determination that at least one aggravating factor was proved is not binding on the trial judge. *Ante*, at 6. The Court makes no pretense that this supposed defect could have prejudiced petitioner, and it seems very clear that it did not.

Attempting to show that he might have been prejudiced by the error, petitioner suggests that the jury might not have found the existence of an aggravating factor had it been instructed that its finding was a prerequisite for the imposition of the death penalty, but this suggestion is hard to credit. The jury was told to consider two aggravating factors: that the murder was committed during the course of a robbery and that it was especially "heinous,

atrocious, or cruel.” App. 212. The evidence in support of both factors was overwhelming.

The evidence with regard to the first aggravating factor—that the murder occurred during the commission of a robbery—was as follows. The victim, Cynthia Harrison, an assistant manager of a Popeye’s restaurant, arrived at work between 7 a.m. and 8:30 a.m. on the date of her death. When other employees entered the store at about 10:30 a.m., they found that she had been stabbed to death and that the restaurant’s safe was open and the previous day’s receipts were missing. At trial, the issue was whether Hurst committed the murder. There was no suggestion that the murder did not occur during the robbery. Any alternative scenario—for example, that Cynthia Harrison was first murdered by one person for some reason other than robbery and that a second person came upon the scene shortly after the murder and somehow gained access to and emptied the Popeye’s safe—is fanciful.

The evidence concerning the second aggravating factor—that the murder was especially “heinous, atrocious, or cruel”—was also overwhelming. Cynthia Harrison was bound, gagged, and stabbed more than 60 times. Her injuries included “facial cuts that went all the way down to the underlying bone,” “cuts through the eyelid region” and “the top of her lip,” and “a large cut to her neck which almost severed her trachea.” *Id.*, at 261. It was estimated that death could have taken as long as 15 minutes to occur. The trial court characterized the manner of her death as follows: “The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs introduced as evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily

ALITO, J., dissenting

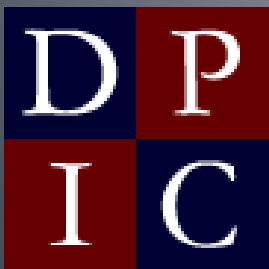
torturous.” *Id.*, at 261–262.

In light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding. More than 17 years have passed since Cynthia Harrison was brutally murdered. In the interest of bringing this protracted litigation to a close, I would rule on the issue of harmless error and would affirm the decision of the Florida Supreme Court.

# Florida State Senate Criminal Justice Committee Workshop on the Death Penalty

Tallahassee, FL

January 27, 2016



Robert Brett Dunham  
Executive Director  
Death Penalty Information Center

# Responding to *Hurst v. Florida*

- The National Perspective
- What Kind of Jury Finding Does *Hurst* Require?
- Does *Hurst* Have Implications at the Selection Stage of Capital Sentencing Proceedings?
- The Implications of Pending Litigation
- The Life Interest Vested by 775.082(2)

# A National Perspective

# The Death Penalty in the U.S.

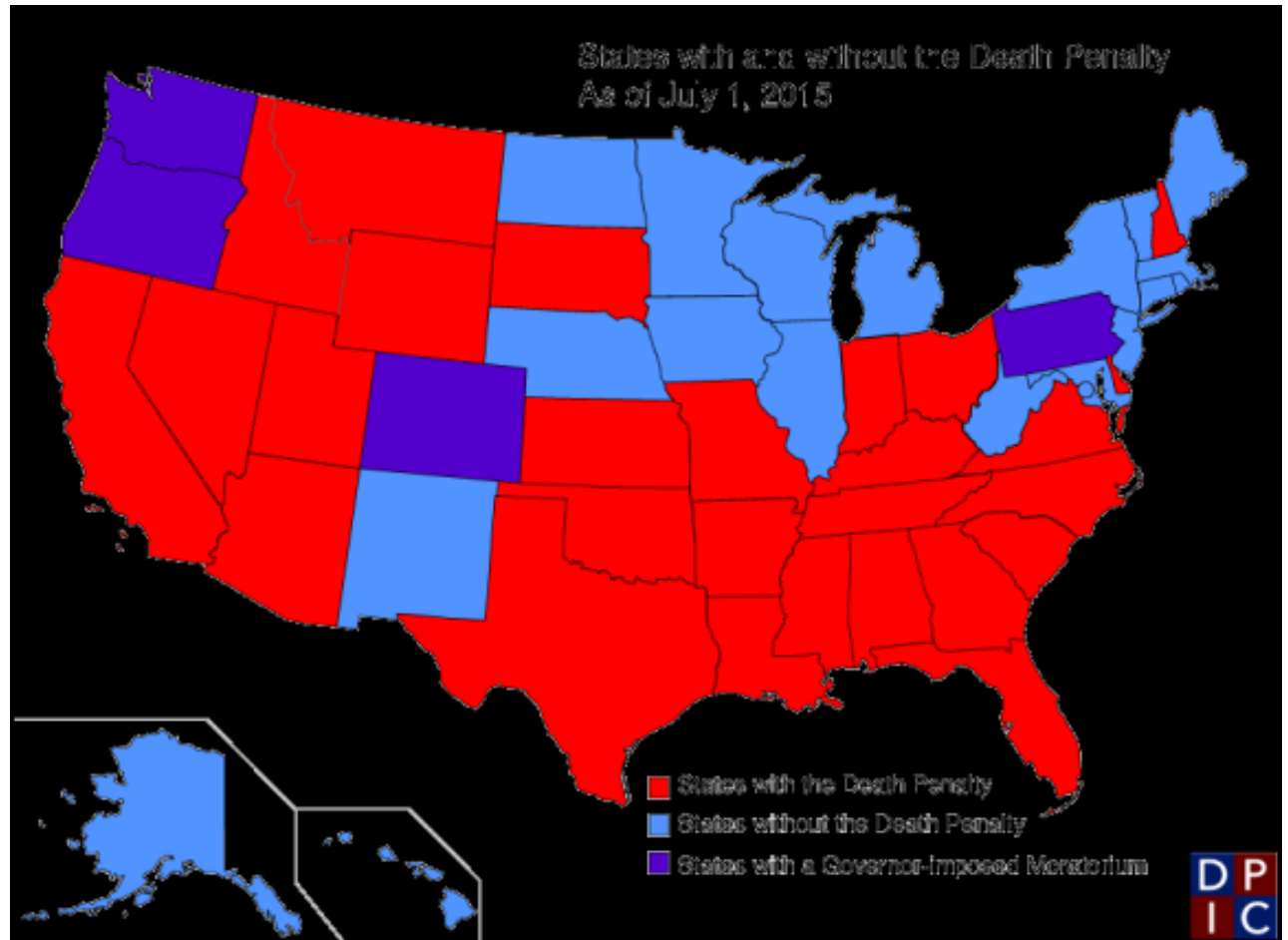
States With the Death Penalty: **32\***

States Without the Death Penalty: **18\***

States With a Governor-Imposed Moratorium: **4**

**Trend: Courts or Legislatures in 7 states have abolished the death penalty in the last decade.**

**\*Nebraska will vote on its legislative repeal of the death penalty in Nov. 2016**



# After Hurst, Florida has four choices.

- Address the constitutional issues decided in *Hurst*.
- Take this opportunity to affirmatively redress other issues that continue to place Florida death sentences in constitutional jeopardy.
- Do nothing and have no death mechanism for imposing death sentences.
- Repeal the death penalty.\*

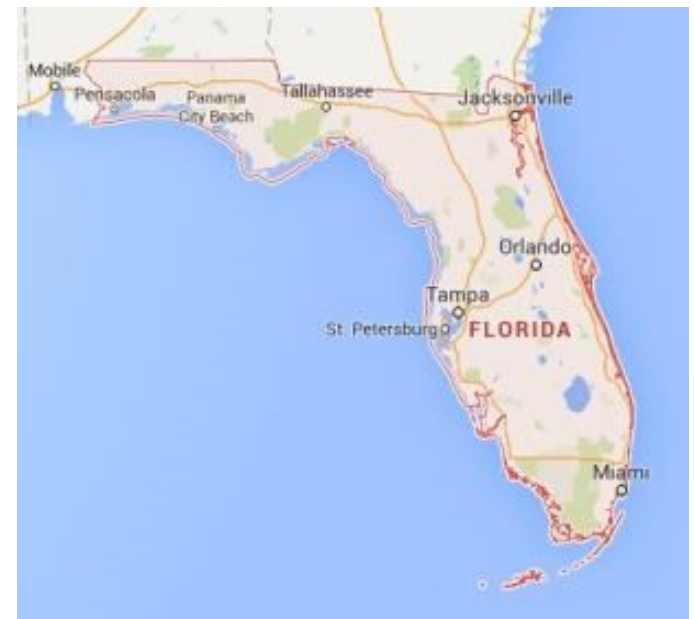
\*The Death Penalty Information Center takes no position on this issue.



# The Florida death penalty

- Florida is the only state to have permitted death without a unanimous jury finding of death eligibility.
- Only three states – Florida, Alabama, and Delaware\* permit non-unanimous jury recommendations of death.

- \*The Delaware House of Representatives votes tomorrow on repealing its death penalty. If it does so, only two states will permit non-unanimous death sentences.



# Various aspects of the state's death penalty statute have been declared unconstitutional.

- ***Hitchcock v. Dugger (1987)*** – disregarding constitutional requirement that sentencer consider and have mechanism to give full effect to non-statutory mitigating evidence violated 8<sup>th</sup> Amend.
- ***Hall v. Florida (2014)*** – 70 IQ threshold cutoff for determining intellectual disability violated 8<sup>th</sup> Amend evolving standards of decency.
- ***Hurst v. Florida (2016)*** – judicial finding of facts necessary to impose death penalty violated 6<sup>th</sup> Amend.

# All were self-imposed wounds

- *Hitchcock* was dictated by U.S. Supreme Court's prior decisions in *Lockett v. Ohio* and *Eddings v. Oklahoma* and Florida's choice to disregard non-statutory aggravation was an outlier practice.
- In *Hall*, Florida disregarded the medical community's diagnostic criteria for intellectual disability and was an outlier practice.
- *Hurst* was dictated by *Ring v. Arizona* and Florida was the only state not to provide jury fact finding of aggravating circumstances.

Florida's practices have placed a majority of its death sentences at constitutional risk

---

The Villages®

**DAILY SUN**

LET'S GO  
Looking for something fun to do today? Try bird-watching! D1

SUNDAY  
January 10, 2016  
\$1.00

---

THE WEATHER TODAY, C2

8 a.m.	Noon	4 p.m.	8 p.m.
63°	66°	65°	56°

NFL playoffs open with first two wild-card games. Sports, B1

Tax-Aide continues to help residents. Local News, C1

---

---

# Redefining Justice

How would Florida's death row look if it were required to play by the same rules as other states?

