Criminal Justice Subcommittee

Wednesday, January 11, 2017
9:00 AM – 11:00 AM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Ross Spano
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time:	Wednesday, January 11, 2017 09:00 am
End Date and Time:	Wednesday, January 11, 2017 11:00 am
Location:	Sumner Hall (404 HOB)
Duration:	2.00 hrs

Presentation and discussion of recent legal developments regarding sentencing in death penalty cases

Discussion of the Statewide Criminal Analysis Laboratory System

Update on sexual offense evidence kit testing

NOTICE FINALIZED on 01/04/2017 3:47PM by Gilliam.Ann

Death Penalty
Sentencing Process

Hurst v. Florida
U.S. Supreme 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.

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

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-

mendation. §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.

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

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

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-

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-

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).

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.

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.

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.

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*

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-

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

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.

Hurst v. State
Florida Supreme Court

Supreme Court of Florida

No. SC12-1947

TIMOTHY LEE HURST,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[October 14, 2016]

PER CURIAM.

This case comes before the Court on remand from the decision of the United States Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016) (Hurst v. Florida), following its certiorari review and reversal of our decision in Hurst v. State, 147 So. 3d 435 (Fla. 2014) (Hurst v. State). In that case, we affirmed Timothy Lee Hurst's death sentence, which was imposed after a second penalty phase sentencing proceeding. We held there, consistent with longstanding precedent, that Florida's capital sentencing scheme was not violative of the Sixth Amendment or the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). See Hurst v. State, 147 So. 3d at 445-46. We concluded that section 921.141, Florida Statutes (2012), the capital sentencing statute under which Hurst

was sentenced to death, was not unconstitutional for failing to require the jury to expressly find the facts on which the death sentence was imposed in this case. Id. at 446. After Hurst sought certiorari review in the United States Supreme Court, that Court granted review in Hurst v. Florida, 135 S. Ct. 1531 (2015), and agreed to entertain the following question:

> 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).

Id. at 1531.

Upon review, the Supreme Court reversed our decision in Hurst v. State and held, for the first time, that Florida's capital sentencing scheme was unconstitutional to the extent it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence—the jury's advisory recommendation for death was "not enough." Hurst v. Florida, 136 S. Ct. at 619. In so holding, the Supreme Court overruled its decisions in Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), to the extent they approved Florida's sentencing scheme in which the judge, independent of a jury's factfinding, finds the facts necessary for imposition of the death penalty. See Hurst v. Florida, 136 S. Ct. at 624. The Supreme Court's ruling in Hurst v. Florida also abrogated this Court's decisions in Tedder v. State, 322 So. 2d 908 (Fla. 1975), Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), Blackwelder v. State,

851 So. 2d 650 (Fla. 2003), and State v. Steele, 921 So. 2d 538 (Fla. 2005), precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing statute. Finally, the Supreme Court refused to take up the issue of whether the error in sentencing was harmless, but left it to this Court to consider on remand whether the error was harmless beyond a reasonable doubt. Hurst v. Florida, 136 S. Ct. at 624.

On remand, this Court accepted additional briefing and held oral argument concerning the effect of the Supreme Court's decision in Hurst v. Florida on capital sentencing in Florida, as well as on issues raised by Hurst and other issues of import to this Court. Hurst and amici curiae[1] contend first that Hurst should be granted an automatic life sentence under the provisions of section 775.082(2), Florida Statutes (2016). Failing that, Hurst contends that the constitutional error in his sentencing proceeding cannot be deemed harmless beyond a reasonable doubt and that instead a new penalty phase proceeding is required.

---

1. The Court granted leave to file amici briefs to former Florida Supreme Court Justice Harry Lee Anstead; former Florida Supreme Court Justice Gerald Kogan; former Florida Supreme Court Justice and current judge on the Iran-United States Claims Tribunal Rosemary Barkett; former president of the American Bar Association Martha Barnett; former president of the American Bar Association Talbot D'Alemberte; former president of The Florida Bar Hank Coxe; the Florida Center for Capital Representation at Florida International University College of Law; and the Florida Association of Criminal Defense Lawyers.

As we will explain, we hold that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of Hurst v. Florida and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

For the reasons we will explain, we reject Hurst's claim that section 775.082(2), Florida Statutes (2016), mandates that Hurst receive an automatic life sentence. However, we conclude that the error in Hurst's sentencing identified by the United States Supreme Court was not harmless beyond a reasonable doubt. Thus, we remand for a new penalty phase proceeding. We will address these

issues in turn after a brief review of the facts and procedural background of this case.

I. FACTS AND PROCEDURAL BACKGROUND

The background and facts of this case were reiterated in our decision in Hurst v. State in pertinent part as follows:

> Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. The victim, also an employee, had been bound and gagged and repeatedly cut and stabbed with a weapon consistent with a box cutter found at the scene. Hurst's conviction and death sentence were originally affirmed in Hurst v. State, 819 So. 2d 689 (Fla. 2002). In that decision, we set forth the facts surrounding the murder as follows:
>
> > On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.
> >
> > . . . .
> >
> > Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in

addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

. . . .

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. . . .

Another of Hurst's friends, "Lee-Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. . . .

> The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab."

Hurst v. State, 147 So. 3d at 437-38 (quoting Hurst v. State, 819 So. 2d 689, 692-94 (Fla. 2002)). Hurst was convicted of first-degree murder and the case proceeded to a penalty phase trial to determine what sentence should be imposed. After a penalty phase proceeding was conducted under the provisions of section 921.141, Florida Statutes (1998), at which evidence of aggravating factors and mitigating circumstances was presented, the jury returned an advisory verdict by a vote of eleven to one recommending that Hurst be sentenced to death. The trial court sentenced Hurst to death and this Court affirmed the first-degree murder conviction and the death sentence. Hurst v. State, 819 So. 2d at 703.

Hurst then filed his initial postconviction motion under Florida Rule of Criminal Procedure 3.851 alleging a number of claims, including that trial counsel provided ineffective assistance of counsel in investigating and presenting mitigation in the penalty phase trial. Hurst appealed the trial court's denial of postconviction relief to this Court. We affirmed denial of relief on most of the claims, but vacated the death sentence and remanded for a new penalty phase proceeding because trial counsel's performance was deficient in failing to

investigate and present available, significant mental health mitigation, resulting in prejudice. We explained:

> During the penalty phase of trial, no expert testimony of mental mitigation was presented. Defense counsel did not have Hurst examined by a mental health expert prior to the penalty phase, even though Hurst's former counsel, an assistant public defender, had filed a motion for a mental evaluation. When the court took up the motion, Hurst's trial attorney stated that he did not see any reason to have Hurst examined. Thus, the motion for mental evaluation was denied and no mental evaluation was ever done. Nor did counsel obtain and present school records of the defendant, who was just nineteen at the time of the crime. The records would have shown that Hurst had a low IQ, was in special education classes, and dropped out of school after repeating tenth grade.

Hurst v. State, 18 So. 3d 975, 1009 (Fla. 2009). We stated: "We reverse the trial court's order denying relief as to [Hurst's] penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation." Id. at 1015-16.

Thus, the case returned to the trial court for a new penalty phase trial before a jury, which occurred on March 5-9, 2012. At this proceeding, the State presented evidence concerning the murder because the new sentencing jury had not heard evidence concerning the facts and circumstances surrounding the murder. Hurst presented mitigating evidence consisting, in pertinent part, of expert testimony concerning brain damage, low IQ, and other significant mental health mitigation.

He also presented mitigating evidence concerning his childhood and poor performance in school. At the conclusion of the penalty phase evidence, the jury was instructed that it should determine if sufficient aggravating circumstances existed to justify recommending imposition of the death sentence, and whether the mitigating circumstances outweighed the aggravating factors. The jury was also instructed to provide the judge with a recommendation as to the punishment to be imposed, which the jury was told was advisory in nature and not binding, but would be given great weight.

The jury in the second penalty phase proceeding ultimately recommended a sentence of death by a vote of seven to five, and the trial court sentenced Hurst to death. In the sentencing order, the judge found as aggravating factors that the murder was committed while Hurst was engaged in the commission of a robbery, although he was not charged with robbery and the jury did not find him guilty of robbery, and the judge found that the murder was especially heinous, atrocious, or cruel. See §§ 921.141(5)(d), (h), Fla. Stat. (2012). In mitigation, the trial court found the statutory mitigating circumstances that Hurst had no significant history of prior criminal activity, that he was nineteen years old, and that he had an even younger mental age. See §§ 921.141(6)(a), (g), Fla. Stat. (2012). The trial court found other mitigating circumstances proven. It found that Hurst had "significant mental issues," including "limited mental and intellectual capacity," and

"widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome." See Hurst v. State, 147 So. 3d at 440.

Hurst again appealed to this Court and the sentence was affirmed. See id. at 449. In that appeal, citing Ring, Hurst contended that constitutional error occurred in his resentencing proceeding because the jury was not required under Florida law to find the specific aggravating factors, and that the jury's recommendation of death was not required to be unanimous.[2] See id. at 445. The majority of this Court rejected the claim based on longstanding precedent including Bottoson, 833 So. 2d 693, and King v. Moore, 831 So. 2d 143 (Fla. 2002). See Hurst v. State, 147 So. 3d at 446. We also relied on Hildwin, 490 U.S. 638, which predated Ring, in which the United States Supreme Court held that the jury was not required to make specific findings authorizing the imposition of a death sentence.[3] See Hurst v. State, 147 So. 3d at 446.

---

2. Hurst's counsel requested an interrogatory verdict, but that request was denied.

3. Recognizing this Court's reliance on the Supreme Court's "repeated support of Florida's capital sentencing scheme in pre-Ring cases," the Supreme Court in Hurst v. Florida confirmed that in Hildwin, 490 U.S. 638, it had "held that the Sixth Amendment '[did] not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " Hurst v. Florida, 136 S. Ct. at 621 (quoting Hildwin, 490 U.S. at 640-41). In Hurst v. Florida, the Supreme Court overruled its earlier decisions in Hildwin and Spaziano, which "summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the

It is from this affirmance of Hurst's death sentence, imposed after the second penalty phase proceeding, that Hurst sought and obtained certiorari review in the United States Supreme Court, and where that Court agreed that portions of Florida's capital sentencing scheme are unconstitutional. Hurst v. Florida, 136 S. Ct. at 621.

II. EFFECT OF HURST V. FLORIDA ON FLORIDA'S CAPITAL SENTENCING

The Supreme Court granted certiorari to resolve the question of whether Florida's capital sentencing scheme violates the Sixth Amendment in light of Ring, 536 U.S. 584.[4] This required the Supreme Court to determine if the holding in Ring applies to Florida's capital sentencing scheme under the dictates of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and the right to a jury trial, with all its attendant protections in capital prosecutions. Thus, it is helpful to look first at what the Supreme Court held in Ring and the cases before and after that ruling. In Ring, the Supreme Court considered Arizona's capital sentencing scheme that allowed the

---

specific findings authorizing the imposition of the sentence of death be made by a jury.' " Hurst v. Florida, 136 S. Ct. at 623 (quoting Hildwin, 490 U.S. at 640-41).

4. The question posed by the Supreme Court in granting certiorari review also included reference to the Eighth Amendment, but the Court did not decide the case on Eighth Amendment grounds.

trial judge, sitting alone, to determine the presence or absence of aggravating factors required by Arizona law for imposition of a death sentence. Id. at 588. The issue before the Court in Ring was made more difficult because the Supreme Court had earlier held in Walton v. Arizona, 497 U.S. 639 (1990), that Arizona's death penalty law "was compatible with the Sixth Amendment because the . . . facts found by the judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.' " Ring, 536 U.S. at 588 (quoting Walton, 497 U.S. at 649).

Ten years after Walton, the Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466 (2000), in which the Court held that the Sixth Amendment does not permit a defendant in a noncapital case, without additional jury findings, to be exposed to a penalty exceeding the maximum he would receive if the punishment was based only on the facts reflected in the jury's guilty verdict. Implementing this same principle in Ring—and applying it to capital defendants—the Supreme Court stated that "[t]his prescription governs . . . even if the State characterizes the additional findings made by the judge as 'sentencing factor[s].' " 536 U.S. at 589 (quoting Apprendi, 530 U.S. at 492). The Court in Ring held, "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." 536 U.S. at 589. In its analysis, the Supreme Court

debunked the contention that the maximum penalty for murder in Arizona was death. The Court explained that a defendant convicted of first-degree murder cannot receive a death sentence unless, under the challenged law in that state, the judge makes critical factual findings that allow the imposition of the sentence of death. Id. at 602.

After noting that "the superiority of judicial factfinding in capital cases is far from evident," and the fact that most states responded to the Court's Eighth Amendment decisions by entrusting the factfinding necessary for imposition of the death penalty to juries, the Supreme Court in Ring stated: "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." 536 U.S. at 607-09.

In concluding that the facts upon which a greater sentence may be imposed are "elements," the Court in Ring noted Justice Stevens's dissent in Walton, which Ring overruled. See id. at 599. The Court in Ring stated that in his dissent in Walton, Justice Stevens noted that in 1791, when the Sixth Amendment became law, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was "particularly well established." He wrote in part:

> "[T]he 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."

Ring, 536 U.S. at 599 (quoting Walton, 497 U.S. at 710-11 (Stevens, J., dissenting) (emphasis in opinion) (quoting Welsh S. White, Fact-Finding & the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 10-11 (1989))).

Justice Scalia, joined by Justice Thomas, commented in his concurrence in Ring that the "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict . . . cause[s] me to believe that our people's traditional belief in the right of trial by jury is in perilous decline," and

> [t]hat 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.

536 U.S. at 611-12 (Scalia, J., concurring). Justice Scalia emphasized that "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." Id. at 612 (Scalia, J., concurring).[5]

After Ring, the Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004), in which it again applied Apprendi and held that the trial judge could not impose an "exceptional sentence" above the statutory maximum after making a judicial determination that the defendant acted with deliberate cruelty in committing a noncapital offense. Blakely, 542 U.S. at 298. In applying its holding in Apprendi to Blakely, the Court stated:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the

---

5. Justice Breyer concurred in the judgment in Ring, reiterating his long-held view that the Eighth Amendment requires the jury, not the judge, to actually sentence the defendant in a capital case. Ring, 536 U.S. at 614 (Breyer, J., concurring in result). Justice O'Connor dissented and opined that facts that increase the maximum penalty should not be treated as elements. Id. at 619 (O'Connor, J., dissenting).

> Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); Jones v. United States, 526 U.S. 227, 244-248 (1999). Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305-06 (emphasis added). The Supreme Court also made clear that "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power." Id. at 308. The Court rejected the criticism that leaving the finding of all these facts to the jury impairs the efficiency or fairness of criminal justice. Id. at 313. The Court explained that "[t]here is not one shred of doubt, however, about the Framers' paradigm for criminal justice" which is the "common-law ideal of limited state power accomplished by strict division of authority between judge and jury." Id. "As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id.

Against this backdrop of decisions implementing the guarantees of the Sixth Amendment in Apprendi, Ring, and Blakely, the Supreme Court issued its opinion in Hurst v. Florida, holding that Florida's capital sentencing scheme violated the Sixth Amendment and the principles announced in Ring by committing to the judge, and not to the jury, the factfinding necessary for imposition of the death

penalty. The Supreme Court in Hurst v. Florida began its opinion with the clear dictate that "[t]he 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." 136 S. Ct. at 619. The Supreme Court made clear, as it had in Apprendi, that the Sixth Amendment, in conjunction with the Due Process clause, "requires that each element of a crime be proved to a jury beyond a reasonable doubt." Id. at 621 (citing Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013)). The Court reiterated, as it had in Apprendi, "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 [the] jury." Id. (quoting Apprendi, 530 U.S. at 494).

Before reaching its conclusion in Hurst v. Florida that Florida's capital sentencing scheme violated this guarantee of the right to a jury trial on all elements of the crime of capital murder, the Supreme Court evaluated Florida's existing capital sentencing scheme by first noting that, pursuant to section 775.082(1), Florida Statutes (2012), the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. Id. at 620. That statute made clear that a person convicted of a capital felony shall be punished by death only if a separate sentencing proceeding "results in findings by the court that such person shall be punished by death." Id. (quoting § 775.082(1), Fla. Stat. (2012)). The Supreme Court analyzed Florida's scheme as one in which a jury renders only an

advisory verdict without specifying the factual basis of its recommendation, while the judge evaluates the evidence of aggravation and mitigation and makes the ultimate sentencing determinations. Id. at 620. The Court stated, "Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. . . . 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." Id. at 619.

Thus, the Supreme Court was aware that Florida precedent, as well as the applicable capital sentencing scheme,[6] required the judge's sentencing order to "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." Id. at 620 (quoting Blackwelder, 851 So. 2d at 653). The Supreme Court also distinguished Arizona law and explained that Florida law, similar to the law invalidated in Ring, did not require the jury to make the critical findings necessary to impose death, but required the judge to make these findings—rejecting as significant the distinction that Florida provides for a jury recommendation as to sentence, whereas Arizona law does not. Id. at 622. "A Florida trial court no more has the assistance of a jury's findings of fact with

6. See § 921.141(3), Fla. Stat. (2012); § 775.082(1), Fla. Stat. (2012).

respect to sentencing issues than does a trial judge in Arizona." Id. (quoting Walton, 497 U.S. at 648). The Court explained that in Florida, the trial judge has no jury findings on which to rely. Id. (citing Steele, 921 So. 2d at 546).

A close review of Florida's sentencing statutes is necessary to identify those critical findings that underlie imposition of a death sentence, which is a matter of state law. First, section 775.082(1), Florida Statutes (2012), provided:

> (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.

§ 775.082(1), Fla. Stat., (emphasis added). Section 921.141, Florida Statutes (2012), provided in pertinent part as follows:

> (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. . . .
>
> (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(1)-(3), Fla. Stat. (2012) (emphasis added).

Pursuant to this sentencing scheme, Hurst's jury recommended death by a vote of seven to five. The trial court then sentenced Hurst to death after independently determining that the murder was especially heinous, atrocious, or cruel and that the murder was committed while Hurst was engaged in the commission of a robbery, both statutory aggravating factors. These two aggravating factors were assigned great weight by the judge. In order to impose the death sentence, the trial judge also found that the aggravators outweighed the mitigators, and set forth those findings in the sentencing order. Hurst v. Florida, 136 S. Ct. at 620.

After evaluating Florida's laws and concluding that the decision in Ring applies equally to Florida's capital sentencing scheme, the Supreme Court held:

> 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.
>
> . . . .

> 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.

Id. at 624 (emphasis added). In reaching these conclusions, the Supreme Court flatly rejected the State's contention that although "Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty," the jury's recommended sentence in Hurst's case necessarily included such findings. Id. at 622. The Court emphasized that this contention is belied by the fact that the law under which Hurst was sentenced expressly required that a person may not be sentenced to death without "findings by the court" that such person shall be so punished. Id. (quoting § 775.082(1), Fla. Stat.). The Supreme Court emphasized that under Florida law, before the sentence of death may be imposed, "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.' " Id. (quoting § 921.141(3), Fla. Stat. (2012)). The Supreme Court was explicit in Hurst v. Florida that the constitutional right to an impartial jury "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." Id. at 624.

Upon review of the decision in Hurst v. Florida, as well as the decisions in Apprendi and Ring, we conclude that the Sixth Amendment right to a trial by jury

mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in Parker v. Dugger, 498 U.S. 308 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." Id. at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.[7]

---

7. Accordingly, we reject the State's argument that Hurst v. Florida only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in Hurst v. Florida made clear that the jury must find "each fact necessary to impose a sentence of death," 136 S. Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," id. at 621, "the facts necessary to sentence a defendant to death," id., "the facts behind" the punishment, id., and "the critical findings necessary to impose the death penalty," id. at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. See § 921.141(3), Fla. Stat. (2012).

These same requirements existed in Florida law when Hurst was sentenced in 2012—although they were consigned to the trial judge to make.

We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.[8] This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven; and it gives effect to our precedent that the "final decision in the weighing process must be supported by 'sufficient competent evidence in the record.' " Ford v. State, 802 So. 2d 1121, 1134 (Fla. 2001) (quoting Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990), receded from on other grounds by Trease v.