---

# Florida's Predicament

## AGGRAVATION FACT FINDINGS

- Most of the current 390 capital cases did not have jury fact findings on aggravation.
- Retroactivity has to be determined.
- Harmless error will have to be determined on a case-by-case basis.

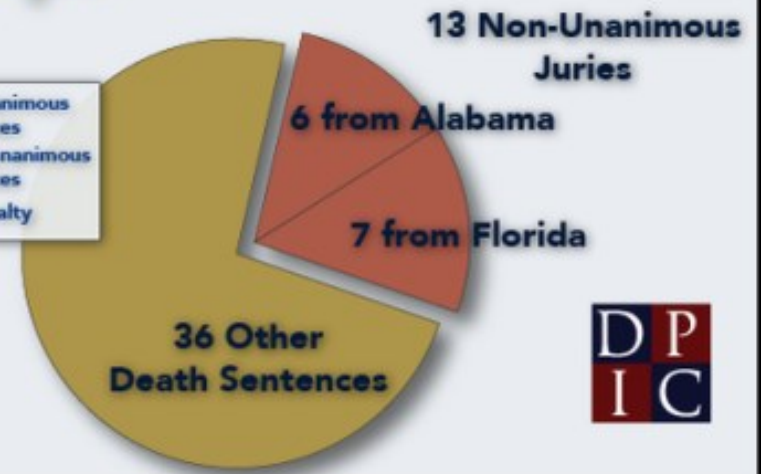
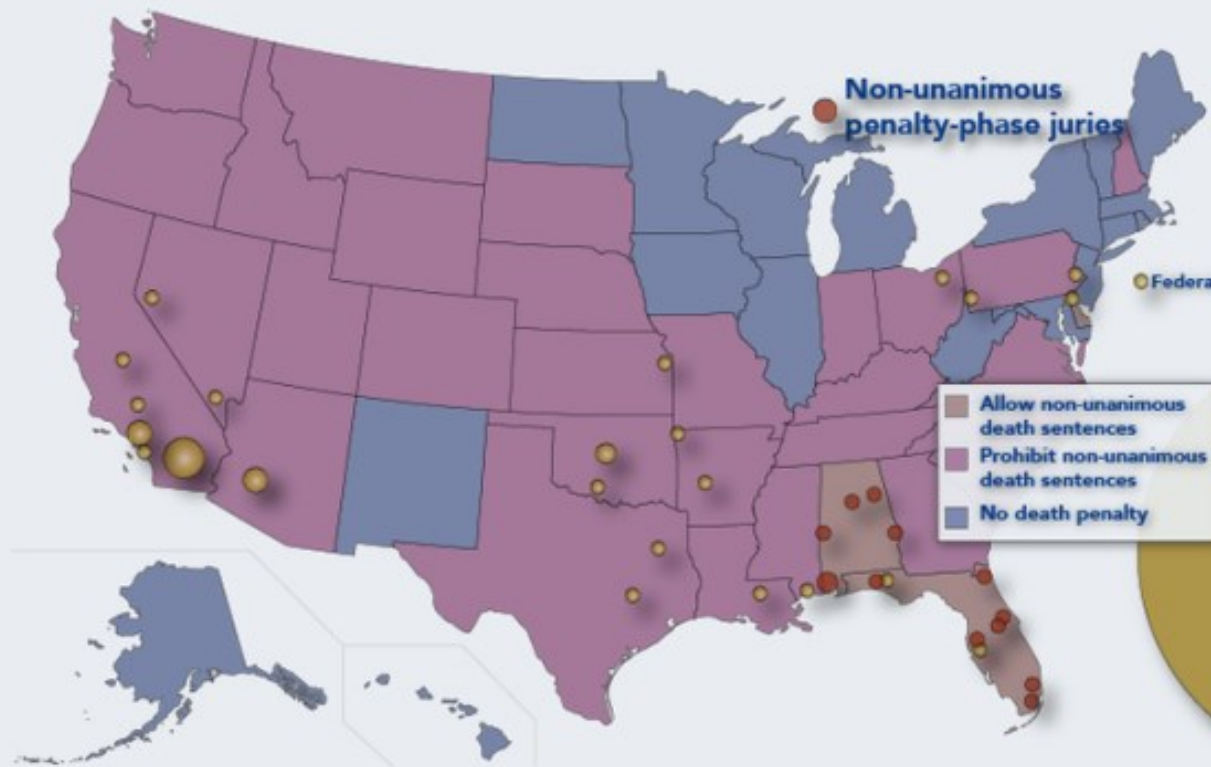
## NON-UNANIMOUS SENTENCE

- 3/4ths of Florida death sentences were imposed (287 of 390) after jurors had split on whether to recommend death.
- 43% of the state's death-row prisoners would have received life sentences if Florida law required a "supermajority" vote of jurors (10 or more)

# Non-unanimous jury recommendations attracted national attention in 2015.

## Outlier Practices in 2015 Death Sentences

- 49 Death Sentences
- 27% with Non-Unanimous Penalty-Phase Juries
- 100% of Alabama Death Sentences Not Unanimous
- 78% of Florida Death Sentences Not Unanimous



# The question of non-unanimity

- Whether or not it is directly required by *Hurst*, Florida's practice of permitting non-unanimous death verdicts is another outlier practice that is already in the national spotlight.
- The Court could perceive not requiring jury unanimity as attempting to evade constitutional guarantees, rather than enforcing them.
- Not requiring jury unanimity invites court challenges and would place in constitutional jeopardy all non-unanimous death verdicts going forward.

## **Sentences resulting from non-unanimity are perceived as less reliable and risk bias**

- **Higher rates of error because of the greater uncertainty.**
- **Greater likelihood error will be deemed harmful, as opposed to harmless.**
- **Greater possibility of permitting outside electoral pressures to influence court outcomes.**
- **Greater risk of sentencing to death innocent defendants.**



# BRENNAN CENTER FOR JUSTICE

---

## TWENTY YEARS

*at New York University School of Law*

Juries, Death, and Judicial Elections

Kate Berry

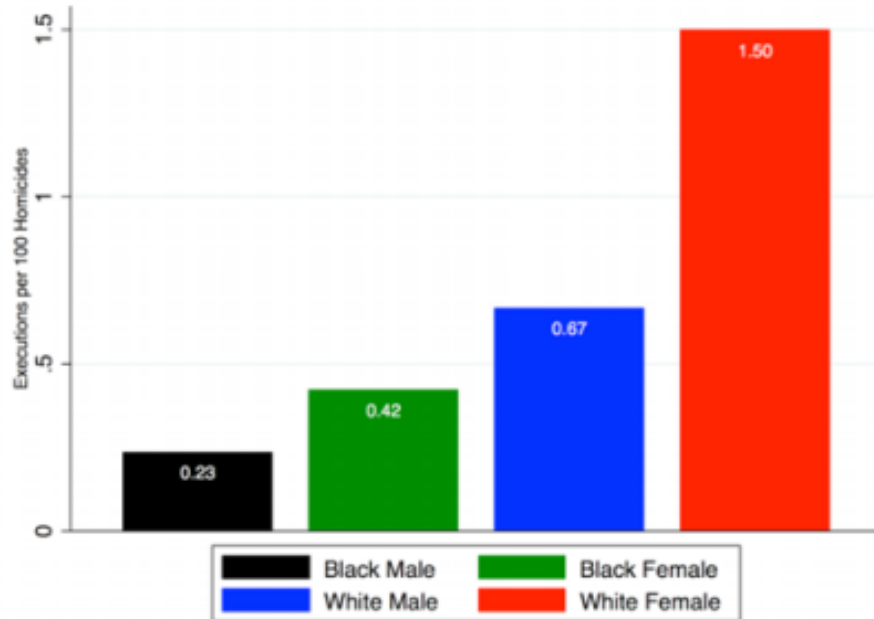
January 21, 2016



The pressure associated with judicial re-election campaigns has measurable effects on judicial decision-making, according to the latest research. Empiricists have found that proximity to re-election [makes judges more punitive toward criminal defendants](#) and, particularly relevant here, [more likely to override jury verdicts of life to instead impose death.](#)

# Victim Disparities in Florida Executions

Figure 1. Comparison of Likelihood of Execution by Race and Gender of Victim

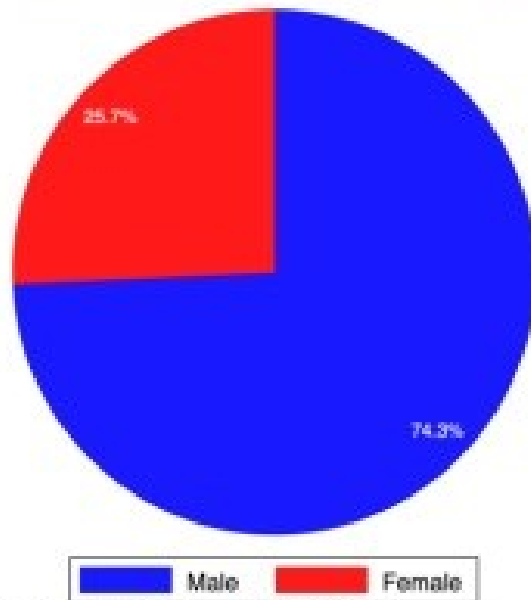


- An execution is 6.5 times more likely in Florida if you were convicted of killing a white female than a black male.
- Florida has not executed any white person for killing any black person.

# Gender of Victim Disparities

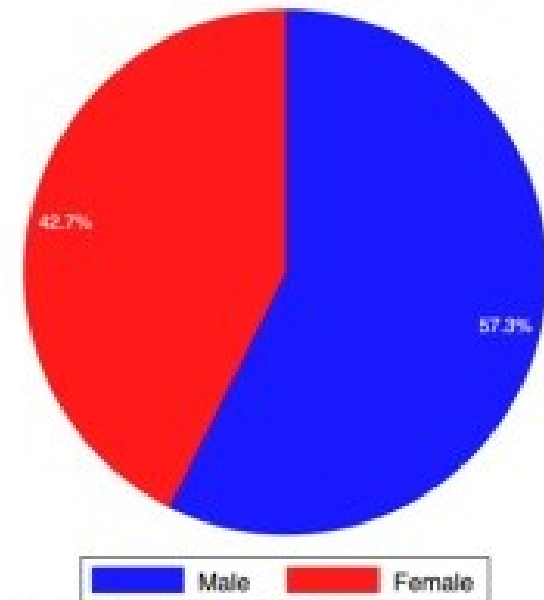
Figure 2. Gender of Victims

All Florida Homicides 1976 - 1999



Based on all homicides from 1976 through 1999 as reported by US DOJ.

All Florida Executions 1976 - 2014

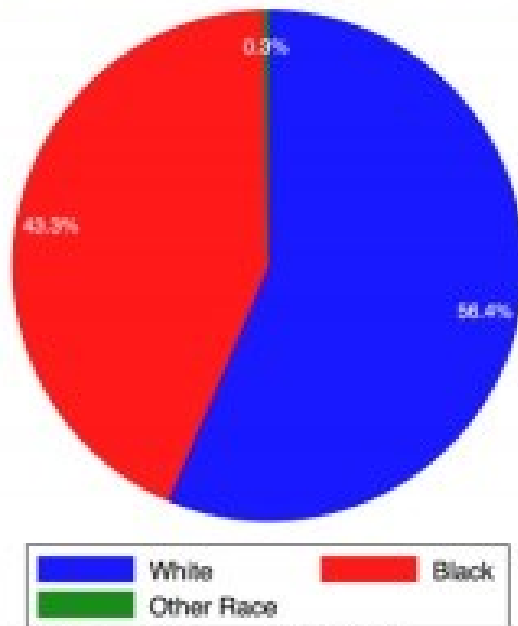


Based on 89 executions from 1976 through 2014, with 143 victims.

# Race of Victim Disparities

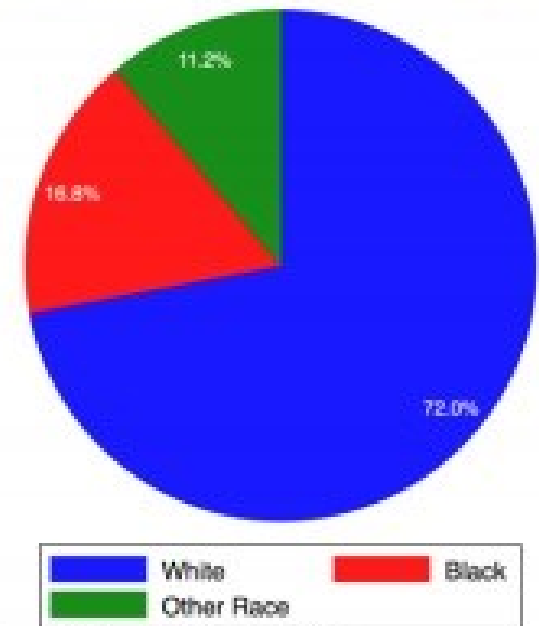
Figure 3. Race of Victims

All Florida Homicides 1976 - 1999



Based on all homicides from 1976 through 1999 as reported by US DOJ.

All Florida Executions 1976 - 2014



Based on 89 executions from 1976 through 2014, with 143 victims.

# The Question of Innocence


## DP IC DEATH PENALTY INFORMATION CENTER





[Home](#) [Issues](#) [Resources](#) [Facts](#) [Reports](#) [About](#) [Press](#) [Donate](#)

Google Custom Search

 [FACT SHEET](#)

 [UPCOMING EXECUTIONS](#)

 [EXECUTION DATABASE](#)

 [STATE-BY-STATE](#)

### Innocence and the Death Penalty





Last exoneration October 12, 2015 (#156)

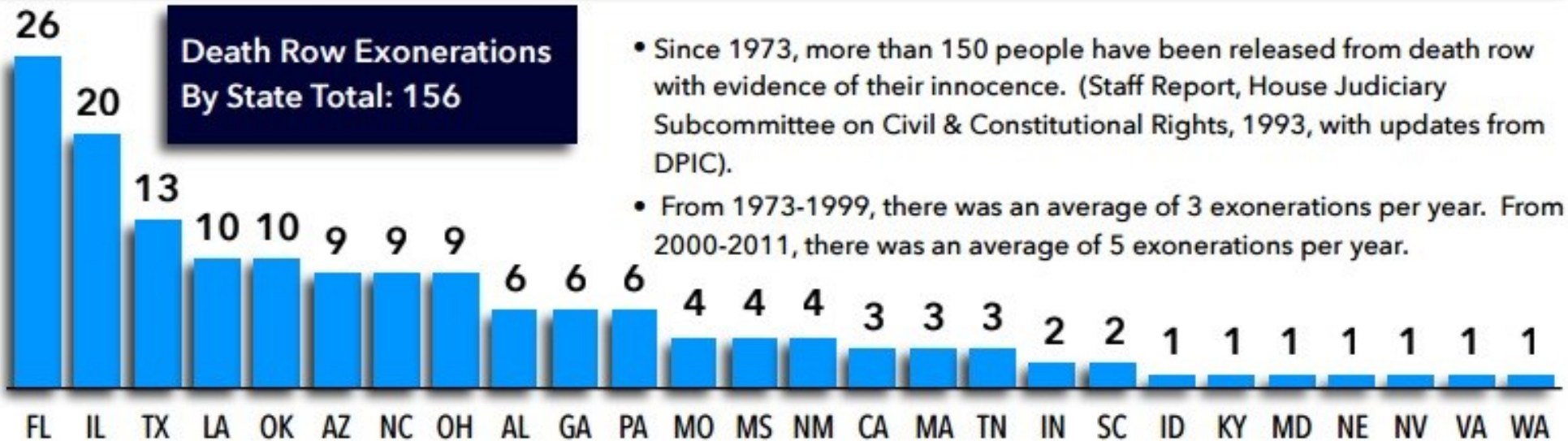
For Inclusion on DPIC's Innocence List:

Defendants must have been convicted, sentenced to death and subsequently either-

- a. Been **acquitted** of all charges related to the crime that placed them on death row, or
- b. Had all charges related to the crime that placed them on death row **dismissed** by the prosecution, or
- c. Been granted a complete **pardon** based on evidence of innocence.

# More Florida death-row prisoners have been exonerated than from any other state.

## INNOCENCE



# The exonerations suggest arbitrariness or bias in Florida's death penalty system

## DPIC DEATH PENALTY INFORMATION CENTER



Fact Sheet  
Upcoming Executions  
Execution Database  
State-by-State  
Podcasts



[Home](#) [Issues](#) [Resources](#) [Facts](#) [Reports](#) [About](#) [Press](#) [Donate](#)

Google Custom Search

### Innocence Cases

#### YEAR OF RELEASE: 1973

##### 1. **David Keaton** *Florida Conviction: 1971, Charges Dismissed: 1973*

On the basis of mistaken identification and coerced confessions, Keaton was sentenced to death for murdering an off duty deputy sheriff during a robbery. The State Supreme Court reversed the conviction and granted Keaton a new trial because of newly discovered evidence. Charges were dropped and he was released after the actual killer was identified and convicted. (*Keaton v. State*, 273 So.2d 385 (1973)).

Read "[The Stigma is Always There](#)" by Sydney Freedberg in *The St. Petersburg Times*





# Nearly ¾ of the Florida death-row exonerees are Black or Latino

#	Name	State	Race	Convicted	Exonerated
1	<a href="#">David Keaton</a>	FL	Black	1971	1973
3	<a href="#">Wilbert Lee</a>	FL	Black	1963	1975
4	<a href="#">Freddie Pitts</a>	FL	Black	1963	1975
11	<a href="#">Delbert Tibbs</a>	FL	Black	1974	1977
21	<a href="#">Annibal Jaramillo</a>	FL	Latino	1981	1982
24	<a href="#">Anthony Brown</a>	FL	Black	1983	1986
27	<a href="#">Joseph Brown</a>	FL	Black	1974	1987
31	<a href="#">Anthony Peek</a>	FL	Black	1978	1987
32	<a href="#">Juan Ramos</a>	FL	Latino	1983	1987
35	<a href="#">Willie Brown</a>	FL	Black	1983	1988
36	<a href="#">Larry Troy</a>	FL	Black	1983	1988
38	<a href="#">Robert Cox</a>	FL	White	1988	1989
39	<a href="#">James Richardson</a>	FL	Black	1968	1989
45	<a href="#">Bradley Scott</a>	FL	White	1988	1991
54	<a href="#">Andrew Golden</a>	FL	White	1991	1994
70	<a href="#">Robert Hayes</a>	FL	Black	1991	1997
85	<a href="#">Joseph Green</a>	FL	Black	1993	2000
88	<a href="#">Frank Smith</a>	FL	Black	1986	2000
94	<a href="#">Joaquin Martinez</a>	FL	Latino	1997	2001
97	<a href="#">Juan Melendez</a>	FL	Latino	1984	2002
105	<a href="#">Rudolph Halton</a>	FL	Black	1986	2003
121	<a href="#">John Ballard</a>	FL	White	2003	2006
133	<a href="#">Herman Lindsay</a>	FL	Black	2006	2009

- 57.7% of the exonerees (15 of 26) are black.
- 15.4% (4) Latino.
- 26.9% (7) are white.

- 38.3% of Florida's death row is black.\*
- 7.8% is Latino.
- 53.3% is white.

\* Based on data from the NAACP Legal Defense Fund's Summer 2015 Death Row USA (as of July 1, 2015)

# What Kind of Jury Finding Does *Hurst* Require?

## SUPREME COURT OF THE UNITED STATES

---

No. 14–7505

---

TIMOTHY LEE HURST, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
FLORIDA

[January 12, 2016]

# Hurst – Jury's "mere recommendation" not enough

JUSTICE SOTOMAYOR delivered the opinion of the Court.

A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.

We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

# *Hurst* is based on *Ring*

The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to

# *Ring v. Arizona* – aggravators are elements

## Opinion of the Court

For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U. S., at 647–649. Because Arizona’s enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense,” *Apprendi*, 530 U. S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.

# Ring is based on *Apprendi v. New Jersey*

- *Apprendi* requires unanimity as to every element of an offense:
- “Trial by jury has been understood to require that *‘the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.’*”
- It also requires proof of each element *beyond a reasonable doubt.*

# In *Sattazhn v. Pennsylvania*, Justice Scalia explained what *Ring* meant

Just last Term we recognized the import of *Apprendi* in the context of capital-sentencing proceedings. In *Ring v. Arizona*, 536 U. S. 584 (2002), we held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” *Id.*, at 609 (emphasis added). That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances”: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.*, at 608–609.