---

8. Mitigating circumstances need only be established by a preponderance of the evidence, Diaz v. State, 132 So. 3d 93, 117 (Fla. 2013), and may include any aspect of the defendant's character or background that is proffered as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); § 921.141(6)(h), Fla. Stat. (2012).

State, 768 So. 2d 1050, 1055 (Fla. 2000)). As we explain, we also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

The right to a unanimous jury in English jurisprudence has roots reaching back centuries, as evidenced by Sir William Blackstone in his Commentaries on the Laws of England, originally published from 1765 through 1769. There he stated, "But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 W. Blackstone, Commentaries on the Laws of England, 349-50 (Rees Welsh & Co. ed. 1898).[9]

---

9. In Blakely, the Court also remarked on this history, stating:

> This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," and that "an accusation which lacks any particular fact

The right to trial by jury was brought from England to this country by those who emigrated here "as their birthright and inheritance, as part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." Duncan v. Louisiana, 391 U.S. 145, 154 & n.21 (1968) (quoting Thompson v. Utah, 170 U.S. 343, 349-50 (1898)).

In the Florida Constitution of 1838, article I, section 10, of the Declaration of Rights enshrined in Florida law the right to trial by jury in criminal cases. Article I, section 6, further guaranteed that the "right of trial by jury shall forever remain inviolate." Art. I, § 6, Fla. Const. (1838). That right now resides in article I, section 22, of the Florida Constitution, which continues to provide that "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const.

The principle that, under the common law, jury verdicts shall be unanimous was recognized by this Court very early in Florida's history in Motion to Call Circuit Judge to Bench, 8 Fla. 459, 482 (1859). In the 1885 Constitution, the right to trial by jury was given even more protection by the promise that "[t]he right of

---

> which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; . . .

Blakely, 542 U.S. at 301-02 (footnote and citation omitted).

trial by jury shall be secured to all, and remain inviolate forever." Declaration of Rights, § 3, Fla. Const. (1885). And, in 1894, this Court again recognized that in a criminal prosecution, the jury must return a unanimous verdict. Grant v. State, 14 So. 757, 758 (Fla. 1894). In 1911, this Court confirmed the unanimity requirement in Ayers v. State, 57 So. 349, 350 (Fla. 1911), stating that "[o]f course, a verdict must be concurred in by the unanimous vote of the entire jury." Almost half a century later, in Jones v. State, 92 So. 2d 261 (Fla. 1956), again acknowledging that "[i]n this state, the verdict of the jury must be unanimous," this Court held that any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution.[10] Id. at 261 (On Rehearing Granted). Thus, Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

In capital cases, Florida's early laws also indicate that jurors controlled which defendants would receive death. When Florida was still a territory, the penalty for defendants convicted of murder was death by hanging. See Acts of the Legislative Council of the Territory of Florida, An Act for the Apprehension of

---

10. The right to a unanimous jury verdict is incorporated in Florida Rule of Criminal Procedure 3.440 ("No verdict may be rendered unless all of the trial jurors concur in it."). The Florida Standard Jury Instructions for Criminal Cases also state in pertinent part, "This verdict must be unanimous, that is, all of you must agree to the same verdict." Fla. Std. Jury Instr. (Crim.) 3.12 Verdict.

Criminals, and the Punishment of Crimes and Misdemeanors, § 21 (1822). Under this type of mandatory statute, the jury's factual findings on the elements of the crime also necessarily served as the elements necessary for imposition of a sentence of death. In later holding such mandatory capital sentencing provisions unconstitutional, the Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 293 (1976), observed that since the 1700s American juries had refused to convict defendants where the automatic consequence of their conviction was death.

In 1849, the Court noted in Holton v. State, 2 Fla. 476, 478 (1849), that "the jury elected, tried and sworn in this cause came into court, and rendered the following verdict: 'That the said Thomas J. Holton is guilty of murder, in manner and form as in the indictment against him is alleged,' and concluded by recommending the prisoner to mercy." Florida law later expressly provided a mechanism by which the jury could grant mercy in a capital case and assure a life sentence, stating, "Whoever is convicted of a capital offence, and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment in the State prison for life." See A Digest of the Laws of the State of Florida, from the Year One Thousand Eight Hundred and Twenty-Two, to the Eleventh Day of March, One Thousand Eight Hundred and Eighty-One, Inclusive,

§ 19 (McClellan Compilation, 1881).[11] Thus, historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed by law.

Florida repealed its mandatory death sentencing provision in 1972 in an attempt to comply with Furman v. Georgia, 408 U.S. 238 (1972), in which arbitrary and capricious capital sentencing was found unconstitutional. The Legislature, in regular and special session, amended section 921.141, Florida Statutes (1972), to provide for consideration of aggravating and mitigating circumstances before a death sentence could be imposed.[12] "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Accordingly, the Supreme Court has made clear that individualized sentencing is required in which the discretion of the jury and the judge in imposing the death penalty will be narrowly channeled, and in which the circumstances of the offense, the character

---

11. Ch. 1877, Laws of Fla. (1872).

12. See ch. 72-72, § 1, at 241, Laws of Fla.; ch. 72-724, § 9, at 20, Laws of Fla. (special session amendments).

and record of the defendant, and any evidence of mitigation that may provide a basis for a sentence less than death must be a part of the sentencing decision. Id.; see also Roper v. Simmons, 543 U.S. 551, 568 (2005) (capital punishment must be limited to a narrow category of the most serious crimes and offenders); Lockett, 438 U.S. at 604 (a defendant may raise as mitigation any aspect of character, record, or circumstances of the offense that may be proffered as a basis for a sentence less than death).[13]

In an effort to meet these requirements for individualized sentencing that narrows the class of murders and murderers for which the death penalty is appropriate, Florida has required the jury to consider evidence of aggravating factors concerning the circumstances of the crime, as well as evidence of mitigating circumstances that a jury may find renders the death penalty inappropriate for an individual defendant in a specific case. These findings are necessary because, as the Supreme Court has explained, "Given that the imposition of death by public authority is so profoundly different from all other penalties, we

---

13. It is not necessary for our analysis to conclude that a right to individualized sentencing existed in the law at the time Florida became a state. It is sufficient for our analysis that individualized sentencing in capital cases is now the law of the land. See, e.g., Gregg, 428 U.S. at 189. It is also sufficient for our analysis that juries in Florida have always been required to be unanimous in finding the elements of the crime, which we now know encompass all the critical findings necessary for imposition of a death sentence.

cannot avoid the conclusion that an individualized decision is essential in capital cases." Lockett, 438 U.S. at 605. Since 1972, until the Supreme Court's ruling in Hurst v. Florida, it has been the Florida judge who ultimately makes his or her own determination of the existence of the aggravating factors, the evidence of mitigation, and the weight to be given each in the sentencing decision before a sentence of death could be imposed.

The Supreme Court in Hurst v. Florida has now made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury. And because these findings occupy a position on par with elements of a greater offense, we conclude that all these findings necessary for the imposition of a sentence of death must be made by the jury—as are all elements—unanimously. We are mindful that a plurality of the United States Supreme Court, in a non-capital case, decided that unanimous jury verdicts are not required in all cases under the Sixth Amendment to the United States Constitution. See Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion).[14] However, this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that

---

14. Nonetheless, unanimous juries have been required by the Supreme Court in the case of six-person state juries. See Burch v. Louisiana, 441 U.S. 130, 137-38 (1979).

mandated by the federal Constitution. This is especially true, we believe, in cases where, as here, Florida has a longstanding history requiring unanimous jury verdicts as to the elements of a crime. We recently explained:

> Unless the Florida Constitution specifies otherwise, this Court, as the ultimate arbiter of the meaning and extent of the safeguards and fundamental rights provided by the Florida Constitution, may interpret those rights as providing greater protections than those in the United States Constitution. State v. Kelly, 999 So. 2d 1029, 1042 (Fla. 2008). Put simply, the United States Constitution generally sets the "floor"—not the "ceiling"—of personal rights and freedoms that must be afforded to a defendant by Florida law. Id. As we explained in Kelly, "we have the duty to independently examine and determine questions of state law so long as we do not run afoul of federal constitutional protections or the provisions of the Florida Constitution that require us to apply federal law in state-law contexts." 999 So. 2d at 1043 (emphasis in original). Our Court reemphasized what we previously stated in Traylor: "[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." Id. at 1044 (quoting Traylor, 596 So. 2d at 962-63).

State v. Horwitz, 191 So. 3d 429, 438 (Fla. 2016) (footnote omitted).

Hurst v. Florida mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the

aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. See Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000). As the relevant jury instruction states: "Regardless of your findings . . . you are neither compelled nor required to recommend a sentence of death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. See Henyard v. State, 689 So. 2d 239, 249 (Fla. 1996) (quoting Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975)). Nor do we intend by our decision to eliminate the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.

In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the

> outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). That court further noted that "[b]oth the defendant and society can place special confidence in a unanimous verdict." Id. Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' " United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977).

Further, it has been found based on data 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. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness." See Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 Colum. L. Rev. 1425, 1428 (1984). Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement. See Scott E. Sundby, War & Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103 (2010). Unanimous-verdict

juries tend to be more evidence driven, generally delaying their first vote until the evidence has been discussed. See Kate Riordan, Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald, 101 J. Crim. L. & Criminology 1403, 1429 (2011). Further, juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating under majority rule express less confidence in the justness of their decisions. See, e.g., Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1272-73 (2000). All these principles would apply with even more gravity, and more significance, in capital sentencing proceedings. We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.

In the past, we expressed our view that unanimity in capital sentencing was necessary in Steele, 921 So. 2d 538. There, based on established precedent, we were constrained to find that the jury was not required to report its findings on an interrogatory verdict. See id. at 548. Nevertheless, we urged the Florida Legislature to take action to require at least some unanimity by the jury in capital penalty proceedings. We explained:

> 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 (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.

Id. at 549 (quoting State v. Daniels, 542 A.2d 306, 315 (Conn. 1988) (some citations omitted)); see also Coday v. State, 946 So. 2d 988, 1022 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part) (reiterating this Court's suggestion to the Legislature to revise the capital sentencing statute to require unanimity in jury findings and recommendations).

Based on the foregoing, we conclude that under the commandments of Hurst v. Florida, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.

III. THE EIGHTH AMENDMENT

In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. Although the United States Supreme Court has not ruled on whether unanimity is required in the jury's advisory verdict in capital cases, the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different.[15] This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders.[16] Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. See Gregg,

---

15. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) (finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); Gregg, 428 U.S. at 187-88 (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); Furman, 408 U.S. at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States.").

16. "As we have stated time and again, death is a unique punishment. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders." Larkins v. State, 739 So. 2d 90, 92-93 (Fla. 1999) (citations omitted).

428 U.S. at 199. The Supreme Court subsequently explained in McCleskey v. Kemp that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." McCleskey, 481 U.S. 279, 303 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

The Supreme Court has described the jury as a "significant and reliable objective index of contemporary values." Gregg, 428 U.S. at 181. Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

The "evolving standards" test considers whether punishments that were within the power of the state to impose at the time, but have since come to be viewed as unconstitutional, should be prohibited on constitutional grounds. See Montgomery v. Louisiana, 136 S. Ct. 718, 742 (2016) (describing the "evolving standards of decency" test in evaluating the retroactive application of Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012), which held that mandatory sentences of life without parole for juveniles are unconstitutional). This evolving standards test also helps to ensure that "the State's power to punish is exercised within the limits of civilized standards." Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (quoting Trop, 356 U.S. at 100). "[A] jury that must choose between life

imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

The Supreme Court in Powers v. Ohio, 499 U.S. 400 (1991), a case holding that prosecutors cannot strike jurors based on their race, quoted Alexis de Tocqueville on the significance of the jury to the direction of society, stating: "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." Powers, 499 U.S. at 407 (quoting Alexis de Tocqueville, 1 Democracy in America 334-37 (Schocken 1st ed. 1961)). This "direction of society" that is invested in the jury is also reflected in the capital sentencing laws of the majority of states that still impose the death penalty.

In failing to require a unanimous recommendation for death as a predicate for possible imposition of the ultimate penalty, Florida has been a clear outlier. Of the states that have retained the death penalty, Florida is one of only three that does not require a unanimous jury recommendation for death.[17] Additionally, federal

---

17. The Delaware Supreme Court recently declared that state's capital sentencing law unconstitutional under the Sixth Amendment because it failed to require the jury to unanimously find all the aggravating circumstances to be weighed, and because the Sixth Amendment requires the jury, not the judge, to find that the aggravating circumstances outweigh the mitigating circumstances. This latter finding was, under Delaware law, "the critical finding upon which the

law requires the jury's recommendation for death in a capital case to be unanimous. See 18 U.S.C. § 3593(e); Fed. R. Crim. P. 31(a). The Supreme Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (abrogated on other grounds in Atkins, 536 U.S. at 321)). The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances. By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law.

Moreover, Florida's capital sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions. When all jurors must agree to a recommendation of death, their collective voice will be heard and will

---

sentencing judge 'shall impose a sentence of death.' " See Rauf v. Delaware, 2016 WL 4224252, *1-*2 (Del. Aug. 2, 2016) (quoting 11 Del. C. § 4209).

inform the final recommendation. This means that the voices of minority jurors cannot simply be disregarded by the majority, and that all jurors' views on the proof and sufficiency of the aggravating factors and the relative weight of the aggravating factors to the mitigating circumstances must be equally heard and considered.

There are other pragmatic reasons why Florida's capital sentencing law must require unanimity in a jury recommendation of death before any sentence of death may be considered or imposed by the trial court. When the Supreme Court decided Hurst v. Florida and finally applied Ring to capital sentencing in Florida, it invalidated a portion of Florida's capital sentencing scheme. Since the issuance of Ring almost fifteen years ago, many death row inmates have raised Ring claims in this Court and have been repeatedly rebuffed based on pre-Ring precedent that held the jury was not required to make the critical findings necessary for imposition of the death penalty. Once the Supreme Court made clear in Hurst v. Florida that these findings are the sole province of the jury and that Ring applies to Florida's capital sentencing laws, the Florida Legislature was required to immediately attempt to craft a new sentencing law in accord with Hurst v. Florida. Florida need not face a similar crisis in the future. Requiring a unanimous jury recommendation before death may be imposed, in accord with the precepts of the Eighth Amendment and Florida's right to trial by jury, is a critical step toward

ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. This requirement will dispel most, if not all, doubts about the future validity and long-term viability of the death penalty in Florida.[18]

We also note that there is no valid basis for concern that such requirement will allow a single juror with a fixed objection to the death penalty to impede the proper conduct of the penalty phase process. Although a prospective juror who voices only general objections to the death penalty cannot be excluded from the jury on that basis, Guardado v. State, 176 So. 3d 886, 898 (Fla. 2015) (citing Witherspoon, 391 U.S. at 522), a prospective juror may be found unqualified to serve if he or she expresses an unyielding conviction and rigidity toward the death penalty. Conde v. State, 860 So. 2d 930, 939 (Fla. 2003). This Court has made clear that, although a juror's initial response to questioning about the death penalty alone will not automatically provide good cause to remove that juror, a juror's "[p]ersistent equivocation or vacillation . . . on whether he or she can set aside biases or misgivings concerning the death penalty in a capital penalty phase

---

18. As we stated earlier, even if the jurors unanimously find that sufficient aggravating factors were proven beyond a reasonable doubt, and that the aggravators outweigh the mitigating circumstances, the jurors are never required to recommend death. And, even if the jury unanimously recommends a death sentence, the trial court is never required to impose death.

supplies the reasonable doubt as to the juror's impartiality which justifies dismissal." Johnson v. State, 969 So. 2d 938, 947-48 (Fla. 2007). This is in accord with the United States Supreme Court's holding in Wainwright v. Witt, 469 U.S. 412 (1985), that a prospective juror may be excused for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 433 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

Furthermore, it is presumed that jurors will, in good faith, follow the law as it is explained to them. See Weeks v. Angelone, 528 U.S. 225, 234 (2000) (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987)). "[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Davis v. State, 121 So. 3d 462, 492 (Fla. 2013) (quoting United States v. Olano, 507 U.S. 725, 740-41 (1993) (quoting Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985))). In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law. Thus, there is no basis for concern that requiring a unanimous death recommendation before death may be imposed will allow a single juror, who for personal reasons would under no circumstances vote to

impose capital punishment, to derail the process of meaningful jury deliberation on all the facts concerning aggravating factors and mitigating circumstances, and on the ultimate finding of whether death has been proven to be the appropriate penalty in any individual case.

For all the foregoing reasons, the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Because the Supreme Court in Hurst v. Florida held that a portion of Florida's capital sentencing scheme under which Hurst was sentenced to death violated the Sixth Amendment and Hurst's right to critical jury findings, and Hurst v. Florida error occurred in this case, we must next determine if, as Hurst contends, he is entitled to an automatic sentence of life imprisonment without the possibility of parole.

IV. SECTION 775.082(2), FLORIDA STATUTES

Because the Supreme Court held that a portion of Florida's sentencing scheme that bases imposition of a death sentence on judicial factfinding violates the Sixth Amendment, Hurst and supporting amici contend that section 775.082(2), Florida Statutes (2015), requires this Court to vacate his death sentence and

sentence him to life in prison without the possibility of parole. That statute provides:

> (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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

§ 775.082(2), Fla. Stat. This statutory provision was originally passed in the spring of 1972,[19] in large part in anticipation that the decision in Furman, 408 U.S. 238 (1972), might strike down the death penalty in its entirety.

As support for his position, Hurst cites what occurred after the Supreme Court issued its decision in Furman on June 29, 1972. In that case, a plurality of the Court struck down Georgia and Texas death penalty statutes as violative of the Eighth and Fourteenth Amendments. After Furman, the Florida Attorney General asked this Court to vacate the death sentences of forty death row inmates who were sentenced under the statute as it existed at the time of Furman and impose life sentences. See Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972). This Court agreed and, pursuant to the motion of the Attorney General, the sentences at issue

---

19. See ch. 72-118, § 1, at 388, Laws of Fla. (effective October 1, 1972).

were commuted to life. Id. at 9. However, nowhere in Anderson did this Court construe or express any opinion regarding the meaning of section 775.082(2), in light of the Supreme Court's decision in Furman. We did state in Anderson, "[a]lthough this Court has never declared the death penalty to be unconstitutional, we nevertheless recognized and followed the concensus [sic] determination of the several opinions rendered by the United States Supreme Court in Furman v. Georgia." Id. at 9. We also noted in Anderson that the United States District Court in United States ex rel. Young v. Wainwright, (No. 64-16-Civ.-J-S) (Fla. M.D.), had set aside the death sentences imposed "upon all persons incarcerated in 'Death Row' of the State prison whose cases had terminated," and had retained jurisdiction over other defendants whose cases were still in the appellate process. Anderson, 267 So. 2d at 9.

The one paragraph, per curiam opinion in Furman simply states that in three capital cases—two in Georgia and one in Texas—the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings." Furman, 408 U.S. at 239-40. Five justices filed separate opinions in support of the judgments, and four justices filed dissenting opinions. It is this multiplicity of separate opinions and the

diversity of views expressed in them that made the true scope of Furman difficult to ascertain. The views expressed in the many concurring opinions created a level of uncertainty in the state of capital sentencing law after Furman, and thus provided the impetus for the Florida Attorney General to request this Court to impose life sentences on a number of death row inmates. To illustrate, we recount portions of the Furman concurring opinions here.

Justice Douglas concurred in the judgment and opined that "these discretionary statutes are unconstitutional" mainly because they are discriminatorily applied. Id. at 256-57 (Douglas, J., concurring). Justice Brennan concurred in the judgment and concluded that "[t]he punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as punishment for crimes." Id. at 305 (Brennan, J., concurring). Justice Stewart concurred in Furman, and noted that "at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments." Id. at 306 (Stewart, J., concurring). However, he found it unnecessary to reach that question. Justice White also concurred in Furman, expressing his concern with statutes that delegate to judges or juries the decision of when the penalty will be imposed without mandating any particular kind or class of case in which it should be imposed. Id. at 311 (White, J., concurring). Finally, Justice Marshall concurred in Furman, and

noted that the judgments of the Court affected not only the three petitioners but "the almost 600 other condemned men and women in this country currently awaiting execution." Id. at 316 (Marshall, J., concurring). Justice Marshall referred to the Court's decision as "striking down capital punishment" and indicated that the Court was concluding "that the death penalty violates the Eighth Amendment." Id. at 370-71 (Marshall, J., concurring).[20] While it is impossible to glean a consistent ruling from the plurality decisions of the Justices in Furman, it can be seen why the Florida Attorney General asked this Court to vacate a large number of death sentences after Furman was issued, and why, in Anderson, this Court agreed.