We can think of no principled reason to distinguish in this

# Individual aggravating circumstances are *elements* of the offense of capital murder

Just last Term we recognized the import of *Apprendi* in the context of capital-sentencing proceedings. In *Ring v. Arizona*, 536 U. S. 584 (2002), we held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a *greater offense.*’” *Id.*, at 609 (emphasis added).



# The capital offense is “one or more” aggravating circumstances

That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances”: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

# Jury must find each aggravating circumstance

Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.

# Government Must Prove “One or More” Aggravating Circumstances

- Issue is not prove one to some jurors and others to other jurors.
- From Sattazahn v. Pennsylvania

*Rumsey* thus reaffirmed that the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an “acquittal” based on findings sufficient to establish legal entitlement to the life sentence—i. e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.

# Does *Hurst* Have Implications at the Selection Stage of Capital Sentencing Proceedings?

- The United States Supreme Court opinions in *Brooks v. Alabama*

# 3 Justices suggest Hurst may be broader than just finding aggravating circumstances.

Cite as: 577 U. S. \_\_\_\_ (2016)

1

SOTOMAYOR, J., concurring

## SUPREME COURT OF THE UNITED STATES

CHRISTOPHER EUGENE BROOKS *v.* ALABAMA

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 15–7786 (15A755) (Decided January 21, 2016)

The application for stay of execution of sentence of death presented to JUSTICE THOMAS and by him referred to the Court is denied. The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring in the denial of certiorari.

This Court's opinion upholding Alabama's capital sentencing scheme was based on *Hildwin v. Florida*, 490 U. S. 638 (1989) (*per curiam*), and *Spaziano v. Florida*, 468 U. S. 447 (1984), two decisions we recently overruled in *Hurst v. Florida*, 577 U. S. \_\_\_\_ (2016). See *Harris v. Alabama*, 513 U. S. 504 (1995). I nonetheless vote to deny certiorari in this particular case because I believe procedural obstacles would have prevented us from granting relief.

2

BROOKS *v.* ALABAMA

BREYER, J., dissenting

JUSTICE BREYER, dissenting from denial of application for stay of execution and petition for certiorari.

Christopher Eugene Brooks was sentenced to death in accordance with Alabama's procedures, which allow a jury to render an "advisory verdict" that "is not binding on the court." Ala. Code §13A–5–47(e) (2006). For the reasons explained in my opinions concurring in the judgment in *Hurst v. Florida*, *ante*, at 1, and *Ring v. Arizona*, 536 U. S. 584, 613–619 (2002), and my dissenting opinion in *Schiro v. Summerlin*, 542 U. S. 348, 358–366 (2004), I dissent from the order of the Court to deny the application for stay of execution and the petition for a writ of certiorari.

Moreover, we have recognized that Alabama's sentencing scheme is "much like" and "based on Florida's sentencing scheme." *Harris v. Alabama*, 513 U. S. 504, 508 (1995). Florida's scheme is unconstitutional. See *Hurst*, *ante*, at 1 (BREYER, J., concurring in judgment). The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment. See *Glossip v. Gross*, 576 U. S. \_\_\_\_, \_\_ (2015) (BREYER, J., dissenting) (slip op., at 1–2). I respectfully dissent.

# Unresolved Constitutional Issues Still Present in *Hurst*

## QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

- **If the Sixth Amendment error in *Hurst* is held to be harmless, the other constitutional issues for which the U.S. Supreme Court granted review are still in the case.**

# Those Still Unresolved

## Constitutional Issues Include:

- The 6<sup>th</sup> Amendment aspects of non-unanimous jury recommendations.
- The 8<sup>th</sup> Amendment *Caldwell* issue diminishing the jury's sense of responsibility based upon repeated instructions that the jury's findings are advisory only.
- The 8<sup>th</sup> Amendment aspects of non-unanimous selection-stage jury recommendations
- The 8<sup>th</sup> Amendment "evolving standards" issue
- The *Hall v. Alabama* issue of judicial sentencing

# The Implications of Pending Litigation

- New Trials (*State v. Dykes*)
- Pending Decisions by the Florida Supreme Court in *Hurst* and *Lambrix*
- The SCOTUS opinions in *Brooks v. Alabama*



# Hurst's Immediate Effect on New Trials

## ORDER STRIKING STATE'S INTENT TO SEEK DEATH PENALTY

THIS CAUSE coming on to be heard pursuant to the Court's own Motion to Strike State's Intent to Seek Death Penalty, it is hereby,

ORDERED AND ADJUDGED that pursuant to *Hurst v. Florida* ---S.Ct. ---, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) this court concludes that there currently exists no death penalty in the State of Florida in that there is no procedure in place. This case is set for trial on February 29, 2016. Because there is no procedure in place the court will not attempt to death qualify the jury and the State's Notice of Intent to Seek Death is hereby struck.

# Hurst Question Presented

## QUESTION PRESENTED

Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

- **If the Sixth Amendment error in *Hurst* is held to be harmless, the other constitutional issues for which the U.S. Supreme Court granted review are still in the case.**

# The “Unresolved” *Hurst* Issues

- We have to wait and see what the Florida Supreme Court decides in *Hurst* and *Lambrix* before we can fully know what issues remain.
- But there is the potential that all of the issues presented and not decided in the original *Hurst* cert proceeding are still in play.

# The Life Interest Vested by 775.082(2)

## **775.082 Penalties; mandatory minimum sentences for certain reoffenders previously released from prison.**

**775.082 Penalties; mandatory minimum sentences for certain reoffenders previously released from prison.--**

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

# The Implications and Future of 775.082

## IMPLICATIONS

- The Florida Supreme Court will determine the immediate implications of 775.082
- **By its terms, 775.082 vests in a death-row prisoner a 14<sup>th</sup> Amendment life interest in an LWOP resentencing**

## AMENDMENT OR REPEAL

- DPIC does not take a position on this issue.
- **Any amendment or repeal that retroactively lessens the substantive protections afforded death-row prisoners could face challenges as an *ex post facto* law.**

**DISCUSSION OUTLINE**  
**O. H. EATON, JR.,**  
**Circuit Judge, Retired**

**1. The Hurst decision did not address or require unanimous verdicts.**

Hurst v. Florida – The only question presented by the Court in Hurst was “whether *Florida's* death sentencing scheme violates the Sixth or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).”

The question of unanimous verdicts was not considered. Two States, Louisiana and Oregon, allow less than unanimous verdicts in criminal cases. Recently, In *Miller v. Louisiana*, (2016) the Supreme Court declined to review that practice.

**2. The Rationale for Requiring Unanimous Verdicts in Capital Cases.**

The State of Florida has always required unanimous verdicts except for the sentence recommendation in death cases. The *Hurst* case now requires the jury to find the existence of at least one aggravating factor before a death sentence can be imposed. *Ring v. Arizona*, 536 U.S. 584 (2002). That finding is required because the penalty for first degree murder in the United States is no more than life imprisonment without possibility of parole unless the jury makes the additional finding of the existence of an aggravating factor. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Any reason for imposing a penalty in excess of the statutory maximum penalty is an element of the offense charged, unless the enhanced penalty is based solely upon prior criminal record, and must be submitted to the jury and reflected in the facts found in the verdict. In *Apprendi*, the enhancement of the permitted sentence from 10 to 15 years was allowed if proof was submitted that the crime was a “hate crime.” This issue was submitted to the court after the jury rendered its verdict. That procedure was held to violate the Sixth Amendment.

**Unanimous Verdicts Presently Required.**

Florida has a number of enhanced penalties. For instance, minimum mandatory penalties are provided for use of a firearm during the commission of certain offenses. F.S. 775.087. Invocation of the minimum mandatory penalty requires the charging document to allege the use of the firearm and the jury verdict must reflect that use, if it is proven. The finding by the jury that predicates the

imposition of the minimum mandatory sentence must be unanimous. Since that is already the law, it seems appropriate for the findings on the verdict in a capital case to be unanimous.

**3. Comments on proposed changes to 921.141 (based upon Senator Altman’s Bill SB330).**

**The following changes to SB330 are suggested:**

**A. Effective Date.**

The present proposal provides for an effective date of all sentencing proceedings commencing on or after July 1, 2016. The effective date of July 1, 2013, should apply to all first degree murders committed on or after that date. The proposed change avoids *ex post facto* issues. The question of whether the present statute is substantive or procedural becomes important here. Procedural changes do not usually involve *ex post facto* analysis. Substantive changes do involve *ex post facto* analysis. The Florida Supreme Court has held requiring the jury to make findings of fact concerning the existence of aggravating factors is a “substantive change.” *State v. Steele*, 921 So. 2d 538 (Fla. 2005). *Ex post facto* problems arise whenever a new law aggravates a crime or makes it greater than it was when committed or provides for a greater punishment than that when the crime was committed. *Stogner v. California*, 539 U.S. 607 (2003); *Sheenfeld v. State*, 14 So.3d 1021 (Fla. 2009).

In cases of first degree murder that are committed after July 1, 2026, an advisory verdict recommending the imposition of a sentence of death must specify each aggravating circumstance found to exist beyond a reasonable doubt. The findings of the existence of aggravating factors and the recommendation of a sentence of death must be unanimous. The court shall instruct the jury that, in order for the jury to recommend a death sentence, the jury must first find that sufficient aggravating circumstances exist which outweigh the mitigating circumstances found to exist. The court shall further instruct the jury that each aggravating circumstance used to support the jury’s recommendation of death must be proven beyond a reasonable doubt as found by a unanimous vote. The court shall provide the jury with a special verdict form that specifies which, if any aggravating circumstances were found to exist and certifies that the vote for each aggravating circumstance found was unanimous. The court shall impose a sentence of life imprisonment without possibility of parole if the jury is unable reach a unanimous decision on which penalty to impose.

The current proposal does not provide for cases in which a jury trial has been waived.

It is suggested that the procedure proposed in SB330 is very similar to the Georgia scheme. In Georgia, and most other death penalty states, the verdict of the jury is the sentence to be imposed, absent a finding of prejudice or misconduct. The additional requirement of the court's preparation of a sentencing order is both unnecessary and an invitation for error. The Georgia scheme takes the sentencing decision off the bench and puts it in the jury box. Since most death penalty states and the Federal Government use some form of the Georgia scheme, the legislature should seriously consider adopting that scheme in Florida.

#### **B. Less than unanimous verdict.**

The statute should include a provision requiring the court to impose a sentence of life without parole in the event the jury is unable to reach a unanimous verdict. This provision would avoid double jeopardy issues and would conserve judicial resources by resolving the sentence to be imposed without the additional time and expense required with another sentencing hearing.

#### **4. Burden of Proof.**

SB330 changes the burden of proof and requires the state to show that the aggravating circumstances outweigh the mitigating circumstances. Presently the mitigation must outweigh the aggravation. This minor change avoids the problem of "shifting burdens of proof." It also places the burden of proof where it belongs, as in other criminal cases.

#### **5. When are appellate decisions retroactive in Florida?**

The question of the retroactivity of the Hurst decision will inevitably come up and deserves discussion. In Florida, the test for retroactivity is contained in the case of *Witt v. State*, 387 So.2d 922 Fla. 1980). The Witt case involved the question of when a decision should become retroactive to cases no longer "in the pipeline." In *Witt*, the court discussed the following principles:

A. The importance of finality in the justice system cannot be understated. Litigation must, at some point, come to an end. Absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.



B. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just.

C. Post-conviction procedures offer an avenue of challenge to a once final judgment and sentence in limited instances, and for limited reasons.

D. The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual cases. A sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very “difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.”

E. Drawing the line to identify when finality gives way to fairness based upon a change of law is not an easy task.

F. There are three essential considerations:

1. the purpose to be served by the new rule.
2. the extent of reliance on the old rule.
3. the effect on the administration of justice a retroactive application of the new rule.

Finality becomes illusory if each defendant is allowed to re-litigate his first trial upon a subsequent change of law. Delay in capital cases compounds this problem. Mere passage of time brings inevitable, attendant refinements to the law and disparities of result can follow.

G. Major constitutional changes may be cognizable in post-conviction proceedings. These are usually within two categories:

1. Changes of the law which beyond the authority of the state the power to regulate certain conduct or impose certain penalties, such as the death penalty for rape (*Coker v. Georgia*).

2. Those changes of the law which are of sufficient magnitude to necessitate retroactive application. The new rule must emanate from the Florida Supreme Court or the United States Supreme Court; it must be constitutional in nature; and it must constitute a development of fundamental significance. Fundamental significance includes the test in paragraph 6.

H. Recent application of the Witt test – juveniles sentenced to life imprisonment.

Falcon v. State, 262 So.3d 954 (Fla. 2015).

Falcon was sentenced to life imprisonment. The crime occurred when he was 15 years old. In *Miller v. Alabama*, the U. S. Supreme Court ruled sentencing juveniles to life in prison without a meaningful sentence review violates the Eighth Amendment – cruel and unusual punishment.

I. **Question: does the *Hurst* decision apply retroactively to cases that are final? In *Falcon*, the court repeated the rule as follows:**

**WHEN THE UNITED STATES SUPREME COURT RENDERS A DECISION FAVORABLE TO CRIMINAL DEFENDANTS, THIS COURT HAS HELD THAT “SUCH DECISIONS APPLY IN ALL CASES TO CONVICTIONS THAT ARE NOT YET FINAL – THAT IS, CONVICTIONS FOR WHICH AN APPELLATE COURT MANDATE HAS NOT ISSUED.**

Once a conviction is final, the principle of finality comes into play. Society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Consideration of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

The Court held the rule in *Miller* to be retroactive to all cases. If imposition of a life sentence for juveniles is retroactive, why not a death sentence for lack of due process?

J. **Substance v. Procedure: *Steele v. State*.**

In *State v. Steele*, the trial judge ordered the use of an interrogatory verdict requiring the jury to find the existence of aggravating circumstances and by what vote. The Supreme Court reversed and stated,

“Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the “avoiding a lawful arrest” aggravator applies, see [§ 921.141\(5\)\(e\)](#), while three others believe that only the “committed for pecuniary gain” aggravator applies, see [§ 921.141\(5\)\(f\)](#), because seven jurors

believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), ***the court's order imposes a substantive burden*** on the state not found in the statute and not constitutionally required.” (Emphasis supplied.) *State v. Steele*, 921 So.2d at 545-546.

### **Further recommendations for statutory changes in F.S. 921.141:**

1. The seminal case of *Furman v. Georgia* requires the category of cases that are eligible for the death penalty to be genuinely narrowed. Broad statutes which encompass all first degree murder cases have been disapproved by the United States Supreme Court. See, *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325(1976). In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice White articulated the rationale supporting the statutory narrowing requirement as follows:

“As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate . . . . it becomes reasonable to expect that juries . . . . will impose the death penalty in a substantial number of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its significance as a sentencing device.”

Over the years, Florida has increased the original six aggravating circumstances to fifteen. It is now impossible to imagine a case of first degree murder that does not include at least one aggravating circumstance. The list of aggravating circumstances should be reduced to include aggravating factors which have historically been used to justify a death sentence. Some of them should be narrowed. For example, the felony murder aggravating circumstance should be narrowed to apply to only the most serious cases.

**FPAA**

**1-22-16**

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. [775.082](#). The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating **factors** or mitigating circumstances enumerated in subsections **(6) and (7) (5) and (6)**. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant’s counsel shall be permitted to present argument for or against sentence of death.

**(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY — This section applies only if the penalty phase is conducted before a jury.**

**(a) After hearing all the evidence presented in aggravation and mitigation, the jury shall deliberate and determine whether the State has proven, beyond a reasonable doubt, the existence of one or more of the aggravating factors set forth in subsection (6).**

**(b) The jury shall return special findings identifying each aggravating factor or factors set forth in subsection (6) found to exist. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in subsection (6) is found to exist, the jury shall recommend a sentence of life imprisonment without the possibility of parole.**

**(c) If the jury finds that one or more aggravating factors set forth in subsection (6) have been proven, the jury shall make a recommendation to the court whether the defendant shall be sentenced to life imprisonment or death. The recommendation shall be based on a weighing of the following:**

**1. Whether sufficient aggravating factors exist as enumerated in subsection (6)**

**2. Whether sufficient mitigating circumstances exist which outweigh the aggravating factors found to exist; and**

3. Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(d) A vote of at least 9-3 is required for the jury to recommend death.

~~(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.~~

(3) SENTENCE OF LIFE. – The court shall impose a sentence of life imprisonment without the possibility of parole if no aggravating factors have been found to exist or, when the penalty phase is conducted before a jury, the jury recommends a sentence of life.

~~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.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.~~

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH. – In each case in which the court imposes the death sentence, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors found to exist outweigh the mitigating circumstances reasonably established by the evidence. The court’s order setting forth an aggravating factor in subsection (6) shall be limited to those unanimously found to exist by the jury. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgement and sentence, the court shall impose sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

(5)-(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

~~(6)~~ (5) **AGGRAVATING FACTORS CIRCUMSTANCES.**—Aggravating factors circumstances shall be limited to the following:

- (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- (l) The victim of the capital felony was a person less than 12 years of age.
- (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
- (n) The capital felony was committed by a criminal gang member, as defined in s. [874.03](#).
- (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. [775.21](#) or a person previously designated as a sexual predator who had the sexual predator designation removed.
- (p) The capital felony was committed by a person subject to an injunction issued pursuant to s. [741.30](#) or s. [784.046](#), or a foreign protection order accorded full faith and credit pursuant to s. [741.315](#), and was

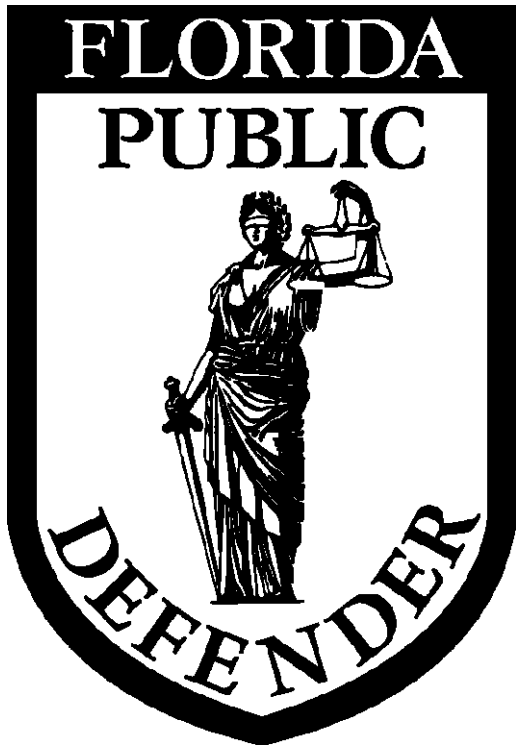
committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

~~(7) (6)~~ MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant at the time of the crime.
- (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

~~(8) (7)~~—VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating ~~factors circumstances~~ as described in subsection ~~(6) (5)~~, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

~~(9) (8)~~—APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. [893.135](#).



## **Florida Public Defender Association**

**Legislative Response to *Hurst v. Florida***



***Hurst* cannot be viewed in  
ISOLATION**

***Hurst* must be viewed in  
CONTEXT**



# ***Hurst* Must Be Viewed In Context With Court Trends**

**6<sup>th</sup> Amendment – Strict Constructionists**  
**Justice Scalia**  
**Justice Thomas**


**8<sup>th</sup> Amendment – “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”**

*Trop v. Dulles*, 356 U.S. 86, 101 (1958)




# ***Hurst* Must Be Viewed In Context With 6<sup>th</sup> Amendment Guarantees**

**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; which such district shall have been previously ascertained by law,**
  - ? **and to be informed of the nature and cause of the accusation;**
  - ✓ **to be confronted with the witnesses against him;**
  - ✓ **to have compulsory process for obtaining witnesses in his favor,**
  - ✓ **and to have the assistance of counsel for his defense.**
- 

# ***Hurst* Must Be Viewed In Context With 6<sup>th</sup> Amendment Cases**


- ***Hurst* (2016) applies *Ring* to Florida**  
“The analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s.”
  - ***Ring* (2002) applied *Apprendi* to capital cases**
  - ***Apprendi* (2000) applied *Jones* to state court cases**
  - ***Jones v. United States* (1999)**  
“under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”
- 

# ***Hurst* Must Be Viewed In Context With 8<sup>th</sup> Amendment Cases**

***Glossip v. Gross*, 135 S.Ct. 1885 (2015)  
(two justices in dissenting opinion)**

**“But rather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”**

**“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.”**



# Fundamental Constitutional Defects

## **(1) Serious Unreliability**

- ❑ **Florida leads the nation in the number of death sentenced inmates whose convictions have been vacated due to legal or factual errors**

## **(2) Arbitrariness in Application**

- ❑ **Florida has no uniform statewide standards to determine when local prosecutors may seek the death penalty**

## **(3) Unconscionably Long Delays**

- ❑ **The average length of time between imposition of sentence and execution significantly exceeds 20 years**