The State contends that section 775.082(2) exists only to assure that a life sentence will be imposed on individuals previously sentenced to death if capital

---

20. Comments in the dissents in Furman also added to the uncertainty of the scope of the Furman plurality. Justice Burger, in his dissenting opinion, noted, "The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear." Furman, 408 U.S. at 397 (Burger, J., dissenting). He also commented that because there was no majority of the Court on the ultimate issue, "the future of capital punishment in this country has been left in an uncertain limbo." Id. at 403 (Burger, J., dissenting). Justice Blackmun, in his dissent, stated, "The Court has just decided that it is time to strike down the death penalty." Id. at 408 (Blackmun, J., dissenting). He also referred to the Court's action as "abolish[ing] capital punishment as heretofore known in this country." Id. at 461 (Blackmun, J., dissenting). Justice Rehnquist, in his dissenting opinion, referred to the Court's judgments as "strik[ing] down a penalty . . . [long] thought necessary." Id. at 465 (Rehnquist, J., dissenting).

punishment as a penalty is declared unconstitutional generally or for any given capital offense. Indeed, the death penalty has, for several types of crimes and individuals, been declared categorically unconstitutional. See, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (holding capital punishment for intellectually disabled persons is unconstitutional); Coker v. Georgia, 433 U.S. 584 (1977) (holding capital punishment as a penalty for raping an adult woman violates the Eighth Amendment). We agree with the State.

When section 775.082(2) is viewed in the context of this State's response to the plurality opinion in Furman, and in light of the fact that Furman was based on Eighth and Fourteenth Amendment principles, we conclude that the statute does not mandate automatic commutation to life sentences after the decision in Hurst v. Florida. Hurst v. Florida was decided on Sixth Amendment grounds and nothing in that decision suggests a broad indictment of the imposition of the death penalty generally. Ring was also decided on Sixth Amendment grounds, and that decision did not require the state court to vacate all death sentences and enter sentences of life and did not address the range of conduct that a state may criminalize. After Hurst v. Florida, the death penalty still remains the ultimate punishment in Florida, although the Supreme Court has now required that all the critical findings necessary for imposition of the death penalty be transferred to the jury.

There is no indication in the Hurst v. Florida decision that the Supreme Court intended or even anticipated that all death sentences in Florida would be commuted to life, or that death as a penalty is categorically prohibited. Moreover, the text of section 775.082(2) refers to the occasion that "the death penalty" is held to be unconstitutional to determine when, and if, automatic sentences of life must be imposed. This provision is intended to provide a "fail safe" sentencing option in the event that "the death penalty"—as a penalty—is declared categorically unconstitutional.[21]

The Supreme Court in Hurst v. Florida focused its decision on that portion of the capital sentencing process requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty. The Court did not declare

---

21. Our construction of section 775.082(2) is supported by historical records concerning this legislation at the time it was being considered by the Legislature. For example, in a September 13, 1971, letter from then-Attorney General Robert L. Shevin to Senator David McClain, who introduced Senate Bill 153 which enacted the statutory language at issue, the Attorney General stated, "I have read with interest your prefiled bill to amend the State's death penalty statute to provide life imprisonment if the Supreme Court of the United States bans the death penalty." (Available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla., Series 19, Box 458). Within those same records appears a report titled "Subject: SB 153 by McCLAIN declaring that persons sentenced to death shall, if the death penalty is ruled unconstitutional, be sentenced to life imprisonment." In that memorandum, it is also stated, "The death penalty is currently being considered by the Supreme Court. If it is declared unconstitutional, some disposition will need to be made of persons who are currently under a death sentence." Id. The memorandum further states, "Assuming that capital punishment is held unconstitutional, life imprisonment would still be a constitutional means of punishment." Id.

the death penalty unconstitutional. Accordingly, we hold that section 775.082(2) does not require commutation to life under the holding of Hurst v. Florida, which did not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death. Because Hurst is not entitled to have his sentence automatically commuted to life in prison without the possibility of parole, we turn to the issue of whether the error in sentencing Hurst that was identified by the United States Supreme Court is harmless beyond a reasonable doubt.

V. HARMLESS ERROR ANALYSIS

In its decision finding that portions of Florida's sentencing scheme violate the Sixth Amendment because the factfinding necessary for imposition of a death sentence is entrusted to the judge and not the jury, the Supreme Court expressly declined to reach the question of whether the error was harmless in Hurst's case. The Court stated, "Finally, we do not reach the State's assertion that any error was 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." Hurst, 136 S. Ct. at 624 (citation omitted). This was the same procedure followed in Ring, where the Supreme Court also declined to reach the question of harmless error, but left that question to the state court to pass on in the first instance. 536 U.S. at 609

n.7. Accordingly, we examine the contention of the State that the error in this case was harmless beyond a reasonable doubt.

Hurst contends that harmless error review cannot apply at all because the error identified by the Supreme Court in this case is structural—that is, error that is per se reversible because it results in a proceeding that is always fundamentally unfair.[22] He contends that even if harmless error review is allowed, the Hurst v. Florida error cannot be quantified or assessed in a harmless error review in this case because the record is silent as to what any particular juror, much less a unanimous jury, actually found. We conclude that the error that occurred in Hurst's sentencing proceeding, in which the judge rather than the jury made all the necessary findings to impose a death sentence, is not structural error incapable of harmless error review. Nevertheless, here, we agree that the error in Hurst's penalty phase proceeding was not harmless beyond a reasonable doubt.

The Supreme Court has explained: "Since this Court's landmark decision in Chapman v. California, 386 U.S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction,

---

22. Structural error has been described as follows: "Only the rare type of error—in general, one that 'infect[s] the entire trial process' and 'necessarily render[s] [it] fundamentally unfair'—requires automatic reversal." Glebe v. Frost, 135 S. Ct. 429, 430-31 (2014) (quoting Neder v. United States, 527 U.S. 1, 8 (1999)).

the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306 (1991). In Neder v. United States, 527 U.S. 1, 7-8 (1999), the Supreme Court held that structural error can occur in "only a 'very limited class of cases,' " and is error that always makes the trial fundamentally unfair. Where an element of the offense was erroneously not submitted to the jury in Neder, the Court found harmless error review applied and that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review." Id. at 8.

More recently, in Washington v. Recuenco, 548 U.S. 212, 218-19 (2006), the Supreme Court held in a noncapital case that failure to submit a sentencing factor to the jury in violation of Apprendi, Blakely, and the Sixth Amendment was not structural error that would always result in reversal. On this same issue, we explained in Galindez v. State:

> Because the question of Apprendi/Blakely error also involved judicial factfinding versus jury factfinding, the Court concluded that the harmless error analysis applied in Neder also applied to the error in Recuenco. Id. In Neder, the Court framed the test as follows: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Neder, 527 U.S. at 18. The Court concluded that the same harmless error analysis developed in Chapman v. California, 386 U.S. 18 (1967), and applied in cases concerning the erroneous admission of evidence under the Fifth and Sixth Amendments, also applied to infringement of the jury's factfinding role under the Sixth Amendment. Neder, 527 U.S. at 18. The [Supreme] Court explained that

> a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." Rose[v. Clark], 478 U.S. [570, 577 (1986)].

Galindez v. State, 955 So. 2d 517, 522 (2007) (emphasis added) (quoting Neder, 527 U.S. at 19).

Having concluded that Hurst v. Florida error is capable of harmless error review, we must now conduct a harmless error analysis under Florida law. Following the harmless error principles announced in Chapman, we set forth the test for harmless error review in Florida in State v. DiGuilio, stating:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So. 2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a

Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

Justice Alito, in his dissent in Hurst v. Florida, opined that the error was harmless beyond a reasonable doubt because, in his view, "it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding." Hurst v. Florida, 136 S. Ct. at 626 (Alito, J., dissenting). Despite Justice Alito's confidence on this point, after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without doubt have found both aggravating factors—and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation. The jury recommended death by only a seven to five vote, a bare majority. Because there was no interrogatory

verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary.

We are fully aware of the brutal actions that resulted in the murder in this case. The evidence of the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted. However, the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an "overwhelming evidence" test. The record in this case demonstrated that the evidence of mitigation was extensive and compelling. Hurst was slow mentally while growing up and did poorly in school. He had difficulty caring for himself and performing normal daily activities. Experts presented evidence of brain abnormalities in multiple areas of his brain. Hurst's IQ testing showed scores dipping into the intellectually disabled range, although he had scored higher on occasion. Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed that mitigation, although we do know that the jury recommended death by only a bare majority. The trial judge found that Hurst's young chronological age of 19, and his

even younger mental age, at the time of the murder was mitigating. The judge also found that Hurst had significant mental mitigation including low IQ and likely brain abnormalities due to fetal alcohol syndrome.

It is noteworthy that after Ring, the Arizona Supreme Court did not find the Ring error to be structural, but did a rigorous harmless error review. State v. Ring, 65 P.3d 915, 933 (Ariz. 2003). The Arizona court held that Arizona's statutes required more than the presence of one or more statutorily defined aggravating factors. Thus, the Arizona court explained, "Because a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency. If we cannot reach that conclusion, we must find reversible error and remand the case for resentencing." Id. at 946. Thus, the Arizona court concluded that the review must extend to the mitigation and to the weighing decision, and that it would affirm a capital sentence on harmless error review only if it found "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." Id.

In Hurst's case, we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was "sufficiently

substantial" to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the Hurst v. Florida error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error in Hurst's sentencing has not been shown to be harmless beyond a reasonable doubt.

VI. CONCLUSION

Because the death sentence was imposed on Hurst in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for imposition of the death sentence, and because we conclude that the error is not harmless beyond a reasonable doubt under the facts and circumstances of this case, we vacate Hurst's death sentence and remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
PARIENTE, J., concurs with an opinion, in which LABARGA, C.J., concurs.
PERRY, J., concurs in part and dissents in part with an opinion.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

If "death is different," as this Court and the United States Supreme Court have repeatedly pronounced,[23] then requiring unanimity in the jury's final recommendation of life or death is an essential prerequisite to the continued constitutionality of the death penalty in this State. I fully concur with the majority in requiring that, before a sentence of death may be constitutionally imposed, the jury must find unanimously the existence of any aggravating factor, that the aggravating factors are sufficient for the imposition of death, that the aggravating factors outweigh the mitigating circumstances, and finally the recommendation for death. See majority op. at 23-24. I write separately to emphasize the historical foundations for this Court's holding requiring unanimity in the jury's final recommendation of death under Florida's constitutional right to jury trial, guaranteed by article I, section 22, of the Florida Constitution.

I also agree with the majority that the Eighth Amendment further buttresses the conclusion that a jury must unanimously recommend death. Simply put, Florida's extreme outlier status in not requiring unanimity in the jury's final recommendation renders the current imposition of the death penalty in Florida

---

23. See Yacob v. State, 136 So. 3d 539, 546 (Fla. 2014) (quoting Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988)); Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

cruel and unusual under the Eighth Amendment to the United States Constitution. Additionally, as the majority notes, resolving this issue now, as opposed to later, ensures that, for as long as death is a permissible punishment in the United States, Florida's death penalty will be constitutionally sound. See majority op. at 41-42.

Lastly, I write to address the dissent's argument that this Court has exceeded the scope of the remand proceeding from the United States Supreme Court.

Right to Jury Trial Under the Florida Constitution

"[A] defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution." State v. Griffith, 561 So. 2d 528, 530 (Fla. 1990). As the majority detailed, unanimity in jury verdicts has been the polestar of Florida's criminal justice system since our State's first Constitution in 1838. Majority op. at 25. Likewise, this Court has "always considered the right to jury trial an indispensable component of our system of justice." Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997). In Florida, "the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." Butler v. State, 842 So. 2d 817, 837 (Fla. 2003) (Pariente, J., concurring in part, dissenting in part); see also In re Std. Jury Instrs. in Crim. Cases—Report No. 2011-05, 141 So. 3d 132, 138 (Fla. 2013) ("Your verdict finding the defendant either guilty or not guilty must be unanimous."). The history of the constitutional right to jury trial in Florida

supports the majority's determination that Florida's constitutional right to a trial by jury requires unanimity in the jury's final and ultimate recommendation: whether the defendant shall live or die.

The right to a trial by jury is not a right to trial by individual jurors. As the majority explains, when considering its functional qualities, a unanimity requirement "furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury." Majority op. at 33 (quoting United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978)) (emphasis added). Requiring unanimity also ensures that every juror's voice, with their attendant backgrounds, is heard and considered. "Unanimous verdicts [] protect jury representativeness—each point of view must be considered and all jurors persuaded. [In fact, s]tudies have shown that minority jurors participate more actively when decisions must be unanimous." Principles for Juries and Jury Trials, SM078 ALI-ABA 753, 782 (2007) (citing Valerie P. Hans, The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making, 4 Del. L. Rev. 2, 23 (2001)). A unanimous verdict also "gives particular significance and conclusiveness to the jury's verdict." Lopez, 581 F.2d at 1341; see also majority op. at 33. Additionally, "[u]nanimous-verdict juries . . . tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed." Kate Riordan, Ten Angry Men: Unanimous Jury Verdicts in Criminal

Trials and Incorporation After McDonald, 101 J. Crim. L. & Criminology 1403, 1429 (2011). As former Justice Raoul Cantero has explained, "Unanimous verdicts are more likely to fulfill the jury's role as the voice of the community's conscience. When less than a unanimous jury is allowed to speak for the community, the likelihood increases that the jury will misrepresent community values." Raoul G. Cantero & Robert M. Kline, Death is Different: The Need for Jury Unanimity in Death Penalty Cases, 22 St. Thomas L. Rev. 4, 32 (2009) (citing Schriro v. Summerlin, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting)).

The majority explains the significance of this Court's holding in Jones v. State that "any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution." Majority op. at 26 (citing Jones, 92 So. 2d 261, 261 (Fla. 1956)). Given this State's historical adherence to unanimity and the significance of the right to trial by jury, the majority correctly concludes that article I, section 22, of the Florida Constitution requires that all of the jury fact-finding, including the jury's final recommendation of death, be unanimous.

Eighth Amendment to the United States Constitution

I also agree with the majority that the Eighth Amendment to the United States Constitution further supports the constitutional basis for requiring a unanimous jury recommendation. The cruel and unusual punishment clause of the

Eighth Amendment was viewed by the Framers, and later by the United States Supreme Court, as "a 'constitutional check' that would ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.' " Furman v. Georgia, 408 U.S. 238 at 261 (1972) (Brennan, J., concurring). As Justice Kennedy has stated, "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." McKoy v. North Carolina, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring).

Due to the severity and irreversibility of death, "the Eighth Amendment requires [in capital cases] a greater degree of accuracy . . . than would be true in a noncapital case." Gilmore v. Taylor, 508 U.S. 333, 342 (1993). As some commentators, including former Justice Raoul Cantero, have observed:

> The Supreme Court has consistently recognized that the death penalty is "qualitatively different" from all other punishments, and therefore "demands extraordinary procedural protection against error."
>
> . . .
>
> Because "death is different," allowing a simple majority to render a verdict in a capital case may violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Cantero & Kline, Death is Different, 22 St. Thomas L. Rev. at 12-13 (citing Jeffrey Abramson, Death-is-Different Jurisprudence and the Role of the Capital Jury, 2 Ohio St. L.J. Crim. L. 117, 117 (2004)) (emphasis added).

Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to "the evolving standards of decency that mark the progress of a maturing society," which inform Eighth Amendment analyses. Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)); see also Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.").

At the time Ring was decided, death was not a penalty in twelve states.[24] Since the United States Supreme Court decided Ring, seven additional states have eliminated the death penalty as a punishment altogether. See Hall, 134 S. Ct. at 1997 (noting that Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York have eliminated the death penalty since 2002); S.B. 268, 104th Leg. 1st

---

24. The states without a death penalty when Ring was decided are, from earliest to most recent in abolishing the death penalty: Michigan, Wisconsin, Maine, Minnesota, Alaska, Hawaii, Vermont, West Virginia, North Dakota, Iowa, Massachusetts, and Rhode Island. See States With and Without the Death Penalty, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 22, 2016).

Sess. (Neb. 2015) (repealing the death penalty). Therefore, when Hurst v. Florida was decided, a total of nineteen states had eliminated the death penalty.

As to the requirement of jury unanimity, until Hurst v. Florida, Florida was one of only three states that permitted capital defendants to be sentenced to death without all twelve penalty phase jurors recommending in unison that the defendant was deserving of the ultimate punishment. See majority op. at 39. Of the thirty-one states that still had the death penalty at the time of Hurst v. Florida, twenty-eight states required a unanimous vote of twelve jurors with respect to the final verdict or recommendation, making Florida, Alabama, and Delaware glaring outliers.[25] However, Delaware just recently declared its capital sentencing statute unconstitutional. Rauf v. Delaware, 2016 WL 4224252 (Del. Aug. 2, 2016). The United States Supreme Court has also vacated the death sentences of four Alabama inmates in light of Hurst v. Florida. See Russell v. Alabama, No.15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016); Kirksey v. Alabama, 136 S. Ct. 2409 (2016); Wimbley v. Alabama, 136 S. Ct. 2387 (2016); Johnson v. Alabama, 136 S. Ct. 1837 (2016).[26]

---

25. Moreover, federal law provides that a jury must unanimously recommend whether a defendant should be sentenced to death. 18 U.S.C. § 3953(e) (2016).

26. Additionally, although contrary to our decision today, the Alabama Supreme Court recently decided that its capital sentencing scheme is constitutional under Hurst v. Florida because its capital sentencing scheme requires the jury to

The current practices of these other states emphasize Florida's outlier status, as this Court expressly acknowledged eleven years ago in State v. Steele, 921 So. 2d 538, 548 (Fla. 2005). In that case we observed that Florida was then "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." Id. (first emphasis added). At the time, we acknowledged that even though Alabama and Delaware did not require unanimity as to the jury's final recommendation, they at least required unanimity as to the jury's finding of at least one aggravator. Id. at 548-49, n.4 & 5.

Taken together, the trend of states either eliminating the death penalty as a punishment or requiring jury unanimity in fact-finding and the final recommendation before sentencing a defendant to death demonstrates "the evolving standards of decency" with respect to the jury's fact-finding role in capital punishment in the United States. Roper, 543 U.S. at 561. This trend solidifies Florida's devolution from an outlier to an extreme outlier.

---

unanimously find one aggravating factor when determining if a defendant is eligible for the death penalty. See Ex parte Bohannon, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016). However, we note that the Alabama Supreme Court in Bohannon did not discuss its statute's constitutionality under its own state constitution and did not mention the Alabama cases remanded by the United States Supreme Court in light of Hurst v. Florida.

The United States Supreme Court has also considered international trends when addressing Eighth Amendment claims, and these trends further confirm Florida's outlier status. Id. 543 U.S. at 577-78. Amnesty International's 2015 Report indicates that the United States was the only member of the Organization of American States (OAS)—an organization whose thirty-five member nations aim to uphold the pillars of democracy, human rights, security, and development—to carry out executions, and one of the countries with the most executions in the world.[27] Both Florida and the United States are outliers as to the imposition of the death penalty, and Florida's non-unanimous recommendation for imposing the death penalty only entrenches the State in outlier territory.

For all of these reasons, I agree that the failure to require jury unanimity before the ultimate decision of death is imposed violates the Eighth Amendment.

Unanimity of the Final Recommendation is Properly Addressed

Finally, I address the dissent's argument that in requiring unanimity in the final jury recommendation this Court exceeds the scope of its proper considerations in this case. See Canady, J., dissenting op. at 76. Contrary to the dissent's assertions, the issue of a unanimous recommendation is properly at issue

---

27. See Amnesty Int'l, Global Report: Death Sentences and Executions 2015 10, http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2015 (2015); Org. of Am. States, Who We Are, http://www.oas.org/en/about/who_we_are.asp (last visited September 21, 2016).

in this case. In Hurst v. Florida, the United States Supreme Court instructed that "[t]he judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." 136 S. Ct. at 624. Nowhere in the opinion is the requirement that this Court may only consider "how we are to apply Hurst v. Florida's Sixth Amendment holding," as the dissent suggests. See Canady, J., dissenting op. at 76. The Hurst v. Florida remand requires only that this Court's proceedings not be inconsistent with the United States Supreme Court's opinion in Hurst v. Florida. 136 S. Ct. at 624. This Court's decision is based on both Florida's constitutional right to jury trial as well as the federal Sixth and Eighth Amendments.