***Hurst* Must Be Viewed In Context  
With *Furman v. Georgia*  
and *Gregg v. Georgia***

**1) Arbitrary Application**

**unbridled discretion leads to arbitrary and capricious results**

**2) Excessive Application**

**narrowing the class of death-eligible defendants**



# **Narrowing the Class of Death Eligible Defendants**

**1) Class of 1<sup>st</sup> degree murder eligible for the death penalty**

**a) premeditated murder**

**b) felony murder**

**2) Aggravating circumstance (element)**

**Everyone convicted of felony murder is death eligible**

**Not Everyone convicted of premeditated murder is death eligible**





## FLORIDA PUBLIC DEFENDER ASSOCIATION *HURST* OVERVIEW

1. *Hurst* cannot be considered in isolation.
  - *Hurst* applies *Ring* to Florida  
“The analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s.”
  - *Ring* applied *Apprendi* to capital cases
  - *Apprendi* applied *Jones* ruling in federal cases to the *states*
  - *Jones* held, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be **charged** in an indictment, **submitted** to a jury, and **proven** beyond a reasonable doubt
  
2. The impact of *Hurst* is far reaching.
  - “Extending *Ring* so as to render Florida’s capital sentencing statute unconstitutional as applied to either King or Bottoson would have a **catastrophic** effect on the administration of justice in Florida and would seriously undermine our citizens’ faith in Florida’s judicial system.” *King v. Moore*, 831 So.2d 143 (Fla. 2002), Justice Wells concurring specially (King and Bottoson were two death sentenced inmates whose executions were temporarily stayed while the US Supreme Court considered *Ring*. After *Ring* was decided, the Florida Supreme Court declined to extend the stays and both were executed. *Hurst* holds that *Ring* does extend to Florida.)
    - ❖ Our citizens’ faith in Florida’s judicial system **is** seriously undermined because our courts wrongly failed to apply *Ring* to Florida cases before Amos King and Linroy Bottoson were executed.
  - Former Justice Wells prophetically explained the extent of what will be *Hurst*’s impact:
    - ❖ “If Florida’s capital sentencing statute is held unconstitutional based upon a change in the law applicable to these cases, all of the individuals on Florida’s death row will have a new basis for challenging the validity of their sentences on issues which have previously been examined and ruled upon. These challenged could possible result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings.”
  - Finally, former Justice Wells addressed the human tragedy *Hurst* will cause:
    - ❖ Importantly, all of those involved in these human tragedies will have to relive horrid experiences in order to reestablish the factual bases of these cases, many which are undeniably heinous.

3. The U.S. Supreme Court's interest in death penalty issues extends far beyond the holding of *Hurst*.
- In *Glossip v. Gross*, 135 S.Ct. 1885 (2015), the Court's consideration of the method of execution extended to the use of a particular drug.
    - ❖ Two Justices, Breyer joined by Ginsburg, proposed a more comprehensive review:
      - "But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."
      - "Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.
        - Florida leads the nation in the number of death-sentenced inmates whose convictions have been vacated due to legal or factual errors
        - Florida has no uniform statewide standards to determine when local prosecutors may seek the death penalty
        - The average length of time between imposition of sentence and execution significantly exceeds 20 years

A rush to reach a limited resolution without considering the serious underlying challenges to Florida's death penalty law serves no one's best interests. It guarantees only that the families and friends of deceased victims will continue to suffer the anguish that follows not just the loss of their loved one but also from the lack of a final resolution of the case. It guarantees that our state's limited financial resources will be diverted from police and fire protection, from emergency medical services, from education, and from critical safety net social services for the mentally ill to protracted litigation costs

**782.04 Murder.—**

(1)(a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, and

1. The victim of the killing was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the killing was related, in whole or in part, to the victim's official capacity,

2. The victim of the killing was a law enforcement officer engaged in the performance of his or her official duties,

3. The killing was committed by a person previously convicted of a capital felony or an offense punishable by life imprisonment and while the defendant was under sentence of death or life imprisonment,

4. The victim of the killing was a child under the age of 12 and the killing was committed while the defendant was engaged in the commission of, or an attempt to commit, and sexual battery or aggravated child abuse, or

5. The defendant knowingly caused the death of many persons.

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

~~(1)~~(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

- a. Trafficking offense prohibited by s. 893.135(1),
- b. Arson,
- c. Sexual battery,
- d. Robbery,
- e. Burglary,
- f. Kidnapping,
- g. Escape,
- h. Aggravated child abuse,
- i. Aggravated abuse of an elderly person or disabled adult,
- j. Aircraft piracy,
- k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
- l. Carjacking,
- m. Home-invasion robbery,
- n. Aggravated stalking,
- o. Murder of another human being,
- p. Resisting an officer with violence to his or her person,
- q. Aggravated fleeing or eluding with serious bodily injury or death,
- r. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

## Submitted by the Florida Public Defender Association

is murder in the first degree and constitutes a ~~capital life~~ felony, punishable as provided in s. 775.082.

~~(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.~~

(23) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(34) When a human being is killed during the perpetration of, or during the attempt to perpetrate, any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aggravated abuse of an elderly person or disabled adult,
- (j) Aircraft piracy,
- (k) Unlawful throwing, placing, or discharging of a destructive device or bomb,
- (l) Carjacking,
- (m) Home-invasion robbery,
- (n) Aggravated stalking,
- (o) Murder of another human being,
- (p) Aggravated fleeing or eluding with serious bodily injury or death,
- (q) Resisting an officer with violence to his or her person, or
- (r) Felony that is an act of terrorism or is in furtherance of an act of terrorism,

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony commits murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(45) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

- (a) Trafficking offense prohibited by s. 893.135(1),
- (b) Arson,
- (c) Sexual battery,
- (d) Robbery,
- (e) Burglary,
- (f) Kidnapping,
- (g) Escape,
- (h) Aggravated child abuse,
- (i) Aggravated abuse of an elderly person or disabled adult,
- (j) Aircraft piracy,

## Submitted by the Florida Public Defender Association

- (k) Unlawful throwing, placing, or discharging of a destructive device or bomb,
- (l) Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
- (m) Carjacking,
- (n) Home-invasion robbery,
- (o) Aggravated stalking,
- (p) Murder of another human being,
- (q) Aggravated fleeing or eluding with serious bodily injury or death,
- (r) Resisting an officer with violence to his or her person, or
- (s) Felony that is an act of terrorism or is in furtherance of an act of terrorism,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(~~56~~) As used in this section, the term “terrorism” means an activity that:

- (a)1. Involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or
- 2. Involves a violation of s. 815.06; and
- (b) Is intended to:
  - 1. Intimidate, injure, or coerce a civilian population;
  - 2. Influence the policy of a government by intimidation or coercion; or
  - 3. Affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.

### **893.135 Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.—**

(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 25 pounds of cannabis, or 300 or more cannabis plants, commits a felony of the first degree, which felony shall be known as “trafficking in cannabis,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity of cannabis involved:

- 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but not more than 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$25,000.
- 2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but not more than 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$50,000.
- 3. Is 10,000 pounds or more, or is 10,000 or more cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$200,000.

For the purpose of this paragraph, a plant, including, but not limited to, a seedling or cutting, is a “cannabis plant” if it has some readily observable evidence of root formation, such as root hairs. To determine if a piece or part of a cannabis plant severed from the cannabis plant is itself a cannabis plant,

the severed piece or part must have some readily observable evidence of root formation, such as root hairs. Callous tissue is not readily observable evidence of root formation. The viability and sex of a plant and the fact that the plant may or may not be a dead harvested plant are not relevant in determining if the plant is a “cannabis plant” or in the charging of an offense under this paragraph. Upon conviction, the court shall impose the longest term of imprisonment provided for in this paragraph.

(b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as “trafficking in cocaine,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
  - b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
  - c. Is 400 grams or more, but less than 150 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.
2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 150 kilograms or more of cocaine, as described in s. 893.03(2)(a)4., commits the first degree felony of trafficking in cocaine. A person who has been convicted of the first degree felony of trafficking in cocaine under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:
- a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or
  - b. The person’s conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the ~~capital life~~ felony of trafficking in cocaine, punishable as provided in ss. 775.082 ~~and 921.142~~. Any person sentenced for a ~~capital life~~ felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

3. Any person who knowingly brings into this state 300 kilograms or more of cocaine, as described in s. 893.03(2)(a)4., and who knows that the probable result of such importation would be the death of any person, commits ~~capital the offense of~~ importation of cocaine, a ~~capital life~~ felony punishable as provided in ss. 775.082 ~~and 921.142~~. Any person sentenced for a ~~capital life~~ felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(c)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as “trafficking in illegal drugs,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of \$50,000.
- b. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of \$100,000.
- c. Is 28 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of \$500,000.

## Submitted by the Florida Public Defender Association

2. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of hydrocodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 14 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as “trafficking in hydrocodone,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of \$50,000.
- b. Is 28 grams or more, but less than 50 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of \$100,000.
- c. Is 50 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of \$500,000.
- d. Is 200 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of \$750,000.

3. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 7 grams or more of oxycodone, or any salt, derivative, isomer, or salt of an isomer thereof, or 7 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as “trafficking in oxycodone,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 7 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of \$50,000.
- b. Is 14 grams or more, but less than 25 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of \$100,000.
- c. Is 25 grams or more, but less than 100 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of \$500,000.
- d. Is 100 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of \$750,000.

4. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 30 kilograms or more of any mixture containing any such substance, commits the first degree felony of trafficking in illegal drugs. A person who has been convicted of the first degree felony of trafficking in illegal drugs under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. ~~However, if the court determines that, in addition to committing any act specified in this paragraph:~~

- ~~a.—The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or~~
- ~~b.—The person’s conduct in committing that act led to a natural, though not inevitable, lethal result;~~

~~such person commits the capital felony of trafficking in illegal drugs, punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.~~

5. A person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of a person, commits capital the offense of importation of illegal drugs, a capital life felony punishable as provided in ss. 775.082 and 921.142. A person sentenced for a capital life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

## Submitted by the Florida Public Defender Association

(d)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), commits a felony of the first degree, which felony shall be known as “trafficking in phencyclidine,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
- b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
- c. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly brings into this state 800 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), and who knows that the probable result of such importation would be the death of any person commits ~~capital~~ the offense of importation of phencyclidine, a ~~capital~~ felony punishable as provided in ss. 775.082 and ~~921.142~~. Any person sentenced for a ~~capital~~ life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(e)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), commits a felony of the first degree, which felony shall be known as “trafficking in methaqualone,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
- b. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
- c. Is 25 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly brings into this state 50 kilograms or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), and who knows that the probable result of such importation would be the death of any person commits capital importation of methaqualone, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(f)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as “trafficking in amphetamine,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
- b. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
- c. Is 200 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or



of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment used in the manufacture of amphetamine or methamphetamine, and who knows that the probable result of such manufacture or importation would be the death of any person commits ~~capital manufacture or importation of amphetamine~~; a capital life felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(g)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits a felony of the first degree, which felony shall be known as “trafficking in flunitrazepam,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 4 grams or more but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 14 grams or more but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 28 grams or more but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of \$500,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits the first degree felony of trafficking in flunitrazepam. A person who has been convicted of the first degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. ~~However, if the court determines that, in addition to committing any act specified in this paragraph:~~

~~a.—The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or~~

~~b.—The person’s conduct in committing that act led to a natural, though not inevitable, lethal result;~~

~~such person commits the capital felony of trafficking in flunitrazepam, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.~~

(h)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture containing gamma-hydroxybutyric acid (GHB), commits a felony of the first degree, which felony shall be known as “trafficking in gamma-hydroxybutyric acid (GHB),” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 5 kilograms or more but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03(1)(d), or any mixture containing gamma-hydroxybutyric acid (GHB), and who knows that the probable result of such manufacture or importation

## Submitted by the Florida Public Defender Association

would be the death of any person commits ~~capital~~ the offense of manufacture or importation of gamma-hydroxybutyric acid (GHB), a ~~capital~~ life felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a ~~capital~~ life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(i)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of gamma-butyrolactone (GBL), as described in s. 893.03(1)(d), or any mixture containing gamma-butyrolactone (GBL), commits a felony of the first degree, which felony shall be known as “trafficking in gamma-butyrolactone (GBL),” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 5 kilograms or more but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly manufactures or brings into the state 150 kilograms or more of gamma-butyrolactone (GBL), as described in s. 893.03(1)(d), or any mixture containing gamma-butyrolactone (GBL), and who knows that the probable result of such manufacture or importation would be the death of any person commits ~~capital~~ the offense of manufacture or importation of gamma-butyrolactone (GBL), a ~~capital~~ life felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a ~~capital~~ life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(j)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of 1,4-Butanediol as described in s. 893.03(1)(d), or of any mixture containing 1,4-Butanediol, commits a felony of the first degree, which felony shall be known as “trafficking in 1,4-Butanediol,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 5 kilograms or more, but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$500,000.

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of 1,4-Butanediol as described in s. 893.03(1)(d), or any mixture containing 1,4-Butanediol, and who knows that the probable result of such manufacture or importation would be the death of any person commits ~~capital~~ the offense of manufacture or importation of 1,4-Butanediol, a ~~capital~~ life felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a ~~capital~~ life felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(k)1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 10 grams or more of any of the following substances described in s. 893.03(1)(c):

- a. 3,4-Methylenedioxymethamphetamine (MDMA);
- b. 4-Bromo-2,5-dimethoxyamphetamine;
- c. 4-Bromo-2,5-dimethoxyphenethylamine;
- d. 2,5-Dimethoxyamphetamine;

Submitted by the Florida Public Defender Association

- e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);
- f. N-ethylamphetamine;
- g. N-Hydroxy-3,4-methylenedioxyamphetamine;
- h. 5-Methoxy-3,4-methylenedioxyamphetamine;
- i. 4-methoxyamphetamine;
- j. 4-methoxymethamphetamine;
- k. 4-Methyl-2,5-dimethoxyamphetamine;
- l. 3,4-Methylenedioxy-N-ethylamphetamine;
- m. 3,4-Methylenedioxyamphetamine;
- n. N,N-dimethylamphetamine;
- o. 3,4,5-Trimethoxyamphetamine;
- p. 3,4-Methylenedioxymethcathinone;
- q. 3,4-Methylenedioxypyrovalerone (MDPV); or
- r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., commits a felony of the first degree, which felony shall be known as “trafficking in Phenethylamines,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. If the quantity involved:

- a. Is 10 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of \$50,000.
- b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of \$100,000.
- c. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of \$250,000.

3. A person who knowingly manufactures or brings into this state 30 kilograms or more of any of the following substances described in s. 893.03(1)(c):

- a. 3,4-Methylenedioxymethamphetamine (MDMA);
- b. 4-Bromo-2,5-dimethoxyamphetamine;
- c. 4-Bromo-2,5-dimethoxyphenethylamine;
- d. 2,5-Dimethoxyamphetamine;
- e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);
- f. N-ethylamphetamine;
- g. N-Hydroxy-3,4-methylenedioxyamphetamine;
- h. 5-Methoxy-3,4-methylenedioxyamphetamine;
- i. 4-methoxyamphetamine;
- j. 4-methoxymethamphetamine;
- k. 4-Methyl-2,5-dimethoxyamphetamine;
- l. 3,4-Methylenedioxy-N-ethylamphetamine;
- m. 3,4-Methylenedioxyamphetamine;
- n. N,N-dimethylamphetamine;
- o. 3,4,5-Trimethoxyamphetamine;
- p. 3,4-Methylenedioxymethcathinone;
- q. 3,4-Methylenedioxypyrovalerone (MDPV); or
- r. Methylmethcathinone,

individually or analogs thereto or isomers thereto or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-r., and who knows that the probable result of such manufacture or importation would be the death of any person commits ~~capital~~ the offense of manufacture or importation of Phenethylamines, a ~~capital~~ life felony punishable as provided in ss. 775.082 ~~and~~

~~921.142~~. A person sentenced for a ~~capital life~~ felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(1)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 gram or more of lysergic acid diethylamide (LSD) as described in s. 893.03(1)(c), or of any mixture containing lysergic acid diethylamide (LSD), commits a felony of the first degree, which felony shall be known as “trafficking in lysergic acid diethylamide (LSD),” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 gram or more, but less than 5 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 5 grams or more, but less than 7 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 7 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$500,000.

2. Any person who knowingly manufactures or brings into this state 7 grams or more of lysergic acid diethylamide (LSD) as described in s. 893.03(1)(c), or any mixture containing lysergic acid diethylamide (LSD), and who knows that the probable result of such manufacture or importation would be the death of any person commits ~~capital the offense of~~ manufacture or importation of lysergic acid diethylamide (LSD), a ~~capital life~~ felony punishable as provided in ss. 775.082 ~~and 921.142~~. Any person sentenced for a ~~capital life~~ felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(2) A person acts knowingly under subsection (1) if that person intends to sell, purchase, manufacture, deliver, or bring into this state, or to actually or constructively possess, any of the controlled substances listed in subsection (1), regardless of which controlled substance listed in subsection (1) is in fact sold, purchased, manufactured, delivered, or brought into this state, or actually or constructively possessed.

(3) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section. A person sentenced to a mandatory minimum term of imprisonment under this section is not eligible for any form of discretionary early release, except pardon or executive clemency or conditional medical release under s. 947.149, prior to serving the mandatory minimum term of imprisonment.

(4) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of that person’s accomplices, accessories, coconspirators, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

(5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) commits a felony of the first degree and is punishable as if he or she had actually committed such prohibited act. Nothing in this subsection shall be construed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection (1).

(6) A mixture, as defined in s. 893.02, containing any controlled substance described in this section includes, but is not limited to, a solution or a dosage unit, including but not limited to, a pill or tablet, containing a controlled substance. For the purpose of clarifying legislative intent regarding the weighing of a mixture containing a controlled substance described in this section, the weight of the controlled substance is the total weight of the mixture, including the controlled substance and any other

substance in the mixture. If there is more than one mixture containing the same controlled substance, the weight of the controlled substance is calculated by aggregating the total weight of each mixture.

(7) For the purpose of further clarifying legislative intent, the Legislature finds that the opinion in *Hayes v. State*, 750 So. 2d 1 (Fla. 1999) does not correctly construe legislative intent. The Legislature finds that the opinions in *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996) correctly construe legislative intent.

**921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—**

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony for which the Attorney General has authorized the prosecuting authority to seek a sentence of death, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections ~~(56)~~ and ~~(67)~~. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) ~~ADVISORY SENTENCE VERDICT~~ BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render ~~an advisory sentence to the court~~ verdict, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection ~~(56)~~;
- (b) Whether ~~sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist~~ the aggravating circumstances found to exist are sufficient to outweigh the mitigating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Effective for sentencing proceedings commencing on or after July 1, 2016, a verdict of death must be based on a unanimous vote by the jury. The verdict of the jury must be in writing, and a verdict of death must certify the vote for death was unanimous. The court shall instruct the jury that, in order for the jury to return a verdict of death the jury must first find that sufficient aggravating circumstances exist which outweigh the mitigating circumstances found to exist. The court shall further instruct the jury that each aggravating circumstance used to support the jury's verdict of death must be proven beyond a reasonable doubt as found by a unanimous vote. The court shall provide a special verdict form that specifies which, if any, aggravating circumstances were found to exist and certifies that the vote for each aggravating circumstance found was unanimous.

(3) MOTION FOR SENTENCE OF LIFE. — If, at the close of the evidence for the state or at the close of all the evidence or within 10 days after the reception of the verdict of the jury, the court finds that the evidence is legally insufficient to support a sentence of death, it may on its own motion, and on the motion of the prosecuting attorney or the defendant shall, enter a sentence of imprisonment for life and every person sentenced in accordance with this subsection shall be ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under section 947.149.