This Court's opinion is firmly rooted in article I, section 22, of the Florida Constitution. As to the Eighth Amendment argument, the last time this Court actually considered an Eighth Amendment argument on its merits was decades ago. See Alvord, 322 So. 2d at 533; Watson v. State, 190 So. 2d at 161. Subsequently, the Court has rejected the claim, providing virtually no analysis and seemingly relying on cases from this Court dating back to the reinstitution of the death penalty, and so it is unclear whether the claim was based on the Eighth Amendment or some other constitutional ground. See, e.g., Hunter v. State, 175 So. 3d 699, 710 (Fla. 2015) (denying this argument by citing to this Court's previous rejection of the same argument); Ford v. State, No. SC14-1011, SC14-

2040, 2015 WL 1741803 (Fla. Apr. 15, 2015) (denying Eighth Amendment claim because it "has been repeatedly rejected by this Court"), cert. denied, 136 S. Ct. 538 (2015); Kimbrough v. State, 125 So. 3d 752, 754 (Fla. 2013) (denying the claim due to this Court's "general jurisprudence that non-unanimous jury recommendations to impose the sentence of death are not unconstitutional"); Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013); Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013); Lazelere v. State, 676 So. 2d 394, 407 (Fla. 1996) (explaining that the claim had been "previously rejected" without addressing the merits); Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995); James v. State, 453 So. 2d 786, 792 (Fla. 1984) (rejecting the claim based on Alvord).

Following this Court's rejections of the Eighth Amendment argument challenging Florida's capital sentencing scheme for allowing a non-unanimous recommendation of death, the United States Supreme Court issued its decision in Hurst v. Florida, which did not address the Eighth Amendment. Therefore, there is no United States Supreme Court precedent this Court must follow asserting that the Eighth Amendment does or does not require unanimity in jury capital sentencing recommendations.

Clearly our holding requiring unanimity in the jury's ultimate recommendation is not inconsistent with Hurst v. Florida or any other decision from the United States Supreme Court. Moreover, the issue of unanimity in the

final recommendation was raised before this Court in Hurst v. State, argued before the United States Supreme Court in Hurst v. Florida, raised by Hurst in his Motion requesting imposition of a life sentence,[28] and serves to provide a complete analysis of what the Florida and United States Constitutions require before the death penalty can be constitutionally imposed.

For all these reasons, I fully concur in the majority's opinion today.

LABARGA, C.J., concurs.

PERRY, J., concurring in part and dissenting in part.

I concur with the entirety of the majority decision except its determination that section 775.082(2), Florida Statutes (2016), is not applicable. See majority op. at 4, 44-51. I therefore disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. Id. at 4, 50.

There is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes, and instead contort all reasoning to apply a

---

28. Hurst's Amended Motion for Remand for Imposition of a Sentence of Life in Prison raising the Eighth Amendment argument was filed shortly after the issuance of the Supreme Court mandate, even before Hurst's Supplemental Initial Brief on the Merits was filed in front of this Court on remand. While the majority addresses the Eighth Amendment basis for unanimity in addition to the Sixth Amendment argument, we have rejected his argument that section 775.082(2), Florida Statutes (2016), requires reducing his sentence to life.

sentencing statute that cannot be resuscitated. Because the majority of this Court has determined that Hurst's death sentence was unconstitutionally imposed, see majority op. at 58, Hurst is entitled to the clear and unambiguous statutory remedy that the Legislature has specified. See § 775.082(2), Fla. Stat. (2016).

The statute's language is clear and unambiguous:

> 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

Id.

The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. "[T]he death penalty in [Hurst's] capital felony [has been] held to be unconstitutional," and accordingly, "the court having jurisdiction over [Hurst, who was] previously sentenced to death

for a capital felony[,] shall cause [him] to be brought before the court, and the court shall sentence [him] to life imprisonment." Id. We need conduct no further legal gymnastics to carry out the will of the Legislature. See, e.g., English v. State, 191 So. 3d 448, 450 (Fla. 2016) ("When the statutory language is clear or unambiguous, this Court need not look behind the statute's plain language or employ principles of statutory construction to determine legislative intent."). The sentencing court must impose a life sentence pursuant to section 775.082(2), Florida Statutes.

My reasoning here is supported by no fewer than three former justices of this Court: Rosemary Barkett, Harry Lee Anstead, and Gerald Kogan; a former President of The Florida Bar, Hank Coxe, who also served on this Court's Innocence Commission; and a former president of The American Bar Association, Talbot D'Alemberte, who chaired Florida's Constitution Revision Commission and the Judiciary Committee in the Florida House of Representatives during the 1972 session, when the Legislature enacted section 775.082(2), Florida Statutes. See Amended Brief of Amici Curiae Harry Lee Anstead, et al., at 6, Hurst v. State, No. 12-1947 (Fla. May 3, 2016) ("The plain language contained in the first sentence of section 775.082(2) could not offer a clearer command . . . .").

The argument that section 775.082(2), Florida Statutes, applies only if capital punishment were itself unconstitutional and not if the capital punishment

procedure in a particular case were invalid is contrary to the text of the statute. Such argument also runs counter to this Court's actions forty years ago, when the Court vacated death sentences and imposed life sentences in the wake of Furman v. Georgia, 408 U.S. 238 (1972), a United States Supreme Court decision invalidating certain death penalty procedures. See id. at 309 ("The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); Stewart v. Massachusetts, 408 U.S. 845, 845 (1972). This Court responded, not by ordering new Furman-compliant capital penalty phase proceedings for these death row prisoners, but by vacating existing death sentences and ordering the prisoners sentenced to life in prison. See In re Baker, 267 So. 2d 331, 335 (Fla. 1972); Anderson v. State, 267 So. 2d 8, 10 (Fla. 1972). This Court never conceded that capital punishment as a whole was unconstitutional and did not read Furman to hold otherwise. Dixon, 283 So. 2d at 6 ("[Furman] does not abolish capital punishment . . . ."); Baker, 267 So. 2d at 331 ([D]eath sentences previously imposed are void . . . .") (emphasis added); Anderson, 267 So. 2d at 9 ("Although this Court has never declared the death penalty to be unconstitutional, we nevertheless recognized and followed the con[s]ensus determination of the several opinions rendered by the United States Supreme Court in [Furman]."). The Court even expressly noted that section 775.082(2) "was conditioned upon the very

holding which has now come to pass by the United States Supreme Court in invalidating the death penalty as now legislated." Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972) (emphasis added). Nonetheless, the Court vacated death sentences and imposed life sentences in their place. See Baker, 267 So. 2d at 335; Anderson, 267 So. 2d at 10. There is absolutely no logical reason for not doing so here. I consequently cannot agree with the majority's reasoning that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. See majority op. at 50. This Court should follow its existing precedent and impose a life sentence.

CANADY, J., dissenting.

Because I conclude that the Sixth Amendment as explained by the Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), simply requires that an aggravating circumstance be found by the jury, I disagree with the majority's expansive understanding of Hurst v. Florida.[29] And because I conclude that the absence of a finding of an aggravator by the jury that tried Hurst was harmless

---

29. The view expressed in this dissent concerning the scope of Hurst v. Florida follows the same line of analysis recently adopted by the Supreme Court of Alabama in rejecting a challenge to Alabama's death penalty law. See Ex parte Bohannon, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016) ("Ring and Hurst[v. Florida] require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less.").

beyond a reasonable doubt and agree with the majority's rejection of Hurst's claim that he is entitled to be sentenced to life, I would affirm the sentence of death.

The majority concludes that the Supreme Court decided in Hurst v. Florida that the Sixth Amendment requires jury sentencing in death cases so that no death sentence can be imposed unless a unanimous jury decides that death should be the penalty. But this conclusion cannot be reconciled with the reasoning of the Court's opinion in Hurst v. Florida or with the underlying framework established by the Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). The majority's reading of Hurst v. Florida wrenches the Court's reference to "each fact necessary to impose a sentence of death," 136 S. Ct. at 619, out of context, ignoring how the Court has used the term "facts" in its Sixth Amendment jurisprudence, and failing to account for the Hurst v. Florida Court's repeated identification of Florida's failure to require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional.

Contrary to the majority's view, "each fact necessary to impose a sentence of death" that must be found by a jury is not equivalent to each determination necessary to impose a death sentence. The case law makes clear beyond any doubt that when the Court refers to "facts" in this context it denotes "elements" or their functional equivalent. And the case law also makes clear beyond any doubt that in the process for imposing a sentence of death, once the jury has found the element

of an aggravator, no additional "facts" need be proved by the government to the jury. After an aggravator has been found, all the determinations necessary for the imposition of a death sentence fall outside the category of such "facts."

This understanding of the use of the phrase "each fact necessary to impose a sentence of death" in Hurst v. Florida is consistent with Hurst v. Florida's repeated statements that the failure to require that a jury find an aggravator is the feature of Florida's death penalty law that renders it unconstitutional under the requirements of the Sixth Amendment as explained in Apprendi and Ring. Most saliently, Hurst v. Florida overrules Spaziano v. Florida, 468 U.S. 447 (1984)—which held that jury sentencing is not required by the Constitution in death cases—only to the extent that Spaziano did not require that the jury find an aggravator.

Not content with its undue expansion of Hurst v. Florida's holding regarding the requirements of the Sixth Amendment, the majority injects conclusions based on the Eighth Amendment even though Hurst v. Florida does not address the Eighth Amendment. Remarkably, the majority adopts the view of the Eighth Amendment expressed by Justice Breyer in his concurring opinions in Ring and Hurst v. Florida. In doing so, the majority addresses a question that is not even properly at issue in this remand proceeding—which solely concerns how we are to apply Hurst v. Florida's Sixth Amendment holding—and delivers a ruling that dramatically departs from binding precedent from the Supreme Court.

In short, the majority fundamentally misapprehends and misuses Hurst v. Florida, thereby unnecessarily disrupting the administration of the death penalty in Florida. I strongly dissent.

Ring's Application of Apprendi:
An Aggravator Constitutes an Element That Must Be Found by the Jury

In Apprendi, the Court held, based on the Sixth Amendment, 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 found to exist by the jury. 530 U.S. at 494. Although Apprendi sought to distinguish the sentencing process in death cases, Ring rejected that distinction and applied Apprendi to Arizona's death penalty law, which provided no role for the jury in the sentencing process.

Applying the logic of Apprendi, Ring concluded that before a sentence of death can be imposed, the Sixth Amendment entitles capital defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589 (emphasis added). The Court recognized that "a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt." Id. at 597 (citation omitted). The Ring Court thus framed the question to be decided: "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,

made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." Id. (footnote omitted).

The Court concluded that "the aggravating factor determination" must be made by a jury. Id. So the Court reversed the Arizona decision affirming Ring's sentence and overruled Walton v. Arizona, 497 U.S. 639 (1990)—in which the Court had upheld the constitutionality of the Arizona statute against a Sixth Amendment challenge. Specifically, the Court "overrule[d] 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." Ring, 536 U.S. at 609. Justice Breyer concurred in the judgment and stated his conclusion "that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." Id. at 614 (Breyer, J., concurring).

In sum, Ring held that "[b]ecause Arizona's enumerated 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 (quoting Apprendi, 530 U.S. at 494 n.19). The reasoning of Ring thus is predicated on the understanding that "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' " and that murder without an aggravator "exposes a defendant to a maximum penalty of life imprisonment" but

murder with an aggravator "increases the maximum permissible sentence to death." Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality opinion).

Hurst v. Florida's Application of Ring:
A Jury's Advisory Recommendation of Death
Cannot Be Treated as the Jury's Finding of an Aggravator

Hurst v. Florida simply applies the reasoning of Ring and Apprendi to Florida's death penalty statute and concludes that the jury's advisory role under Florida law does not satisfy the requirements of the Sixth Amendment. Hurst v. Florida goes beyond Ring because Hurst v. Florida addressed a sentencing process in which the jury played an advisory role as distinct from the process at issue in Ring in which the jury had no role. But the reasoning of Hurst v. Florida closely mirrors the reasoning of Ring, and the requirements of the Sixth Amendment articulated in Hurst v. Florida are the same as the requirements articulated in Ring. Hurst v. Florida merely establishes that an advisory determination of a jury cannot satisfy Ring's requirement that an aggravator be found by the jury. In Hurst v. Florida, unlike numerous Florida direct appeal death cases in which the Court has denied relief under Ring, the existence of an aggravator was not established by a jury finding embodied in either a conviction for a contemporaneous crime or a prior conviction.

The Hurst v. Florida Court recognized the foundational importance of Apprendi's holding under the Sixth Amendment "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." Hurst v. Florida, 136 S. Ct. at 621 (quoting Apprendi, 530 U.S. at 494). The Court observed that in Ring it "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. (quoting Ring, 536 U.S. at 604).

Hurst v. Florida went on to hold that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's," id. at 621-22, and that the State was precluded from "treat[ing] the advisory recommendation by the jury as the necessary factual finding that Ring requires," id. at 622. That "necessary factual finding" is, of course, the finding that an aggravator exists. In its analysis, the Court took pains to reject the State's argument—which would have been dispositive—that Hurst had admitted the existence of an aggravator. Id. at 622-23. The Hurst v. Florida opinion concludes with this statement of the Court's holding regarding the Sixth Amendment: "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Id. at 624.

In so holding, the Court accepted the precise Sixth Amendment argument that Hurst had presented to the Court. But in its imposition of jury sentencing, the majority here has adopted an understanding of Hurst v. Florida's Sixth

Amendment holding that not only departs from the Court's statement of its holding but also indisputably goes far beyond the Sixth Amendment argument that Hurst presented to the Court.

Hurst made an argument—supported by Justice Breyer's concurring opinion in Ring—for jury sentencing based on the Eighth Amendment. This Eighth Amendment argument was in Hurst v. Florida once again accepted by Justice Breyer in a concurring opinion, but it was not accepted by the Hurst v. Florida majority. Hurst did not, however, make any Sixth Amendment argument for jury sentencing. Instead, Hurst argued that "Florida's capital sentencing scheme violates" the Sixth Amendment as explained in Apprendi and Ring "because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.' " Brief for Petitioner at 18, Hurst v. Florida, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 3523406, at *18 (quoting Ring, 536 U.S. at 609).[30] In the oral argument before the Court, Hurst's counsel summed up the Sixth Amendment argument:

> [L]eaving aside our Eighth Amendment point in our brief that -- that followed on Justice Breyer's concurrence in Ring, the -- this is all

---

30. This point followed the reasoning of Justice Pariente's dissent from this Court's decision regarding Hurst's sentence: "I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply." Hurst v. State, 147 So. 3d 435, 452 (Fla. 2014) (Pariente, J., concurring in part and dissenting in part), cert. granted in part, 135 S. Ct. 1531 (2015), and rev'd, 136 S. Ct. 616 (2016).

> about the eligibility, not the determination of what sentence applies. And you have held that the existence of a specified statutory aggravating factor is a condition. It is an element of capital murder, and it is, by statute and Florida Supreme Court decision, an element of capital murder in Florida."

Tr. of Oral Argument at 12, Hurst v. Florida, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 5970064, at *12.

Hurst v. Florida's Limited Overruling of Precedent: Spaziano's Vindication of Judicial Sentencing is Undisturbed Except to the Extent That it Did Not Require the Jury to Find an Aggravator

In its articulation of the overruling of Spaziano and Hildwin—the two cases this Court relied on when rejecting Ring claims—the Hurst v. Florida Court once again makes clear the limited scope of its holding. Like Ring's overruling of Walton, Hurst v. Florida's overruling of Spaziano and Hildwin is precisely focused on the absence of a jury finding of an aggravator: "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." Hurst v. Florida, 136 S. Ct. at 624.

Therefore, except "to the extent" that Spaziano and Hildwin "allow a sentencing judge to find an aggravating circumstance," they are left undisturbed by Hurst v. Florida. Of particular relevance here is the portion of Spaziano that is not affected by Hurst v. Florida. In Spaziano, the Court was urged to find Florida's death penalty law unconstitutional under both the Sixth and Eighth Amendments.

The Court unequivocally rejected the "fundamental premise" of Spaziano's argument: "that the capital sentencing decision is one that, in all cases, should be made by a jury." Spaziano, 468 U.S. at 458.

Rejecting Spaziano's Sixth Amendment argument, the Court stated: "[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." Id. at 459 (citations omitted). Regarding the Eighth Amendment, the Court held that "there certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that requires that the sentence be imposed by a jury." Id. at 460. The Court further explained "that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." Id. at 462-63. The Court summed up its rejection of the "fundamental premise" regarding jury sentencing argued by Spaziano:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. at 464.

The majority decision here collides with these undisturbed and binding holdings of Spaziano regarding both the Eighth Amendment and the Sixth Amendment. There is no plausible explanation of why the Court would overrule Spaziano only to the extent that Spaziano did not require the jury to find an aggravator if the Court intended to hold that jury sentencing is required in death cases. Indeed, neither the majority opinion nor the concurrence even attempts to offer such an explanation. The point is met with total silence.

The Majority's Basic Error:
Confusing "Facts" with Other Determinations
in the Sentencing Process

The majority's misinterpretation of Hurst v. Florida is rooted in its misunderstanding of the Court's Sixth Amendment jurisprudence concerning "facts" that must be found by a jury. The majority confuses the "facts" that must be proved by the government to a jury in order for a defendant to pass the threshold of eligibility for a death sentence with the other determinations that may lead to the imposition of a death sentence. This confusion apparently causes the majority to overlook the limited nature of the overruling of Spaziano as well as Hurst v. Florida's focus—in which it follows Ring—on the absence of an aggravator found by a jury.

Apprendi, Ring, and Hurst v. Florida are all based on the principle that the Sixth Amendment requires that a jury—rather than a judge—determine whether

the government has proved every element of an offense. The Court therefore has explained that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime" and that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Alleyne v. United States, 133 S. Ct. 2151, 2162 (2013). "Elements" are "facts" that the State must prove to the jury. Ring made clear and Hurst v. Florida reaffirmed that in death cases, the necessary elements include the existence of an aggravating circumstance. But the other determinations made in a death penalty proceeding—whether the aggravation is sufficient to justify a death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—are not elements to be proven by the State. Rather, they are determinations that require subjective judgment. And nothing in Ring or Hurst v. Florida suggests—much less holds—that such determinations are elements and therefore "facts" that must be found by a jury.

This understanding of the distinction between the facts that the government must prove to the jury and the other determinations required to be made in the process for imposing a death sentence is reinforced by comments made in the Supreme Court's opinion in Kansas v. Carr, 136 S. Ct. 633 (2016), which was released after Hurst v. Florida. In Carr, the Court referred to the determination of

the existence of an aggravating circumstance as the "eligibility phase" in which it is decided whether a defendant is eligible for a death sentence. 136 S. Ct. at 642. After a defendant is determined to be "eligibl[e]", the "selection phase" occurs in which the existence of mitigating circumstances is determined, and a judgment is made whether mitigating circumstances outweigh the aggravation to determine whether a death-eligible defendant should be selected to receive a death sentence. Id. The Court explained that although the determination of whether an aggravating circumstance does or does not exist "is a purely factual determination," a determination of whether mitigation exists "is largely a judgment call," and "what one juror might consider mitigating another might not." Id. Whether the mitigating circumstances outweigh aggravating circumstances, the Court said, "is mostly a question of mercy." Id.; see also Tuilaepa v. California, 512 U.S. 967, 973 (1994) (stating that "[e]ligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death,' " while "[t]he selection decision . . . requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability" (quoting Arave v. Creech, 507 U.S. 463, 471 (1993))).

Thus, the only factual findings necessary to impose a sentence of death are findings regarding the elements of first-degree murder plus the existence of an aggravating circumstance, which is the functional equivalent of an element. Neither the Sixth Amendment nor Hurst v. Florida requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed.

The Absence Here of an Aggravator Found by the Jury Is Harmless Beyond a Reasonable Doubt

Although Hurst's jury did not find an aggravator and no conviction reflected a jury finding of an aggravator, I would conclude that this error was harmless beyond a reasonable doubt. As Justice Alito explained in his dissent in Hurst v. Florida:

> 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. 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. 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 torturous.

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.

Hurst v. Florida, 136 S. Ct. at 626 (Alito, J., dissenting) (citations omitted).

On the basis of the record here I would conclude that any rational juror would have found that both of the two aggravating circumstances on which the trial court relied in imposing the death sentence were proven beyond a reasonable doubt. Although the jury may not have reached unanimous determinations regarding the sufficiency of the aggravating circumstances, whether they were outweighed by the mitigating circumstances, and whether a death sentence should

be imposed, such determinations—as I have explained—are not required by Hurst v. Florida or the Sixth Amendment. Hurst's death sentence should be affirmed.

POLSTON, J., concurs.

An Appeal from the Circuit Court in and for Escambia County,
Linda Lee Nobles, Judge - Case No. 171998CF001795XXXAXX

Nancy Ann Daniels, Public Defender, David A. Davis, William Carl McLain, and Nada Margaret Carey, Assistant Public Defenders, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Carine L. Mitz, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Robert C. Josefsberg of Podhurst Orseck, P.A., Miami, Florida; Robert G. Kerrigan of Kerrigan, Estess, Rankin, McLeod & Thompson, LLP, Pensacola, Florida; Karen Marcia Gottlieb, Florida Center for Capital Representation at Florida International University College of Law, Miami, Florida; and Sonya Rudenstine, Gainesville, Florida,

for Amici Curiae Justice Harry Lee Anstead, Judge Rosemary Barkett, Martha Barnett, Talbot D'Alemberte, Hank Coxe, Justice Gerald Kogan, Florida Association of Criminal Defense Lawyers, Florida Capital Resource Center, and Florida Center for Capital Representation at Florida International University College of Law

Supreme Court of Florida

No. SC16-547

LARRY DARNELL PERRY,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[October 14, 2016]

PER CURIAM.

The issue before this Court is whether the newly enacted death penalty law, passed after the United States Supreme Court held a portion of Florida's capital sentencing scheme unconstitutional in Hurst v. Florida, 136 S. Ct. 616 (2016) ("Hurst v. Florida"), may be constitutionally applied to pending prosecutions for capital offenses that occurred prior to the new law's effective date. The Fifth District Court of Appeal concluded in State v. Perry, 192 So. 3d 70 (Fla. 5th DCA

2016), that chapter 2016-13, Laws of Florida (2016) ("the Act"), could apply to pending prosecutions without constitutional impediment.[1]

In its decision, the Fifth District passed on the following questions, which the court certified to be of great public importance:

> 1) DID HURST V. FLORIDA, 136 S. CT. 616 (2016), DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL?
>
> 2) IF NOT, DOES CHAPTER 2016-13, LAWS OF FLORIDA, APPLY TO PENDING PROSECUTIONS FOR CAPITAL OFFENSES THAT OCCURRED PRIOR TO ITS EFFECTIVE DATE?

Id. at 76.[2] Perry filed his Notice to Invoke Discretionary Jurisdiction in this Court based upon the two certified questions.[3] We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

---

1. Two trial courts in two different circuits have recently held the Act unconstitutional as to pending prosecutions because unanimity was not required in the final vote for death or in the jury fact-finding. State v. Keetley, No. 10-CF-018429 (Fla. 13th Jud. Cir. Ct., June 9, 2016) (pending before the Second District Court of Appeal in Case No. 2D16-2717); State v. Gaiter, No. F01-128535 (Fla. 11th Jud. Cir. Ct. May 9, 2016) (pending before the Third District Court of Appeal in Case No. 3D16-1174).

2. After accepting jurisdiction and during merits briefing, this Court ordered that Perry and the State "address whether the provision within section 921.141(2)(c), Florida Statutes (2016), Chapter 2016-13, Laws of Florida, requiring that 'at least 10 jurors determine that the defendant should be sentenced to death' is unconstitutional." Perry v. State, SC16-547 (Fla. Sup. Ct. Order filed May 5, 2016).

3. William T. Woodward, the other defendant whose case was considered by the Fifth District, moved for a motion for rehearing in the Fifth District, which

We have addressed the first certified question in our opinion on remand in Hurst v. State, No. SC12-1947 (slip op. issued Fla. Oct. 14, 2016) ("Hurst"). Based on that decision, in which we concluded that the death penalty was not declared unconstitutional, we answer the first certified question in the negative. See Hurst, SC12-1947, slip op. at 50-51. Further, by its own terms, section 775.082(2), Florida Statutes (2013), is limited to those cases in which the

---

was still pending at the time Perry sought review in this Court. Woodward did not move for joinder in this case, but instead filed a motion for leave to appear as amicus curiae, which this Court granted on April 18, 2016. After the Fifth District denied Woodward's motion for rehearing on April 21, 2016, Woodward filed his Notice to Invoke Discretionary Jurisdiction in this Court. On April 29, 2016, this Court stayed that case pending disposition of this case. See Woodward v. State, No. SC16-696 (Fla. Sup. Ct. Order accepting jurisdiction filed April 29, 2016).

William T. Woodward and McClain & McDermott, P.A., the Law Offices of Todd G. Scher, P.L. and the Law Offices of John Abatecola, filed amicus curiae briefs on the certified questions in which they explain that they do not take the positions of either party. Capital Collateral Regional Counsel-South was granted leave to appear as amicus curiae by joining in the brief filed by McClain & McDermott, P.A., the Law Offices of Todd G. Scher, P.L., and the Law Offices of John Abatecola.

The Tenth Judicial Circuit Public Defender, Howard L. "Rex" Dimmig, II, the Constitution Project (TCP), and the American Civil Liberties Union Capital Punishment Project (ACLU-CPP) and the American Civil Liberties Union of Florida (ACLU-FL) filed amicus curiae briefs in support of Perry on the issue of whether section 921.141(2)(c), Florida Statutes (2016), chapter 2016-13, Laws of Florida, requiring that at least ten jurors determine that the defendant should be sentenced to death is unconstitutional under the Florida or United States Constitution. The Florida Association of Criminal Defense Lawyers (FACDL), Florida Capital Resource Center (FCRC), Florida International University College of Law's Center for Capital Representation (FIU CCR), and the Florida Public Defender Association (FPDA) were granted leave to join as amici curiae and adopted Mr. Dimmig's amicus brief on the issue of the constitutionality of the ten-juror recommendation.

defendant was "previously sentenced to death." Because this case involves a pending prosecution where the death penalty is sought, section 775.082(2) is inapplicable.

In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in Hurst. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.[4] Hurst, SC12-1947, slip op. at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. Id. at 23-24, 36.

---

4. In Hurst, we also decided the requirements of unanimity under both the Sixth and Eighth Amendments to the United States Constitution, but our basic reasoning rests on Florida's independent constitutional right to trial by jury. Art. I, § 22, Fla. Const.

While most of the provisions of the Act can be construed constitutionally in accordance with Hurst, the Act's requirement that only ten jurors, rather than all twelve, must recommend a death sentence is contrary to our holding in Hurst. See id. at 35 ("[W]e conclude under the commandments of Hurst v. Florida, [136 S. Ct. 616 (2016)], Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed."). [5] Therefore, we answer the second certified question in the negative, holding that the Act cannot be applied constitutionally to pending prosecutions because the Act does not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death.

BACKGROUND

In State v. Perry, the Fifth District Court of Appeal addressed two cases involving defendants awaiting trial for charges of first-degree murder, in which the State filed notices of intent to seek the death penalty prior to the United States Supreme Court issuing its decision in Hurst v. Florida on January 12, 2016. Perry,

---

5. The statutory provision requiring "at least 10 jurors recommend death" was a result of compromise after the Florida House of Representatives and the Florida Senate promulgated two separate proposals, the House's proposing a final recommendation of nine to three and the Senate requiring a unanimous recommendation. Fla. S.B. 7068, § 3 (Feb. 3, 2016); Fla. H.B. 7101, § 2 (Feb. 5, 2016).

192 So. 3d at 73 n.2. In Hurst v. Florida, the United States Supreme Court held that Florida's capital "sentencing scheme [was] unconstitutional." 136 S. Ct. at 619. On March 7, 2016, the Florida Legislature, in response to Hurst v. Florida, amended Florida's capital sentencing scheme ("the Act"). See ch. 2016-13, Fla. Laws (2016). When the Act went into effect, the State had already filed its petition in the Fifth District. Perry, 192 So. 3d at 73.

The first case addressed by the Fifth District involves Larry Darnell Perry, who was indicted for first-degree murder and aggravated child abuse for the 2013 death of his son. Id. at 72. After Hurst v. Florida was issued, Perry moved to strike the State's notice of intent to seek the death penalty. Id. The second case concerns William Theodore Woodward, who was charged with two counts of first-degree murder for the 2012 deaths of his two neighbors. Id. After Hurst v. Florida, Woodward moved to prohibit the death qualification of the jury. Id.

The trial courts in both cases granted the defendants' respective motions and, in both cases, the State filed petitions for writs of prohibition in the Fifth District seeking to prohibit the trial courts from striking its notice of intent to seek the death penalty in Perry's case and refusing to death qualify the jury in Woodward's case. Id. The Fifth District consolidated the cases for the purposes of disposition only. Id. at n.2.

The Fifth District first determined that prohibition is appropriate when a trial court strikes a notice of intent to seek the death penalty or refuses to death qualify a jury in a capital case. Id. Then the Fifth District determined that the United States Supreme Court's decision in Hurst v. Florida did not leave Florida without a death penalty, as contended by Perry and Woodward, but rather "struck [only] the process of imposing a sentence of death." Id. at 73. Thus, the Fifth District rejected Petitioners' arguments that the Act does not apply because section 775.082(2), Florida Statutes (2015), provides for a mandatory, alternative sentence of life imprisonment when the death penalty is stricken. Id. We rejected the same arguments in Hurst, reasoning, first, that section 775.082(2) specifically applied only to "individuals previously sentenced to death," and, second, as stated above, that Hurst v. Florida did not hold the death penalty unconstitutional. SC12-1947, slip op. at 50-52.

The Fifth District next turned to the argument that application of the new law to pending cases would constitute an ex post facto violation under the United States and Florida Constitutions. Perry, 192 So. 3d at 74 (citing U.S. Const. art. I, § 10; art. I, § 10, Fla. Const.). The Fifth District concluded that since ex post facto principles generally do not bar the application of procedural changes to pending criminal proceedings, and because it determined that the new law is procedural rather than substantive, there was no ex post facto violation. Id. at 75. The court

likened the situation to that in Dobbert v. Florida, 432 U.S. 282 (1977), in which the United States Supreme Court determined that Florida's newly enacted death sentencing law, passed in response to Furman v. Georgia, 408 U.S. 238 (1972), did not constitute an ex post facto violation when it was applied to capital defendants who had not yet been sentenced because it "simply altered the methods employed in determining whether the death penalty was imposed." Perry, 192 So. 3d at 75 (quoting Dobbert, 432 U.S. at 293-94). The Fifth District also found guidance in this Court's decision in Horsley v. State, 160 So. 3d 393 (Fla. 2015), which held that the new juvenile sentencing law, enacted in response to Miller v. Alabama, 132 S. Ct. 2455 (2012), would apply to juvenile offenders whose offenses predated the new law. Perry, 192 So. 3d at 75. After determining that the Act applies to pending prosecutions, the Fifth District certified the two questions regarding the applicability of the Act. Id. at 76.

ANALYSIS

We now address the important question of whether the Act, chapter 2016-13, Laws of Florida, applies to cases in which the underlying crime was committed prior to the Act's effective date (March 7, 2016). We begin our analysis with an explanation of the statutory changes and how we construe these changes consistent with the United States Supreme Court's decision in Hurst v. Florida and our decision in Hurst. Ultimately, we conclude that while most of the provisions of the

Act can be construed constitutionally and could otherwise be validly applied to pending prosecutions, because the Act requires that only ten jurors, rather than all twelve, recommend a final sentence of death for death to be imposed, the Act is unconstitutional to that extent pursuant to Hurst and requires us to answer the second certified question in the negative.

I. STATUTORY CHANGES

We begin with a discussion of the Act's changes to Florida's capital sentencing scheme. The most important changes made to the previously existing statutes appear in sections 775.082, 782.04, and 921.141. Ch. 2016-13, Laws of Fla. (2016). This Act was adopted shortly after the United States Supreme Court held in Hurst v. Florida that Florida's capital sentencing scheme was unconstitutional because it did not require the jury to determine the facts necessary for the imposition of the death penalty. 136 S. Ct. 616 (2016). As we explained in Hurst:

> The Supreme Court emphasized that under Florida law, before the sentence of death may be imposed, 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.' " Id. (quoting § 921.141(3), Fla. Stat. (2012)). The Supreme Court was explicit in Hurst v. Florida that the constitutional right to an impartial jury "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." Id. at 624.

SC12-1947, slip op. at 21.

Section 1 of the Act amends section 775.082(1)(a), Florida Statutes, from referring to the results of the sentencing procedure set forth in section 921.141 as "findings by the court" to "a determination" that such person shall be punished by death. Ch. 2016-13, § 1. Section 2 of the Act amends section 782.04(1) to create a notice requirement whereby prosecutors must notify the defendant within forty-five days after arraignment of the aggravating factors the State intends to prove at trial. Id. at § 2. Though not required by the United State Supreme Court's decision in Hurst v. Florida, by providing notice of aggravating factors, this change in section 2 provides a benefit to capital defendants that they were not previously afforded. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) (finding that no statute, rule of procedure, or decision of the Florida Supreme Court or United States Supreme Court compelled a trial court to require advance notice of aggravating factors).

Section 3 of the Act defines the facts required to be found by the jury for a sentence of death to be imposed. Section 3 contains the most substantial changes, significantly amending section 921.141, Florida Statutes. Ch. 2016-13, § 3. Specifically, it changes the expression "aggravating circumstances" to "aggravating factors" throughout section 921.141. The amended section 921.141(1) limits the State to presenting evidence of only those aggravating factors

of which it provided notice to the defendant pursuant to section 782.04(1)(b), as amended by section 2 of the law. Id.

The amended section 921.141(2) now expressly provides that the requirements in the statute apply to cases in which the defendant has not waived his or her right to a sentencing proceeding by a jury. Section 921.141(2)(a) now requires the jury to determine whether at least one aggravating factor has been proven beyond a reasonable doubt, and section 921.141(2)(b) requires the jury to find the aggravating factors unanimously and to specify which aggravating factors have been found unanimously:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY. . . .
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous.

§ 921.141(2), Fla. Stat. (2016).

The revised statute also now states that if the jury does not unanimously find at least one aggravating factor, the defendant is "ineligible for a sentence of death." Id. § 921.141(2)(b)1. The significance of this change is that the statute now expressly indicates that a death sentence cannot be considered unless at least one aggravating factor has been proven beyond a reasonable doubt. Of course, this

change is consistent with preexisting case law. See, e.g., Steele, 921 So. 2d at 543 ("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.").

Next, section 3 changes former subsection (3) of section 921.141, which required the court to find whether sufficient aggravating circumstances existed to impose death and to determine that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances," to subsection (2)(b)2. of the new section 921.141, now requiring the jury to make a sentencing recommendation based on the weighing of whether sufficient aggravating factors exist, whether those aggravating factors outweigh the mitigating circumstances found to exist, and based on those two considerations, whether the defendant should be sentenced to life or death:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY. . . .
>
> . . .
>
> (b) . . . If the jury:
>
> . . .
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b)2., Fla. Stat. (2016).

The change from a finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" in section 921.141(3), Florida Statutes (2015), to the jury considering whether "aggravating factors exist which outweigh the mitigating circumstances found to exist" in section 921.141(2)(b)2.b., Florida Statutes (2016), is a change to a reciprocal, synonymous statement. The previous version of the statute also indicated that the jury's advisory recommendation would be based on "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), Fla. Stat. (2015). It has always been that death can be imposed only when the aggravating factors outweigh the mitigating circumstances, rather than the opposite.

Under the amended statute, the jury may recommend a death sentence so long as at least ten jurors agree that the defendant should be sentenced to death, whereas under the previous statute, a bare majority of the twelve-member jury was sufficient. Compare § 921.141(2)(c), Fla. Stat. (2016) ("If at least 10 jurors determine that the defendant should be sentenced to death . . ."), with § 921.141(3),

Fla. Stat. (2015) ("Notwithstanding the recommendation of a majority of the jury . . . "). The new statute provides in pertinent part:

> If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

§ 921.141(2)(c), Fla. Stat. (2016).

Finally, the law expressly eliminates the ability of the court to override a jury's recommendation for a life sentence with the imposition of a sentence of death, while expressly allowing the court to impose a life sentence even where the jury recommends death. Id. § 921.141(3)(a)1. (setting forth that if the jury recommends "[l]ife imprisonment without the possibility of parole, the court shall impose the recommended sentence."); id. § 921.141(3)(a)2. (setting forth that if the jury recommends death, "the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life . . . ."). Section 3 also removes all reference to the jury playing an "advisory" role in the sentencing process. Ch. 2016-13, § 3.

As to the effective date, the Act provides, "[t]his act shall take effect upon becoming a law." Id. § 7. The Act became a law on March 7, 2016.

The amendments to section 921.141 clearly require the jury to explicitly find at least one aggravating factor unanimously. Additionally, they require unanimity

as to each aggravating factor that may be considered by the jury and trial court in determining the appropriate sentence. The changes also require the jury to consider whether there are sufficient aggravating factors to outweigh the mitigating circumstances in order to impose death. The changes further mandate that a life sentence be imposed unless ten or more jurors vote for death.

We reject Perry's argument that the burden of proof is inverted. The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute. The Act did not change the list of aggravating factors and mitigating circumstances that affect the weighing process. The prior statute, which is mirrored in the jury instructions, stated that "after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: . . . Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2), Fla. Stat. (2015); In re Std. Jury Instrs. in Crim. Cases—Report No. 2013-03, 146 So. 3d 1110, 1120 (Fla. 2014). The statute, as well as this Court's precedent, then required that "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[, including] [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (2015).

The changes made by the Act, enacted in response to the United States Supreme Court's declaration in Hurst v. Florida, that Florida's prior statute was unconstitutional in not requiring the jury to make all findings necessary to render the defendant eligible for the death penalty, clearly place the jury in the all-important and constitutionally required factfinding role.

II. WHETHER THE AMENDED STATUTE COMPLIES WITH HURST

We next construe the statutes amended by the Act to ensure that the Act is consistent with the United States Supreme Court's decision in Hurst v. Florida, as we interpreted that decision in Hurst. This Court has an obligation to construe a statute in a way that preserves its constitutionality. See State v. Harris, 356 So. 2d 315, 316-17 (Fla. 1978) (construing section 812.021(3), in a constitutional manner where the statute was procedurally flawed); see also Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004) (stating that the Court has an obligation to construe a statute in a way that preserves its constitutionality). It is this Court's duty to "save Florida statutes from the constitutional dustbin whenever possible." Doe v. Mortham, 708 So. 2d 929, 934 (Fla. 1998). This Court is bound to "resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent." Heart of Adoptions, Inc. v. J.A., Inc., 963 So. 2d 189, 207 (Fla. 2007) (citation

omitted). However, this Court may only do so, if "to do so does not effectively rewrite the enactment." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) (quoting Firestone v. News-Press Publ'g Co., 538 So. 2d 457, 459-60 (Fla. 1989)).

In Hurst, we held that the United States Supreme Court's decision in Hurst v. Florida and Florida's right to a jury trial provided under article I, section 22 of the Florida Constitution require the jury's findings of the aggravating factors, that there are sufficient aggravating factors to impose death, that those aggravating factors outweigh the mitigation, and that death is the appropriate sentence are all required to be found unanimously by the jury for the defendant to be sentenced to death. Hurst, SC12-1947, slip op. at 23-24. We also held that, based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury's ultimate recommendation of the death sentence must be unanimous. Id. at 4. We interpret the Act consistent with those opinions defining the parameters of a defendant's right to a jury trial before the maximum penalty—a death sentence—may be constitutionally imposed. See id. at 24-28.