(34) 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 ~~itsthe~~ findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (56), and
- (b) That ~~there are insufficient mitigating circumstances to outweigh the aggravating circumstances~~ the aggravating circumstances found to exist are sufficient to outweigh the mitigating circumstances found to exist.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (56) and (67) and upon the records of the trial and the sentencing proceedings, except that the court's consideration and finding of any fact based upon the circumstances in subsection (6) shall be limited to those unanimously found to exist by the jury. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(45) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(56) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

## Submitted by the Florida Public Defender Association

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

~~(6)~~ **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

~~(7)~~ **VICTIM IMPACT EVIDENCE.**—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection ~~(5)~~, the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

~~(8)~~ **APPLICABILITY.**—~~This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.~~

**~~921.142—Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—~~**

~~(1)—FINDINGS.— The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life.~~

~~(2)—SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.— Upon conviction or adjudication of guilt of a defendant of a capital felony under s. 893.135, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.~~

~~(3)—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 (6);~~

~~(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.~~

~~(4)—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 (6), and~~

~~(b)—That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.~~

~~In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082, and that person shall be ineligible for parole.~~

~~(5)—REVIEW OF JUDGMENT AND SENTENCE.— The judgment of conviction and sentence of death shall be subject to automatic review and disposition rendered by the Supreme Court of Florida~~



~~within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.~~

~~(6) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:~~

~~(a) The capital felony was committed by a person under a sentence of imprisonment.~~

~~(b) The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least 1 year of imprisonment.~~

~~(c) The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.~~

~~(d) The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.~~

~~(e) The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.~~

~~(f) The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.~~

~~(g) The defendant:~~

~~1. Intentionally killed the victim;~~

~~2. Intentionally inflicted serious bodily injury which resulted in the death of the victim; or~~

~~3. Intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.~~

~~(h) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.~~

~~(i) The defendant committed the offense after planning and premeditation.~~

~~(j) The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.~~

~~(7) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall include the following:~~

~~(a) The defendant has no significant history of prior criminal activity.~~

~~(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.~~

~~(c) The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.~~

~~(d) The defendant was under extreme duress or under the substantial domination of another person.~~

~~(e) The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.~~

~~(f) The age of the defendant at the time of the offense.~~

~~(g) The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.~~

~~(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.~~

~~(8) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.~~

Submitted by the Florida Public Defender Association

FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FIU COLLEGE OF LAW  
Submission for the Death-Penalty Workshop

The Supreme Court's decision in *Hurst v Florida* has resulted in great confusion and many disparate opinions as to both its meaning and the changes in Florida law that it requires. The questions posed by this Committee only underscore this confusion and uncertainty, and we expect that there will be no consensus on the answers to these questions.

A critical question raised is whether *Hurst* requires a unanimous jury verdict. Since the word "unanimity" is not contained in the opinion, the issue of unanimity no doubt will be subject to dispute, as well as certain litigation if it is not required by any new legislation..

State attorneys propose a narrow legislative change, still clinging to a less-than-unanimous advisory verdict. But this proposed change ignores fundamental issues that are still outstanding as a result of *Hurst* and will only lead to further court proceedings and countless delays, with their attendant costs.

The prosecutors' 9-3 proposal will permit the life-and-death decision by capital juries to remain uniquely out of line with every other jury decision in Florida. Indeed, in misdemeanor prosecutions, in contract or property disputes, a unanimous jury is always required in Florida. Why not in the decision to impose a death sentence?

There is proposed legislation that would fix the problems raised by *Hurst* as well as promote the reliability in the death decision that we require in the civil and misdemeanor contexts. HB157/SB 330 would require jury unanimity on the finding of aggravating factors and also require jury unanimity as a prerequisite to any sentence of death. Nearly every other state that still has the death penalty as a possible punishment has legislation to this effect. Is it a coincidence that Florida is the state with the highest number of death-row exonerations in the country?

As far back as 2005, in *State v. Steele*, the Florida Supreme Court asked the Legislature to consider requiring unanimity. But the Legislature did not act, evidently out of concern that litigation would follow any change made to Florida's death penalty law. Given that *Hurst* has now created the chaos and litigation that the Legislature sought to avoid, this is a fitting time to revisit the statute and adopt the more reliable and just scheme for dispensing a death sentence, as set forth in HB157/SB 330.

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/27/16

Meeting Date

✓  
workshop  
Bill Number (if applicable)

Topic Death Penalty Workshop

Amendment Barcode (if applicable)

Name Robert Dunham

Job Title Executive Director, Death Penalty Information Center

Address 1015 18th St., NW, Suite 704

Phone (202) 289-2275

Street

Washington  
City

DC  
State

20036  
Zip

Email rdunham@deathpenaltyinfo.org

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing Death Penalty Information Center

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-27-16

Meeting Date



SB330

Bill Number (if applicable)

Topic Death Penalty

Amendment Barcode (if applicable)

Name D. H. Eaton, Jr

Job Title Circuit Judge 18<sup>th</sup> Cir (Retired)

Address 708 S. Oak Ave

Phone 407-314-4708

Street

Sanford FL 32771

Email oh Eaton Jr@live.com

City

State

Zip

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing appearance by request of the Committee

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

✓

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1.27.16  
Meeting Date

\_\_\_\_\_  
Bill Number (if applicable)

Topic DEATH PENALTY WORKSHOP

\_\_\_\_\_  
Amendment Barcode (if applicable)

Name REX DIMMIG

Job Title PUBLIC DEFENDER

Address 255 N. BROADWAY  
Street

Phone 863 534-4250

BARTON  
City

FL  
State

33813  
Zip

Email rdimmig@pd10.org

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing FLORIDA PUBLIC DEFENDER ASSOCIATION

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

**This form is part of the public record for this meeting.**

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Meeting Date

Bill Number (if applicable)

Topic DEATH PENALTY WORKSHOPS

Amendment Barcode (if applicable)

Name NEAL DUPREE

Job Title CCRC-SOUTH

Address 1 E. BROWARD BLVD SUITE 444

Phone (954) 713-1284

Street

FORT LAUD.

City

FLA

State

33301

Zip

Email DUPREE@CCSR.STATE.FL.US

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing CCRC'S

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/27/16  
Meeting Date

N/A  
Bill Number (if applicable)

Topic Death Penalty

Amendment Barcode (if applicable)

Name Brad King

Job Title State Attorney, 5<sup>th</sup> Circuit

Address 110 NW 1<sup>ST</sup> AVE, Suite 5000  
Street

Phone 352-671-5914

Ocala FL 34475  
City State Zip

Email bking@sao5.org

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing Florida Prosecuting Attorney's Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

**This form is part of the public record for this meeting.**



THE FLORIDA SENATE  
**APPEARANCE RECORD**



(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/27/16  
Meeting Date

\_\_\_\_\_  
Bill Number (if applicable)

Topic Death Penalty Reform

\_\_\_\_\_  
Amendment Barcode (if applicable)

Name Michael Ufferman

Job Title President - Fla. Assn. of Criminal Defense Lawyers

Address 2022-1 Raymond Diehl Rd  
Street

Phone 850 386 2345

Tallahassee FL 32308  
City State Zip

Email ufferman@uffermanlaw.com

Speaking:  For  Against  Information.

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing Fla. Assoc. Crim. Defense Lawyers

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

**This form is part of the public record for this meeting.**

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)



1/27/16

Meeting Date

Bill Number (if applicable)

Topic Death Penalty Issues

Amendment Barcode (if applicable)

Name Marty McDonnell

Job Title Secretary, Executive Council of Criminal Law Section, Florida Bar

Address 119 S. Monroe St Ste 202

Phone (850) 681-6788

City

State

Zip

Email

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing Florida Bar Criminal Law Section

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

**This form is part of the public record for this meeting.**

THE FLORIDA SENATE  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/27/2016  
Meeting Date

\_\_\_\_\_  
Bill Number (if applicable)

Topic HURST

\_\_\_\_\_  
Amendment Barcode (if applicable)

Name MARK SCHLAKMAN

Job Title FSU Center for the Advancement of

Human Rights

Address 424 W. Jefferson St

Phone \_\_\_\_\_

Street

Tallahassee FL 32301

City

State

Zip

Email mschlakman@fsu.edu

Speaking:  For  Against  Information

Waive Speaking:  In Support  Against  
(The Chair will read this information into the record.)

Representing FSU Center for the Advancement of Human Rights

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

# CourtSmart Tag Report

Room: KN 412

Case No.:

Type:

Caption: Senate Criminal Justice Committee

Judge:

Started: 1/27/2016 3:33:49 PM

Ends: 1/27/2016 5:52:28 PM

Length: 02:18:40

**3:33:48 PM** Meeting called to Order - Roll Call  
**3:37:12 PM** Connie Cellon explains the current law when the State is seeking the death penalty and the Hurst decision  
**3:38:20 PM** Senator Bradley asks a question to Connie  
**3:39:44 PM** Connie responds to question.  
**3:45:19 PM** TAB 3 Recognize Rob Dunham, representing the Death Penalty Information Center  
**3:53:16 PM** Senator Bradley asks a question of Mr. Dunham about a statute.  
**3:53:47 PM** Mr. Dunham addresses the question.  
**4:14:12 PM** Tab 3 Recognize Retired Judge O.H. Eaton, Circuit Judge 18th Circuit  
**4:27:39 PM** Senator Clemens asks Judge Eaton a question  
**4:28:10 PM** Judge Eaton responds.  
**4:32:27 PM** Senator Brandes asks about resentencing.  
**4:32:44 PM** Judge Eaton responds.  
**4:36:43 PM** Tab 3 Recognize Rex Demmig, representing the Florida Public Defender Association  
**4:42:32 PM** Senator Brandes asks a question about aggravating factor  
**4:42:59 PM** Mr. Demmig responds to the question.  
**4:49:02 PM** Tab 3 Recognize Brad King, representing the Florida Prosecuting Attorneys Association  
**4:54:51 PM** Senator Gibson asks a question about choosing jurors.  
**4:55:15 PM** Mr. King responds to question.  
**4:56:34 PM** Senator Brandes also ask a question about jurors.  
**4:57:02 PM** Mr. King responds to the question.  
**5:04:21 PM** Tab 3 Recognize Neal Dupree, representing the Capital Collateral Regional Counsel  
**5:11:52 PM** Tab 3 Recognize Allen Winsor, representing Office of the Attorney General  
**5:12:57 PM** Senator Joyner asks a question. Mr. Winsor responds.  
**5:15:14 PM** Tab 3 Recognize Michael Ufferman, representing the Florida Association of Criminal Defense Lawyers  
**5:18:17 PM** Senator Brandes asks about aggravating factors  
**5:18:47 PM** Mr. Ufferman responded.  
**5:23:38 PM** Recognize Marty McDonnell, representing the Criminal Law Section of the Florida Bar  
**5:25:27 PM** Mark Schlakman, FSU Center for Advancement of Human Rights  
**5:32:04 PM** Senator Brandes ask Mr. King about reducing number of aggravating circumstances.  
**5:32:55 PM** Mr. King responds to Senator Brandes question.  
**5:38:31 PM** Senator Clemens aska question to Mr. King about Fix for Constitution Issues  
**5:39:17 PM** Mr. King reponds to Senator Clemens question.  
**5:41:46 PM** Senator Gibson asks Judge Eaton about what is the difference aggravators is to jury.  
**5:42:44 PM** Judge Eaton responds to question.  
**5:44:12 PM** Mr. King answers question from Senator Gibson about difference aggravators is to jury.  
**5:48:49 PM** Senator Evers makes a statement about the workshop.  
**5:52:18 PM** Meeting adjourned