The Act amends Florida's death penalty statute to provide that the jury must make a recommendation that is "based on" the "considerations" of whether sufficient aggravating factors exist and whether they outweigh the mitigating circumstances found to exist, but it does not specify whether these findings themselves must be unanimous or explicit. § 921.141(2)(b)2., Fla. Stat. (2016).

We recognize that the amended statute also provides that the death recommendation must be made by only ten jurors. See id. The statute is not explicit as to whether the requirement of a ten-to-two vote applies to the factual findings that there are sufficient aggravators and that the aggravating factors outweigh the mitigating circumstances or to the ultimate death recommendation. Compare § 921.141(2)(b), Fla. Stat. (2016), with § 921.141(2)(c), Fla. Stat. (2016). Consistent with our decision in Hurst, we construe section 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist. Hurst, slip op. at 23. Clearly, if the intent was to apply a non-unanimous vote requirement to those separate factual findings, this would be unconstitutional as inconsistent with Hurst, where we have held that those findings must be made unanimously. See id.

However, we determine that the sentencing recommendation is a separate conclusion distinct from the jury's findings of whether sufficient aggravating factors exist and whether the aggravating factors outweigh the mitigation. It has long been true that a juror is not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances. See, e.g., Cox v. State, 819 So. 2d 705, 717 (Fla. 2002) ("[W]e

have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.' " (quoting Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996))). That instruction is contained in the jury instructions used before Hurst v. Florida:

> 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.

In re Std. Jury Instrs. in Crim. Cases—Report No. 2013-03, 146 So. 3d at 1127-28 (emphasis added). This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the "mercy" recommendation. See, e.g., Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So. 2d 422 (Fla. 1988) (explaining that the jury and judge may exercise mercy in their recommendation even if the factual situations may warrant capital punishment).

This provision of the Act not requiring that the jury's ultimate recommendation for death be unanimous is unconstitutional under this Court's holding in Hurst, and we are unable to construe that provision to be consistent with

Hurst. As we held in Hurst, "under the commandments of Hurst v. Florida, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." SC12-1947, slip. op. at 35.

In conclusion, we resolve any ambiguity in the Act consistent with our decision in Hurst. Namely, to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death. Id. at 23-24. While most of the Act can be construed constitutionally under our holding in Hurst, the Act's 10-2 jury recommendation requirement renders the Act unconstitutional.

CONCLUSION

Based on the reasoning of our opinion in Hurst, we answer both certified questions in the negative. As to the second question, we construe the fact-finding provisions of the revised section 921.141, Florida Statutes, constitutionally in conformance with Hurst to require unanimous findings on all statutory elements required to impose death. The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required

unanimous, twelve-member jury. Accordingly, it cannot be applied to pending prosecutions.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.
CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., concurring in part and dissenting in part.

I agree with the majority in approving the Fifth District's rejection of Perry's argument that the Supreme Court's decision in Hurst v. Florida "leave[s] Florida without a death penalty." I therefore concur with the majority in answering the first certified question in the negative.

But I dissent from the negative answer to the second certified question. Although I agree with the majority that the Fifth District correctly rejected Perry's argument that application of Florida's new death penalty statute to his case would be an ex post facto violation, I strongly disagree with the majority's conclusion that the new statute is unconstitutional under Hurst v. Florida. As I explained in my dissent in Hurst, SC12-1947, slip op. at 75 (Canady, J., dissenting), the Supreme Court "repeated[ly] identifi[ed]" "Florida's failure to require a jury finding of an aggravator as the flaw that renders Florida's death penalty law unconstitutional." See, e.g., Hurst v. Florida, 136 S. Ct. at 624 ("Florida's

sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."). The new statute has remedied that flaw. See § 921.141(2)(a)-(b), Fla. Stat. (2016).

The Legislature's work in enacting the new statute reflects careful attention to the holding of Hurst v. Florida, which does not require jury sentencing. In rejecting the new statute, the majority has "fundamentally misapprehend[ed] and misuse[d] Hurst v. Florida," Hurst, SC12-1947, slip op. at 76 (Canady, J., dissenting).

POLSTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fifth District - Case No. 5D16-516

(Osceola County)

J. Edwin Mills and Frank J. Bankowitz, III, Orlando, Florida,

for Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; Carol M. Dittmar, Senior Assistant Attorney General, Tampa, Florida; and Vivian Ann Singleton, Assistant Attorney General, Daytona Beach, Florida,

for Respondent

Martin J. McClain and Linda McDermott of McClain & McDermott, P.A., Wilton Manors, Florida; Todd Gerald Scher of the Law Offices of Todd G. Scher, P.L., Dania Beach, Florida; John Paul Abatecola of John Abatecola, P.A., Estero, Florida; and Neal Andre Dupree, Capital Collateral Regional Counsel – Southern Region, Suzanne Myers Keffer, Chief Assistant Capital Collateral Regional

Counsel – Southern Region, and Michael Chance Meyer, Staff Attorney, Capital Collateral Regional Counsel – Southern Region, Fort Lauderdale, Florida,

for Amici Curiae Capital Law Offices Specializing in Capital Appeals and Capital Collateral Regional Counsel – Southern Region

Robert Ralph Berry of Eisenmenger, Berry, Blaue & Peters, P.A., Viera, Florida,

for Amicus Curiae William Woodward

Howard L. Dimmig, II, Public Defender, Robert Arthur Young, General Counsel, Steven L. Bolotin and Peter Mills, Assistant Public Defenders, Tenth Judicial Circuit, Bartow, Florida; Sonya Rudenstine, Gainesville, Florida; Karen Marcia Gottlieb, Florida International University College of Law's Center for Capital Representation; and Julianne M. Holt, Public Defender, Thirteenth Judicial Circuit, and President of the Florida Public Defender Association, Tampa, Florida,

for Amici Curiae Tenth Judicial Circuit Public Defender, Florida Association of Criminal Defense Lawyers, Florida Capital Resource Center, Florida International University College of Law's Center for Capital Representation, and Florida Public Defender Association

Elliot H. Scherker of Greenberg Traurig, P.A., Miami, Florida,

for Amicus Curiae The Constitution Project

Nancy Gbana Abudu, American Civil Liberties Union Foundation of Florida, Inc., Miami, Florida; and Norman Adam Tebrugge, American Civil Liberties Union Foundation of Florida, Inc., Tampa, Florida,

for Amici Curiae American Civil Liberties Union Foundation, and American Civil Liberties Union of Florida

MICHAEL P. ALLEN

Business

Stetson University College of Law
1401 61st Street South
Gulfport, FL 33707
(727) 562-7360
allen@law.stetson.edu

Home

2702 Skimmer Point Way
Gulfport, FL 33707
(727) 344-1511 (H)
(727) 365-2076 (C)

EMPLOYMENT IN LEGAL EDUCATION:

STETSON UNIVERSITY COLLEGE OF LAW, Gulfport, Florida
Associate Dean for Academic Affairs, 2014-present
Associate Dean for Faculty Development and Strategic Initiatives, 2012-2014
Director, Veterans Law Institute, 2012-present
Professor of Law, August 2007-present
Associate Professor of Law, August 2004-July 2007 (tenure effective 8/1/06)
Assistant Professor of Law, July 2001-July 2004

Courses Taught: Civil Procedure; Constitutional Law I; Remedies; Complex Litigation; Federal Courts & the Federal System; Veterans' Benefits: Law, Practice & Policy.

Director United States Court of Appeals for Veterans Claims Internship Program; Federal Judicial Internship Program

UNIVERSITY OF ILLINOIS COLLEGE OF LAW, Champaign-Urbana, Illinois
Visiting Assistant Professor of Law, Spring 2004

Course Taught: Civil Procedure I (2 Sections)

NON-ACADEMIC LEGAL EXPERIENCE:

September 1992 To July 2001 — **ROPES & GRAY**, Boston, MA
Associate, Trial Department

EDUCATION:

COLUMBIA UNIVERSITY LAW SCHOOL, New York, NY
Juris Doctor, May 1992; Harlan Fiske Stone Scholar (top 25% of class) 1990-91, 1991-92
UNIVERSITY OF ROCHESTER, Rochester, NY
Bachelor of Arts (History and Political Science), May 1989, *Summa Cum Laude*

PUBLICATIONS:

Books

FEDERAL COURTS: CONTEXT, CASES AND PROBLEMS (Second Edition) (with Professors Michael Finch and Caprice Roberts) (Wolters Kluwer 2014)(with accompanying teacher's manual)

AN ILLUSTRATED GUIDE TO CIVIL PROCEDURE (Second Edition) (with Professor Michael Finch) (Wolters Kluwer 2011)(with accompanying teacher's manual)

Book Chapter

Constitutional Law in AN OVERVIEW OF AMERICAN LAW (LEXIS, 2009)

Articles and Essays

Justice Delayed; Justice Denied?: Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits, __ U. Miami Nat. Sec. & Armed Conf. L. Rev. __ (forthcoming 2015) (invited contribution)

Veterans' Benefits Law 2010-2013: Summary, Synthesis, and Suggestions, 6 Vet. L. Rev. 1 (2014)

Remedies as a Capstone Experience, 57 ST. LOUIS U. L.J. 547 (2013)

Some Commentary on Three Cases from the Federal Circuit and the CAVC as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits, 5 VET. L. REV. 136 (2013)

Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System, 80 U. CIN. L. REV. 501 (2011)

The Roberts Court and How *to Say What the Law Is*, 40 STETSON L. REV. 671 (2011) (symposium issue)

The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future, 3 VET. L. REV. 1 (2011)

A Limited Defense of (at Least Some of) the Umpire Analogy, 32 SEATTLE U. L. REV. 525 (2009) (invited symposium contribution)

The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future, 58 CATH. U. L. REV. 361 (2009)

The Underappreciated First Amendment Importance of Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045 (2008)

Of Remedy, Juries and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams, 63 N.Y. U. ANNUAL SURVEY AM. L. 343 (2008)

George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change, 72 BROOKLYN L. REV. 871 (2007)

Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit, 40 U. MICH. J. L. REFORM 483 (2007)

A Survey and Some Commentary on Federal "Tort Reform" 39 AKRON L. REV. 909 (2006) (Invited Contribution to Fourth Remedies Discussion Forum)

Justice O'Connor and the "Right to Die": Constitutional Promises Unfulfilled, 14 WM. & MARY BILL RIGHTS J. 821 (2006)

Congress and Terri Schiavo: A Primer on the American Constitutional Order?, 108 W. VA. L. REV. 309 (2005)

Terri's Law and Democracy, 35 STETSON L. REV. 179 (2005) (symposium issue)

The Supreme Court, Punitive Damages and State Sovereignty, 13 GEO. MASON L. REV. 1 (2004)

The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die, 53 AM. U. L. REV. 971 (2004)

Life, Death and Advocacy: The Role of Procedure in the Contested End-of-Life Case, 34 STETSON L. REV. 55 (2004) (Advocacy Symposium Issue)

Making Legal Education Relevant to Our Students One Step at a Time: Using the Group Project to Teach Personal Jurisdiction in Civil Procedure, 27 HAMLINE L. REV. 134 (2004)

In Rem Jurisdiction From Pennoyer to Shaffer to the Anticybersquatting Consumer Protection Act, 11 GEO. MASON L. REV. 243 (2002)

Other Writings

Book Review: *The Constitution of the United States of America: A Contextual Analysis*, THE LAW AND POLITICS BOOK REVIEW Vol. 19 No. 7 (July 2009) pp. 534-37

The United States Court of Appeals for Veterans Claims: The Past, Present and Future, prepared in conjunction with and appearing in the proceedings of the Tenth Judicial Conference of the United States Court of Appeals for Veterans Claims (April, 2008)

Book Review: *The Civil Contingencies Act 2004: Risk, Resillience, and the Law in the United Kingdom*, THE LAW AND POLITICS BOOK REVIEW Vol. 17 No. 2 (February 2007) pp. 122-24

Introduction and Commentary: Reflections on and Implications of Schiavo, 35 STETSON L. REV. 1 (Symposium Issue) (2005) (with Rebecca Morgan)

Book Review: *Asbestos Litigation*, THE LAW AND POLITICS BOOKS REVIEW Vol. 15 No. 12 (December 2005) pp. 1057-59

The Proper Role of Religion in End-of-Life Matters, NAELA EBULLETIN (May 3, 2005) (invited contribution)

An Introduction (and Confession): The Role of Mentoring and Modeling in Teaching Professional Responsibility 14 WIDENER L. J. 323 (Symposium Issue) (2005)

Book Review: *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, THE LAW AND POLITICS BOOK REVIEW Vol. 12 No. 4 (April 2002) pp. 173-175

SCHOLARSHIP AWARDS

May 2009	Dickerson-Brown Award for Excellence in Faculty Scholarship
May 2005	Homer & Dolly Hand Award for Excellence in Faculty Scholarship (University Wide)

TEACHING AWARDS:

Fall 2007	Golden Apple Achievement Award for teaching awarded based on vote of Stetson student body
Spring 2007:	Stetson University Award for Excellence in Teaching (University Wide)
Fall 2006	Golden Apple Achievement Award for teaching awarded based on vote of Stetson student body
Spring 2005	Stetson Student Bar Association Award for "Best All Around Professor"

Fall 2004	Golden Apple Achievement Award for teaching awarded based on vote of Stetson student body
Spring 2004	Stetson Student Bar Association Award for "Best All Around Professor"
Fall 2003:	Golden Apple Achievement Award for teaching awarded based on vote of Stetson student body
Fall 2002:	Golden Apple Achievement Award for teaching awarded based on vote of Stetson student body
Fall 2001:	Stetson Student Bar Association Award for "Excellence in Professionalism and Career Development"

SELECTED EXTERNAL ACADEMIC PRESENTATIONS:

November 2014	Invited Symposium Panelist: *Delays in Veterans' Benefits Adjudications*, UNIVERSITY OF MIAMI NATIONAL SECURITY AND ARMED CONFLICT LAW REVIEW (Miami, Florida)
July 2014	Southeastern Association of Law Schools Annual Meeting (Amelia Island, Florida) Panelist: *Emerging Remedies Discussion Group* Panelist: *Civil Procedure Discussion Group* Panelist: *Tenure: Now What?*
November 2013	Panelist, *Veterans Benefits and the Elderly: PTSD and Dementia*, Richardson School of Law, University of Hawaii
July 2013	Southeastern Association of Law Schools Annual Meeting (Palm Beach, Florida) Coordinator and Panelist: Teaching Remedies
July 2012	Southeastern Association of Law Schools Annual Meeting (Amelia Island, Florida) Panelist: Teaching Civil Procedure Panelist: The Passive/Aggressive Virtues of the Federal Courts
August 2011	Southeastern Association of Law Schools Annual Meeting (Hilton Head, South Carolina) Panelist: Civil Procedure at a Crossroads Panelist: The Current State of Detainee Litigation
June 2011	Speaker at the Annual Meeting of the Florida Association of Criminal Defense Lawyers (Palm Beach, Florida)

April 2011	Speaker at the Annual Florida DCA Judges' Conference (Amelia Island, Florida)
December 2010	Constitutional Law Discussion Forum (University of Louisville) Speaker: The Roberts Court at Five
August 2010	Southeastern Association of Law Schools Annual Meeting (Palm Beach, Florida) Panelist: Federal Pleading Standards
May 2010	Speaker at the Judicial Conference of the United States Court of Appeals for the Federal Circuit (Washington D.C.)
March 2010	Speaker at the Eleventh Judicial Conference of the United States Court of Appeals for Veterans Claims (Washington, D.C.)
February 2010	Stetson University College of Law (Gulfport, Florida) Panelist: *The Jurisprudence of Justice Clarence Thomas*
October 2009	Keynote Speaker at the Ceremonial Convening of the United States Court of Appeals for Veterans Claims in honor of that Court's Twentieth Anniversary (Washington, D.C.)
April 2009	Seattle University School of Law Symposium Participant: *Alternative Conceptions of the Role of Courts in the United States*
January 2009	AALS Annual Meeting (San Diego, California) Moderator: *Civil Case Outcomes*
July 2008	Southeastern Association of Law Schools Annual Meeting (West Palm Beach, Florida) Panelist: *Alternative Conceptions of the Judicial Role*
April 2008	Tenth Judicial Conference United States Court of Appeals for Veterans Claims (Washington, D.C.) *The United States Court of Appeals for Veterans Claims: Past, Present and Future*
January 2008	AALS Annual Meeting (New York, New York) Moderator: Co-Sponsored Program of the Sections on Remedies and Employment Discrimination *Employment Discrimination Remedies*

December 2007	Third First Amendment Discussion Forum (Brandeis School of Law, University of Louisville) Participant and Presenter
July 2007:	Southeastern Association of Law Schools Annual Meeting (Amelia Island, Florida) Panelist: *The War Against Terror in the Courts*
May 2007	Fifth Remedies Discussion Forum (Emory University School of Law) Participant and Presenter
January 2007	AALS Annual Meeting (Washington, D.C.) Panelist: Section on Remedies Program *Consent Decrees and Structural Litigation*
July 2006:	Southeastern Association of Law Schools Annual Meeting (Palm Beach, Florida) Panelist: *The Changing Paradigm of Article II*
April 2006:	Ninth Judicial Conference United States Court of Appeals for Veterans Claims (Washington, D.C.) *Significant Decisions and Trends, 2004-2006*
January 2006:	AALS Annual Meeting (Washington, D.C.) Moderator: Section on Remedies Program *A Roundtable Discussion on Tort Reform: Remedial and Compensatory Proposals*
January 2006:	AALS Annual Meeting (Washington, D.C.) Moderator: Section on New Law Professors Program *Getting Involved: The Law Professor and Service to the Community and the Profession*
November 2005:	Fourth Remedies Discussion Forum (Brandeis School of Law, University of Louisville) Participant and Presenter
October 2005	Discussion of *Lofton v. Secretary* Joint Program of BYU School of Law and Stetson University College of Law Organizer and Participant/Moderator
Summer 2005:	Southeastern Association of Law Schools Annual Meeting (Hilton Head, South Carolina)

	Panelist: "Punitive Damages after *State Farm*"
April 2005:	Thirteenth Annual Florida Bioethics Conference (Miami, Florida) Panelist: The Terri Schiavo Litigation
February 2005:	Presentation to Villanova Law School faculty concerning "Punitive Damages and State Sovereignty"
January 2005:	Presentation at Stetson College of Law Conference: "Reflections on and Implications of *Schiavo*." My presentation concerns 'Terri Schiavo and Democracy." In addition to presenting at the conference and moderating several panels, I, along with my colleague Professor Rebecca Morgan, organized the conference.
Summer 2004:	Southeastern Association of Law Schools Annual Meeting (Kiawah Island, South Carolina) Panelist: "Supreme Court and Legislative Update"
Summer 2004:	Southeastern Association of Law Schools Annual Meeting (Kiawah Island, South Carolina) Moderator: "The Jurisprudence of Justice Sandra Day O'Connor"
Summer 2004:	Microsociety National Meeting (St. Petersburg, Florida) Invited Speaker Concerning United States Litigation System
January 2004:	AALS Annual Meeting (Atlanta, Georgia) Moderator: "Can Actions Teach Louder than Words: The Role of Mentoring and Modeling in Teaching Professional Ethics" (Joint Program of the Sections on New Law Professors and Professional Responsibility)
Summer 2003:	AALS Section on Civil Procedure Conference (New York City) Presenter: "Innovative Personal Jurisdiction Curriculum: Using the Group Project"
Summer 2003:	Southeastern Association of Law Schools Annual Meeting Presenter: "Developments in the First Year Curriculum"
Summer 2003:	Southeastern Association of Law Schools Annual Meeting (Amelia Island, Florida) Moderator of Panel: "Judicial Selection: Election or Nomination"
Summer 2003:	Southeastern Association of Law Schools Annual Meeting (Amelia Island, Florida) Moderator of New Scholars' Panel

SELECTED COMMUNITY/PROFESSIONAL PRESENTATIONS

June 2015	Facilitator, Second Bench & Bar Conference, United States Court of Appeals for Veterans Claims (Washington, D.C.)
June 2015	Speaker, Tampa Bay Chapter of the Federal Bar Association, *The Supreme Court and Same-Sex Marriage* (Tampa Florida)
May 2015	Speaker, Orange County Bar Association Military Affairs Committee. *Veterans Benefits* (Orlando, Florida)
May 2015	Speaker, ABA Law Day, Manatee County Bar Association, *The Magna Carta and the Constitution* (Bradenton, Florida)
April 2015	Speaker, ABA Law Day, Seminole County Bar Association, *The Magna Carta and the Constitution* (Lake Mary, Florida)
April 2015	Speaker, Hillsborough County Bar Association Military Affairs Committee, *Veterans' Benefits* (Tampa, Florida)
March 2015	Speaker, Roads Scholar Program, *Law and Baseball* (St. Petersburg, Florida)
January 2015	Speaker, National Academy of Elder Law Attorneys Annual Meeting, *Veterans Benefits* (Newport Beach, California)
October 2014	Speaker, West Palm Beach Chapter of the Federal Bar Association, *The Supreme Court: Review and Preview* (West Palm Beach, Florida)
October 2014	Speaker, Special Needs Alliance Annual Meeting, *Veterans' Benefits* (St. Petersburg, Florida)
September 2014	Speaker, National Association of Veterans Advocates Semi-Annual Meeting, *Ethics in Veterans Law* (Orlando, Florida)
September 2014	Speaker, Constitution Day Otis Lecture for Palm Beach County School District, *Constitutional Interpretation* (Palm Beach, Florida)
September 2014	Speaker, Jacksonville Chapter of the Federal Bar Association, *The 225th Anniversary of the Judiciary Act of 1789* (Jacksonville, Florida)

June 2014	Moderator of the Federal Judicial Roundtable at the Annual Meeting of the Florida Bar
June 2014	Speaker, Florida Bar Military Affairs Committee, *Veterans Benefits: System Delays Causes and Cures*
June 2014	Presenter, *Contracts*, at the College of Advanced Judicial Studies for Florida Circuit Judges (Orlando, Florida)
June 2014	Speaker, Federal Bar Association of Tampa Bay, *Religion and Corporations*
June 2014	Court of Appeals for Veterans Claims Bar Association Program (Washington DC). Panelist: (1) Evidence and Veterans Benefits; and (2) Attorney Fee Issues
May 2014	World Congress on Guardianship (Washington, DC) Panelist, *Veterans Benefits and the Elderly: PTSD and Dementia*,
April 2014	Eckerd College "Roads Scholar" Program: *Law and Baseball*
March 2014	*Speaker*, Aging in America Conference, *10 Tips for the Expert Witness* (San Diego, CA)
September 2013	Speaker at Otis Lecture for Palm Beach County School Board
September 2013	Speaker, Federal Bar Association of West Palm Beach, *Supreme Court Roundup*
June 2013	Moderator of the Federal Judicial Roundtable at the Annual Meeting of the Florida Bar
June 2013	Speaker, Miami Federal Bar Association, *Judicial Independence*
May 2013	Presenter, *Damages*, at the College of Advanced Judicial Studies for Florida Circuit Judges (Orlando, Florida)
April 2013	Featured Speaker for the 12th Judicial Conference of the United States Court of Appeals for Veterans Claims (Washington, D.C.)
September 2012	Speaker at Otis Lecture for Palm Beach County School Board
July 2012	Speaker/Facilitator for the American Legions Florida Boys State Program (Tallahassee, Florida)

June 2012	Speaker at the Day Long CLE presented by the Bar Association of the United States Court of Appeals for Veterans Claims (Washington, D.C.)
February 2012	Speaker for the Osher Lifelong Learning Institute concerning Law and Baseball (Eckerd College, Florida)
June 2011	Speaker to the National Organization of Veterans' Advocates concerning Judicial Decision-making (St. Pete Beach, Florida)
September 2010	Speaker at the Palm Beach County Bar Association Constitution Day Luncheon
Spring 2010	St. Petersburg, Florida Library Association *The History of the Constitution*
Fall 2009	Presentation to the National Organization of Veterans' Advocates concerning "EAJA Developments" (Charlotte, North Carolina)
Spring 2009	Presentation to Clearwater Bar Association "People's Law School" Concerning Judicial Independence
Spring 2008	Presentation to the Sarasota County Bar Association Law Week Luncheon concerning "Threats to an Independent Judiciary"
Spring 2008	Presentation to the Charlotte County Bar Association Law Week Luncheon concerning "Threats to an Independent Judiciary"
Spring 2008	Presentation to Clearwater Bar Association "People's Law School" Concerning Judicial Independence
Fall 2008	Presentation to the Clearwater Bar Association Constitution Day Luncheon concerning "The Current State of the Legal War on Terror"
Spring 2007	Presentation to the Charlotte County Bar Association concerning "George Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change"
Spring 2007	Presentation to Clearwater Bar Association "People's Law School" Concerning Judicial Independence
Fall 2006	Keynote Address to Lakewood High School "The People Speak" Forum concerning "Immigration in America Today"

Fall 2006	Presentation to Tampa Federalist Society Chapter concerning "Judicial Activism"
Fall 2006	Presentation to Bradenton Rotary Club concerning "Current Constitutional Issues"
Spring 2006	Presentation to the Sarasota Bar Association Law Week Luncheon concerning "Significant Contemporary Constitutional Issues"
Spring 2006	Presentation to the Justice William Glenn Terrell Inn of Court concerning the "Importance of an Independent Judiciary"
Winter 2006	Presentation to the Clearwater Bar Association's People's Law School concerning the "Importance of an Independent Judiciary"
Fall 2005	Presentation to the Manatee County Bar Association concerning the state of constitutional separation of powers in 2005.
Spring 2005	Presentation to Temple Beth-El concerning Terri Schiavo litigation.
Spring 2005	Presentation to the Tampa Bay Paralegal Association concerning the litigation surrounding Terri Schiavo
Fall 2004	Presentation to the Gulfport Senior Citizens group concerning Florida Constitutional Amendments.

PROFESSIONAL AND COMMUNITY SERVICE:

American Association of Law Schools Section on Remedies
Member of Executive Committee, 2006-2007; 2010-2012
Chair-Elect 2007-2008
Chair 2008-2009
Immediate Past Chair 2009-2010

American Association of Law Schools Section on New Law Professors
Chair, 2005-2006
Chair-elect, 2004-2005
Secretary, 2002-2004
Member of Executive Committee, 2002-2006

Southeastern Association of Law Schools

Trustee, Board of Trustees, 2004-2009
Member, Conference Planning Committee, 2002-present
Member, Site Selection Committee, 2002-present

Academic Master, Willson American Inn of Court, Polk County, Florida, 2002-2004

Coach, National Moot Court Team, 2001-present

Coach, American Bar Association Appellate Advocacy Competition Team, 2001-present

Coach, Workers' Compensation Moot Court Competition Team, 2008-present

Coach, Veterans Law Appellate Advocacy Competition, 2009-present

Law School Committee Service (Representative):

Member, Curriculum Committee, 2001 – 2004, 2009-present (chair 2010-2011)
Chair, Speakers, Honors, Awards and Graduation Committee, 2002-2004
Member, Committee for Graduate and International Programs, 2001-2002
Member, Ad Hoc Faculty Retreat Committee, 2002-2004
Member, Ad Hoc Bar Passage Committee, 2002-2004
Chair, Strategic Planning Task Force, 2004-2005, 2008-2009
Member, Strategic Planning Coordinating Committee, 2004-2005, 2008-2009; 2013-2015
Member, Appointments Screening Committee, 2004-2005; 2007-2009
Chair, Appointments and Appointments Screening Committees, 2007-2009
Member, Academic Standards Committee, 2004-2005; 2014-present
Member, Academic Review Committee, 2014-present
Member, Admissions Committee, 2005-2007; vice-chair 2009-2010
Member, Faculty Scholarship Committee, 2002-2003, 2005-2007 (*chair* 2006-2007)
Member, Dean's Advisory Committee, 2007-2011
Co-Chair, Ad Hoc Committee on the Order of the Coif, 2009-2011
Member, Ad Hoc Committee on Faculty Workload, 2010
Elected *Academic Integrity Officer*, 2009-2012
Chair, College of Law Dean Search Committee, 2011-2012
Member, School of Business Administration Dean Search Committee, 2015

COMMUNITY SERVICE

Co-Chair, Temple Beth-El Social Action Committee
St. Petersburg, Florida

Received the "Shofar Award" (with my wife Debbie Allen) for Temple Beth-El's Volunteers of the Year, 2008

Facilitator, *Temple Beth-El Krosher Leadership Development Program*

CONGRESSIONAL TESTIMONY

March 2015	Invited Participant in United States House of Representatives Committee on Veterans Affairs Appeals Roundtable
October 2013	Invited Participant in United States House of Representatives Committee on Veterans Affairs Appeals Roundtable
March 2010	Testified before the United States House of Representatives Committee on Veterans' Affairs
July 2009	Testified before the United States Senate Committee on Veterans' Affairs

BAR ADMISSIONS: Commonwealth of Massachusetts; Supreme Court of the United States; United States Courts of Appeals for the First, Third, Eleventh, and Federal Circuits; United States Court of Appeals for Veterans Claims; United States District Courts for the District of Massachusetts and the Eastern District of Michigan.

MEDIA

I have been widely interviewed in the local media on a number of legal issues, including providing extensive commentary on issues concerning constitutional law and civil litigation.

Rex Dimmig

Education

Undergraduate: Tulane University
B.S. Political Science
May, 1975

Law School: Florida State University, College of Law
Juris Doctor with Honors
December, 1977
Moot Court Team, Phi Delta Phi Legal Fraternity

Legal Experience

2/1978 – 2/1980
Assistant Public Defender, Office of the Public Defender, 10th Judicial Circuit of Florida, Bartow
- Misdemeanor Trial Attorney
- Misdemeanor Division Director
- Felony Trial Attorney

2/1980 – 7/1980
Law Offices of Denis Fontaine, Lakeland
- Litigation Attorney

7/1980 – 1/1985
Assistant State Attorney, Office of the State Attorney, 10th Judicial Circuit of Florida, Bartow
- Felony Trial Attorney
- Child Victim Division Director
  - Personally prosecuted crimes of sexual abuse of children
  - Supervised attorneys prosecuting crimes of physical abuse of children
  - Supervised Juvenile Division

1/1985 – 7/1988
Law Offices of H. L. "Rex" Dimmig
- Solo Practitioner with emphasis on criminal and domestic litigation

7/1988 – 1/2013
Assistant Public Defender, Office of the Public Defender, 10th Judicial Circuit of Florida, Bartow
- Felony Trial Attorney

Felony Trial Division Chief
Juvenile Division Director
Capital Trial Attorney
Capital Trial Division Director
General Counsel
Administrative Division Director

1/2013 – Present
Public Defender, 10th Judicial Circuit of Florida

Memberships

Polk County Trial Lawyers Association, Board of Directors
Florida Association of Criminal Defense Lawyers
National Association of Criminal Defense Lawyers

Awards

Justice for Children – Man of the Year, 1982 and 1983
Florida Public Defender Association – President's Award, 2007 and 2010
Florida Public Defender Association – Craig Stewart Barnard Award, 2008
For relentless pursuit of justice and outstanding service to the Florida Public Defender system

Community Activities

Justice Teaching certified instructor

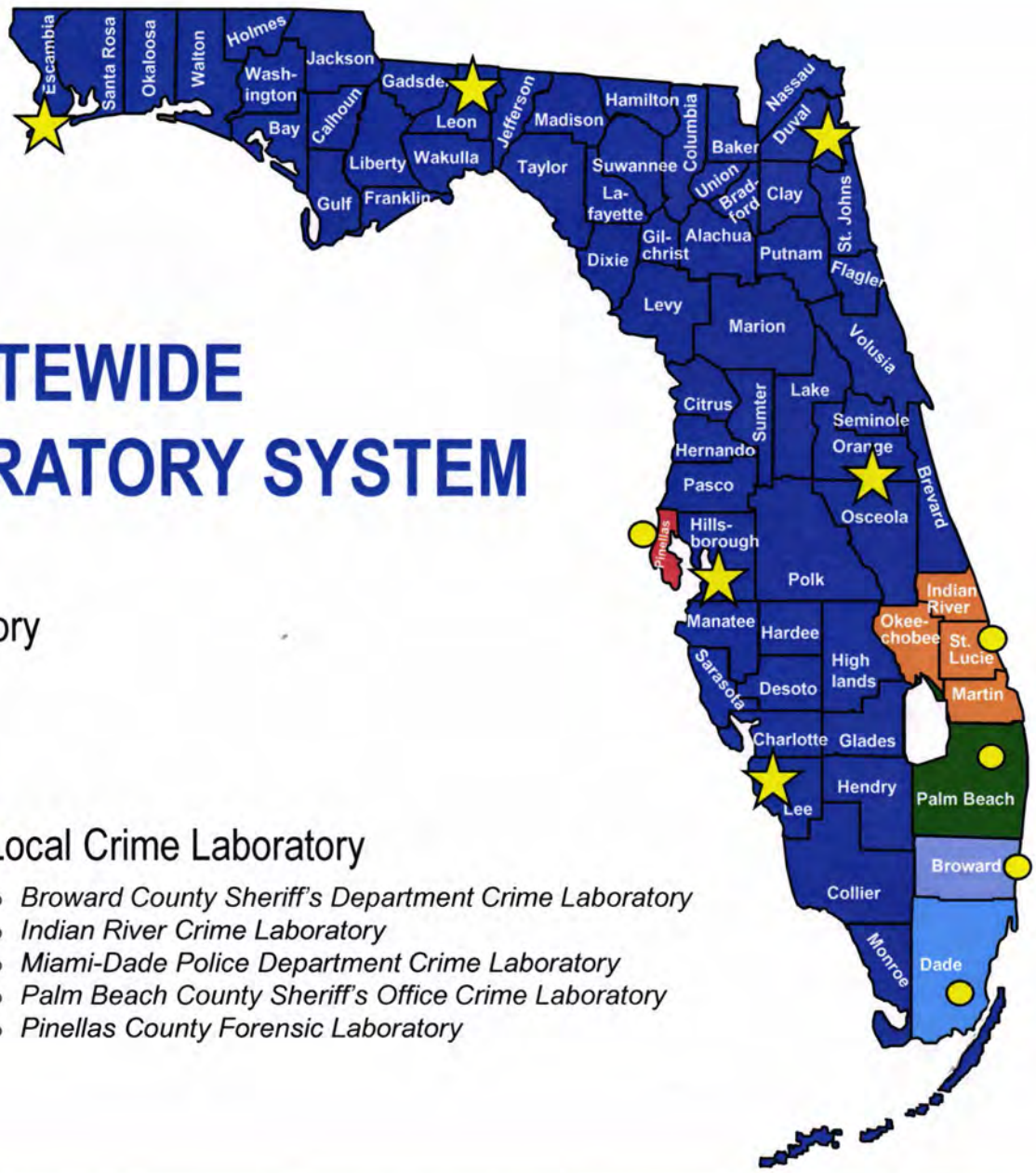
Frequent speaker – Leadership Lakeland, Bartow Citizens Police Academy, various civic organizations, schools

Polk County Police Academy – former instructor

Boy Scouts of America - Former Cubmaster
Former Scoutmaster – 2 sons achieved rank of Eagle Scout

Criminal Analysis
Laboratory System

FLORIDA STATEWIDE CRIME LABORATORY SYSTEM



FDLE Crime Laboratory

- *Fort Myers*
- *Jacksonville*
- *Orlando*
- *Pensacola*
- *Tallahassee*
- *Tampa Bay*

Local Crime Laboratory

- *Broward County Sheriff's Department Crime Laboratory*
- *Indian River Crime Laboratory*
- *Miami-Dade Police Department Crime Laboratory*
- *Palm Beach County Sheriff's Office Crime Laboratory*
- *Pinellas County Forensic Laboratory*

SERVICES PROVIDED		Broward	Indian River	Miami	Palm Beach	Pinellas	FDLE	Fire Marshal
Crime Scene	Scene Response				X		X	
Drugs	Seized Drug Analysis	X	X	X	X	X	X	
Toxicology	DUI - Urine Drugs				X	X	X	
	DUI - Blood Alcohol		X		X	X	X	
	DUI - Blood Drugs				X	X	X	
	Sex Assualt - Urine/Blood				X	X	X	
	Post Mortem/Medical Examiner					X		
	Other Internal Affairs_____				X	X	X	
Trace	Fire Debris Analysis		X			X		X
	Paint Analysis			X			X	
	Polymer Analysis			X			X	
	Fiber Analysis			X			X	
	Explosives - Low							X
	Explosives - High							X
	Other _Glass, Frac Match, Filaments			X			X	
	Other_Chemical Unknowns			X		X		X
	GSR Analysis			X				
Biology	DNA-Forensic	X	X	X	X	X	X	
	Serological Screening	X	X	X	X	X	X	
	DNA - Paternity		X	X	X	X	X	
	Other _DNA Investigative Support Database_						X	
Firearms	Projectile/Casing Comparision	X	X	X	X		X	
	GSR	X		X				
	Toolmarks, Distance	X	X	X	Distance		X	
Impression	Footwear	X	X	X			X	
	Tiremarks	X	X	X			X	
	Other __Tool Mark Examinations	X	X	X				
Latent Prints	Processing			X	X		X	
	Comparison	X		X	X		X	
	Other ____BIS	X		X	X		X	
	BIS Reverse Search_State-wide						X	
Digital Evidence	Digital Evidence						X	
	Cell Phones						X	
	Other - Forensic Video						X	X
Other - Photo	Film/CD/Development				X			
	Prints				X			
Other - Question Docs	_____						X	

Sexual Offense
Evidence Kit Testing

SEXUAL ASSAULT KIT Progress Report

Florida Department of Law Enforcement

OCT 2016

Previously Unsubmitted SAKs (Backlog)
October 2015 - September 2016

Completed - 1,814
CODIS hits - 406

July - September 2016

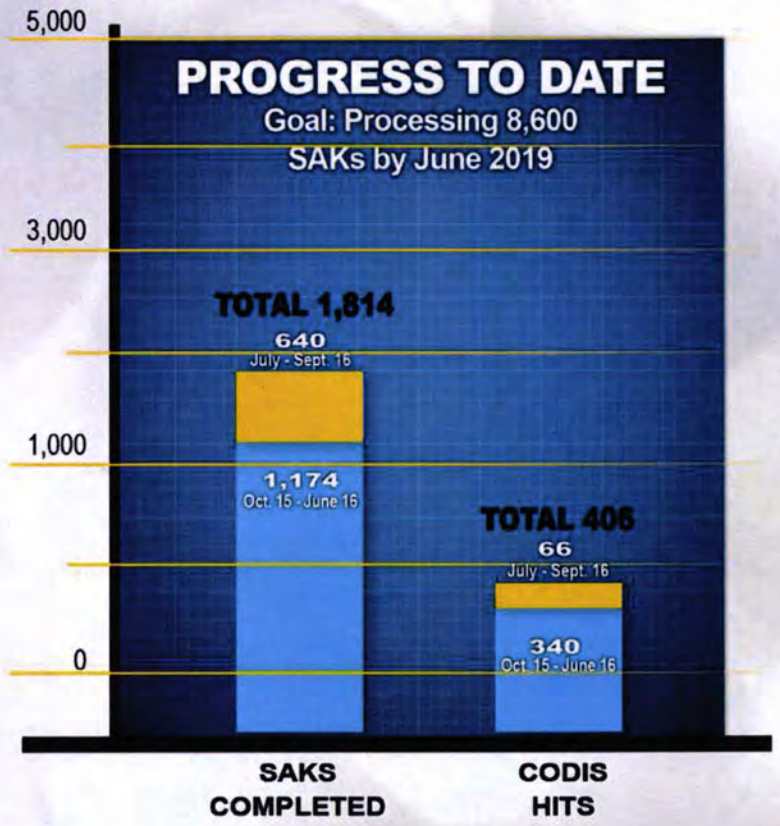
Received - 1,030
Completed - 640
CODIS hits - 66

Previously unsubmitted SAKs have an offense date prior to 10/1/14 but were not previously submitted to the laboratory. These SAKs were received by the laboratory on or after 1/1/15. Effective 7/1/16, the department began using legislative appropriations to process SAKs.

SAKs Submitted per Section 943.326, FS
July - September 2016

Received– 553
Completed– 103
120 day TAT compliance – 100%
Average TAT - 53 days

Effective 7/1/6, Florida law requires all newly collected SAKs to be processed by the laboratory within 120 days of receipt.



Terms and Definitions

SAKs – Sexual Assault Kits

CODIS is the Combined DNA Index System. CODIS blends forensic science and computer technology into a tool for linking crimes. It enables federal, state, and local forensic laboratories to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to known offenders.

A CODIS hit occurs when DNA evidence is matched to a sample in the DNA system. Not all CODIS hits are actionable. An "actionable hit" is a match that provides new information to the investigation. For example, a hit to an offender who was already convicted in the associated case is not an "actionable hit."

TAT or Turnaround Time is the length of time from when the kit was submitted to the laboratory, the analysis completed and a laboratory report released to the submitting agency.

Curriculum Vitae

CURRICULUM VITAE

Jon R. Thogmartin, M.D.

District Six Medical Examiner
Executive Director, Pinellas County Forensic Laboratory
10900 Ulmerton Road
Largo, FL 33778
(727) 582-6800

Education:

The University of Texas Health Science Center at San Antonio, Doctor of Medicine, 1990

Southern Methodist University, Dallas, Texas Bachelor of Science (Biology), 1986 Magna Cum Laude

R. L. Turner High School, Carrollton, Texas, Graduate with Honors, 1982

Training:

Dade County Medical Examiner Department, Miami, Florida, Fellowship in Forensic Pathology, July 1, 1995-June 30, 1996

Residency in Anatomic and Clinical Pathology at the University of Texas Health Science Center at San Antonio (and affiliated hospitals) 1990-1995

Professional Employment:

District Medical Examiner, District 6, Pinellas/Pasco Counties, Executive Director Pinellas County Forensic Laboratory, December 1, 2000-present.

Consultant for Broward County, Florida Administration for evaluation of the District 17 Medical Examiner, December 6, 2011-April 2012.

District Medical Examiner (*Interim*), District 5, Lake, Sumter, Marion, Hernando, and Citrus Counties, July 2007-September 30, 2008.

District Medical Examiner, District 15, Palm Beach County Medical Examiner Office, 3126 Gun Club Road West Palm Beach, Florida 33406, April 1, 1999-October 31, 2000.

Associate Medical Examiner, Palm Beach County Medical Examiner Office, July 1, 1997- March 31, 1999.

Associate Medical Examiner, Broward County Medical Examiner's Office, Fort Lauderdale, Florida, July 1, 1996-June 30, 1997

Associate Medical Examiner, Dade County Medical Examiner Office, Miami, Florida, July 1, 1995-June 30, 1996 (fellowship)

Acting Associate Medical Examiner, Medical Examiner District 5 (Leesburg, Florida). Date of appointment February 2000, by Medical Examiner Commission Chairperson Joan Wood, M.D. to provide interim Medical Examiner services during the absence of an appointed District Medical Examiner.

Acting Associate Medical Examiner, Medical Examiner District 7 (Volusia County) and District 24 (Seminole County). Date of appointment December 10, 1998 to provide interim Medical Examiner services during the absence of an appointed District Medical Examiner.

Acting Associate Medical Examiner, Palm Beach County Medical Examiner's Office January 1, 1997- June 30, 1997 to provide interim Medical Examiner services pending the appointment(s) of permanent Associate Medical Examiners.

Licenses:

Physician License, State of Florida ME - 0071056

Physician License, State of Texas J-0310

Physician License, State of Alabama MD.29384

Certification:

Board Certified in Anatomic, Clinical, and Forensic Pathology by the American Board of Pathology

Honors:

Alpha Omega Alpha Medical Honor Society, 1989

Phi Beta Kappa, 1986

Robert Stewart Hyer Society, 1985

National Honor Society, 1981

Awards:

Silver Medal of Valor, Metro-Dade Police Department, November, 1996

Professional Organizations:

American Academy of Forensic Sciences

Florida Association of Medical Examiners

National Association of Medical Examiners

Pinellas County Medical Society

Appointments and other training:

Chairman Florida Medical Examiners Commission Drugs Found in Deceased Persons Quality Assurance Committee. November 2011- current

Florida Medical Examiners Commission Annual Reports and Standards of Excellence Committee. Jan 2011- current

Key Opinion Leader Conference. Medical and Research Advisory Committee (MARAC) of the Sickle Cell Disease Association of America (SCDAA) in Partnership with the Centers for Disease Control and Prevention. Sponsored Attendee. Public Health Implications of Sickle Cell Trait, Atlanta Georgia, December, 2009

EXPERT PANEL OF UNIFORM STANDARDS AND CASE DEFINITIONS, CENTER FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, Washington, DC, November 2009

Revision Work Group, General Records Schedule GS2 for Law Enforcement, Correctional Facilities, and District Medical Examiners. April 1, 2008.

Florida Medical Examiners Commission, 2003-2007

Florida Child Abuse Death Review Team, 2003

Florida Crime Laboratory Council, 2000-2004

Host of Annual Education Conference of the Florida Association of Medical Examiners, October 2000.

Stuart James' Bloodstain Pattern Analysis Workshop, August 25, 2000

Certified Range Officer, United States Practical Shooting Association, 1995

Certified Firearms Instructor, National Rifle Association, 1994

Medical School Admissions Committee, University of Texas Health Science Center at San Antonio, 1989-1990

Teaching Experience/Presentations:

Framing the Research Agenda for Sickle Cell Trait. National Institutes of Health. Natcher Conference Center, Bethesda, MD June 3, 2010

Sickle Cell Trait Associated Deaths: A Case Series with a Spectrum of Clinical Presentations. 2009 American Academy of Forensic Sciences Annual Meeting, Denver, Colorado

Strangulation and Other Compressions. Dade County Medical Examiner Office and IACP Seminar, Police - Medical Investigation of Death. Miami, Florida (2000)

Laboratory Instructor, University of Texas Health Science Center at San Antonio, Dept. of Pathology, 1994-1995

Teaching Assistant, University of Texas Health Science Center at San Antonio, Dept. of Cellular and Structural Biology, Gross Anatomy, 1989-1990

Teaching Assistant, University of Health Science Center at San Antonio, Dept. of Cellular and Structural Biology, Microanatomy/Histology, 1987-1988

Teaching Assistant, Southern Methodist University, Dallas, Texas, Dept. of Chemistry (Organic Chemistry), 1984-1985

Court Experience:
Accepted as an expert in the field of Forensic Pathology in U.S. Federal Court, Puerto Rico, the State of Michigan and in the Circuit Courts of Manatee, Marion, Sumter, Hillsborough, Sarasota, Pinellas, Pasco, Dade, Broward, and Palm Beach Counties.

Major Areas of Interest:
Wound Ballistics
Firearms
Infant Deaths and Child Abuse
Asphyxia
Forensic Toxicology

Publications:

Thogmartin, JR. Start, DA. 9mm ammunition used in a 40 caliber Glock pistol: An atypical gunshot wound. J Forensic Sci 1998;43(3):712-714.

Thogmartin, JR. Sudden death in police pursuit. J Forensic Sci 1998;43(6): 1228-1231.

Thogmartin, JR. Fatal fall of a stowaway: A demonstration of the importance of death scene investigation. J Forensic Sci 2000;45(1): 211-215.

Thogmartin JR, Siebert CF, Jenkins DC, Pellan WA. An analysis of seasonal variations of in traffic crashes and fatalities in Palm Beach County. (Palm Beach Post and ME Annual Report 1999).

Siebert CF, Thogmartin JR. Restraint-related fatalities in mental health facilities. Report of two cases. Am J For Med Pathol 2000;21:210-212.

Thogmartin JR, Siebert CF, Pellan WA. Sleep position and bed-sharing in sudden infant deaths: An examination of autopsy findings. J Pediatrics 2001;138:212-217.

Thogmartin JR, England D, Siebert CF. Hepatic glycogen staining: Application in injury survival time and child abuse. Am J For Med Pathol 2001;22:313-318.

Chu AY, Ripple MG, Allan CH, Thogmartin JR, Fowler DR. Fatal dog maulings associated with infant swings. J Forensic Sci 2006; 51(2):403-406.

Thogmartin JR, Wilson CI, Palma NA, Ignacio SS, Pellan WA. Histological diagnosis of sickle cell trait: a blinded analysis. Am J For Med Pathol 2009;30:36-39.

Goldberger B, Thogmartin JR, Johnson H, Paulozzi L, Rudd R, Ibrahimova A. Drug Overdose Deaths Florida, 2003—2009. MMWR 2011;60(26):869-872.

Thogmartin JR, Wilson CI, Palma NA, Ignacio SS, Shuman MJ, Flannagan LM. Sickle cell trait associated deaths: a case series with a review of the literature. J Forensci Sci 2011;56(5):1352-1360.

Paulozzi LJ, Rudd RA, Ibrahimova A, Goldberger BA, Thogmartin JR, Ocampo B, Shelton KC. A comparison of Florida medical examiners' reports and death certificates for specific drug-related overdose deaths. Academic Forensic Pathology 2012;2(2):190-192.

Lee D, Delcher C, Maldonado-Molina MM, Bazydlo LA, Thogmartin JR, Goldberger BA. Trends in licit and illicit drug-related deaths in Florida from 2001 to 2012. Forensic Sci Int. 2014 Oct 24;245C:178-186.

Job Title Laboratory Director

Discipline(s):
☒ controlled substances ☒ fire debris (trace evidence)

Education:

Institution	Dates attended	Major	Degree completed
University of Phoenix	1999 – 2001	Management	MA
Missouri State University (formerly Southwest Missouri State University)	1984 – 1988	Chemistry	BS

Certification:
American Board of Criminalistics, Fellow: Fire Debris and Controlled Substance Analysis

Awards:
1988 American Institute of Chemist -Outstanding Senior Chemist, SMSU

Other Training:

2016 Synthetic Cannabinoids: A Primer. ATI, February 2016, (Web-based)
2015 Qualtrax Training, Qualtrax, June, 2015, Largo, FL
2015 American Academy of Forensic Sciences – Annual Meeting, February 2015, Orlando,FL
2015 Measurement Traceability – ASCLD/LAB Assessor Training, April, 2015, (Web-based)
2014 Controlled Substances Analysis, RTI/Agilent/NMS (Web-based)
2014 Uncertainty of Measurement I, II, and III, RTI , April 2014 (Web-based)
2014 Measurement Confidence 100A, 100B, 100C , ASCLD/LAB, April 2014 (Web-based)
2012 IFRI Forensic Science Symposium, March, 2012, Miami, FL (FIU)
2012 Uncertainty and Traceability, June, 2012, Largo, FL
2012 Updating Knowledge of 17025, ASCLD-LAB, April, 2012 (Online)
2010 K2 and Synthetic Cannabinoids, NMS, Sept 2010 Webinar
2010 NIJ Grant Management Seminar, October, 2010, San Diego, CA
2009 TWGFEX Annual Symposium, September, 2009, Orlando, FL
2009 Population Statistics and Forensic DNA Analysis, September, 2009, Largo, FL
2009 Crime Scene and DNA Basics for Forensic Analysts, October, 2009 (web)
2009 Introduction to Uncertainty in Forensic Chemistry, Part II, May, 2009, RTI
2009 Introduction to Uncertainty in Forensic Chemistry, April, 2009, RTI
2009 To Hell and Back: The Ethics of Stewardship and the Stewardship of Ethics, Jan, 2009, RTI
2006 Courtroom Testimony – May, 2006 Largo, FL
2006 Artel Pipette Calibration, Largo
2006 Volatiles Analysis, Largo
2006 AAFS – Feb 22-25 – New Orleans
2005 Drugs and the Brain, Dr. James Harlow, Largo
2005 SOFT – Stimulants Workshop, April, 2005 Orlando
2005 Solid Phase Extractions, Varian, - June 2006 - Largo, FL
2005 ELISA – July, 2005 – Largo, FL
2005 American Forensic Quality Managers (AFQAM) Annual Meeting, October Indian Rocks Beach, FL
2005 ToxiLab Broad Based Spectrum Drug Detection – November – 2005, Largo, FL
2005 CODIS Meeting – November, 2005, Washington DC

2004 ASCLD-LAB International Assessor Training – May 2004, Garner NC
2004 Laboratory Management Orientation Training ISO/IEC – June 2004, Garner, NC

2004 FL Crime Lab Council: ISO 17025 Quality Assurance Seminar – June, 2004 – Largo, FL
2003 ASCLD Annual Conference – Oct, 2003 St. Petersburg, FL
2003 AAFS Meeting – Feb, 2003, Chicago, IL
2002 ASCLD Annual Conference – Oct. 2002, St. Petersburg, FL
2002 ASCLD-LAB Meeting Workshop – Oct. 2002, St. Petersburg, FL
2001 Florida Crime Lab Council Drug Analyses Seminar – June 2001, Jupiter Beach, FL
2001 TWG-FEX Fire and Explosion Analysis and Investigation Seminar – Aug. 2001, Orlando FL
2000 ASCLD Annual Conference – Aug. 2000, Buffalo, NY
2000 ISO Guide 25 and ISO 17025 Accreditation Standard Workshops.
2000 ODV Field Test Kits - Master Instructor Training - Largo, Florida
2000 Budgeting and Finance in the Public Sector Workshop, ASCLD Meeting - Buffalo, NY
1999 "ASCLD-LAB Inspector Training", American Society of Crime Lab Directors Laboratory Accreditation Board - San Jose, California.
1999 ASCLD Annual Conference – Aug. 1999, Las Vegas, NV
1999 Fire Investigators Conference (PARCO) – May 1999, Clearwater, FL
1999 AAFS Meeting – Feb. 1999, Reno, NV
1996 "Statistics and Probability in Forensic Science: Trace Evidence Modular", National Forensic Science Technology Center, SPJC-Allstate - St. Petersburg, FL.
1995 "Contemporary Issues of Fire Investigations," American Academy of Forensic Sciences, WORKSHOP CHAIRPERSON - Seattle, WA.
1995 "Active Carbon: Principles and Application", PACS - Pittsburgh, PA
1994 "Wood Fiber Identification Workshop," Southern Association of Forensic Scientists - Orlando, Florida
1994 "Explosive Recognition and Scene Management - Tampa Bomb Squad - Tampa, FL
1993 "Advanced Accelerant Detection Seminar", Midwestern Association of Forensic Scientists - Cincinnati, OH
1993 "Advanced Arson Investigation", Denver Fire Department - Denver, CO.
1993 "Fire Debris Analysis", Florida Crime Lab Council Workshop - St. Petersburg, FL.
1992 "Microscopical Infrared Spectroscopy Workshop", American Academy of Forensic Sciences - February 14, 1994, San Antonio, Texas.
1991 "The Effects of Drugs on Human Performance: Drugs and Driving/Drugs in the Workplace," American Academy of Forensic Sciences Meeting - Anaheim, CA.
1991 "Arson Analysis Course", Bureau of Alcohol, Tobacco and Firearms - Boulder, CO.
1991 "GC-IRD-MSD Workshop", American Academy of Forensic Sciences/Hewlett Packard - New Orleans, LA.
1990 " Chromatographic Methods of Forensic Science," FBI - Quantico, VA
1990 "Forensic Chemist Seminar," Drug Enforcement Agency - McLean, VA.
1990 "Mass Spec Workshop", Hewlett Packard - Orlando, FL.

Courtroom Experience:

Discipline	Period of time	Approx. number of times
Controlled Substances	1989 – present	200
Fire Debris/Trace Evidence	1991 – present	10

Professional Affiliations:

Member of:	Offices held	Date(s)
OSAC-Chemistry: Fire and Explosives	Member	2014-present
AFQAM-Association of Forensic Quality Assurance Managers	Member	2002 - 2006
SAFS – Southern Association of Forensic Scientists	Member	2001 – 2006
AAFS – American Academy of Forensic Scientists	Criminalistics Section representative to ABC Examination Committee	2000 – 2010
	Fellow	1994 – present

ASCLD-LAB – Laboratory Accreditation Board	Trace Analysis Proficiency Review Committee	2000 – present
	Delegate and Assessor	1999 – present
ASCLD – American Society of Crime Lab Directors	Member	1999 – present
TWG–FEX – Technical Working Group for Fire Debris Analysis	Standards and Protocols Committee Chairman	1998 – 2003
	Executive Committee	1999-2004
	Member	1998-present
ASTM – American Standard and Testing Materials	E-30 Committee Forensic Science, Member	1998 – 2008
ABC – American Board of Criminalistics	Fellow	1995 – present
	Exam Committee	2001-2010
	Exam Committee Chair	2004-2010
MAFS – Midwestern Association of Forensic Scientists	Member	1991 – 2009
	Representative – ABC Fire Debris Analysis Exam Maintenance Committee	1998 – 2000
AAI – International Association of Arson Investigators	Member	1992 – 1995

Employment History:

Laboratory Director — Pinellas County Forensic Laboratory — 1998 - present

Management and supervision of the forensic laboratory; employee supervision and evaluation; maintenance of ASCLD-LAB accreditation and the professional development of the laboratory personnel; analysis of suspected controlled substance, analysis of fire debris.

Forensic Chemist — Pinellas County Forensic Laboratory — 1989 - 1998

Analysis of suspected controlled substance and analysis of fire debris.

Instructor — Multi-Jurisdictional Counter Drug Task Force Training — 1996 - 2001

Instructor for law enforcement training or controlled substance recognition.

Instuctor — National Center for Forensic Science — 2000-2014

Lead instructor for NCFS-ATF. Basic,Advanced, Comprehensive Fire Debris Analysis Courses.

Instructor — National Forensic Science Technology Center — 1997 - 1999

Lead instructor for NFSTC-ATF. Basic and Advanced Fire Debris Analysis Courses.

Laboratory Analyst — Springfield Police Department — 1988 - 1989

Chemical analysis of suspected controlled substances.

Laboratory Instructor — Southwest Missouri State University — 1989 - 1989

Instruction and supervision of chemistry laboratory classes.

Other Qualifications:

Presentations/Research:

2012 "Water Loss Study on Crack Cocaine Packaged in Kapak Evidence Bags", IFRI Symposium, Florida International University, Miami, FL, March 2012
2012 "Use of Ignitable Liquids in Fire Debris Analysis", IFRI Symposium, Florida International University, Miami, FL, March 2012
2012 "Use of Ignitable Liquids in Fire Debris Analysis", IFRI Symposium, Florida International University, Miami, FL, March 2012
2009 "Understanding Ignitable Liquid Classifications and Why they are Used", Annual TWGFEX Symposium, September, 2009, Orlando, FL
2003 "Quality Assurance in Fire Debris Analysis" AAFS Workshop – Feb. 2003, Chicago, IL
2001 "Pattern Recognition and Data Interpretation" presented at TWG-FEX Fire Debris Symposia - Aug. 2001, Orlando, Florida
2001 Solvent Options for the Desorption of Activated Charcoal in Fire Debris Analysis". AAFS, Presentation - February, Atlanta GA. (Presented by Julia Dolan, Senior Forensic Scientist, ATF)
1995 "An Evaluation of Multiple Extraction of Fire Debris by Passive Diffusion", FBI International Fire Investigations Symposium, Poster Presentation - August 7, 1995, Fairfax, VA.
1995 "An Evaluation of 42 Accelerant Detection Canine Teams," presented at Contemporary Issues of Fire Investigations Workshop, American Academy of Forensic Sciences - February 14, 1995, Seattle, WA.
1994 "Effects of Elution Techniques on the Desorption of Activated Charcoal Strips in Fire Debris Analysis." American Academy of Forensic Sciences, Poster Presentation - February 17, 1994, San Antonio, Texas.
1994 "The Effects of Time, Temperature, Strip Size and Concentration in the use of Activated Charcoal Strips in Fire Debris Analysis." American Academy of Forensic Sciences, Presentation - February 18, 1994, San Antonio, Texas.
1994 "Physical and Chemical Factors Influencing the Recovery of Accelerants from Activated Charcoal Strips." American Academy of Forensic Sciences, Presentation - February 18, 1994, San Antonio, Texas, publication pending.
1993 "Chemists and Canines: Developing a Canine Testing Program, II" CADA, Accelerant Detection Canine Association - October 1993, St. Petersburg, FL.
1993 "Optimizing the Use of Activated Charcoal Strips in Fire Debris Analysis", Presented at Southeastern Association of Forensic Scientist, Juried Paper Presentation - September 8, 1993, Charleston, South Carolina.
1993 "Use of Activated Charcoal Strips," Presented at Florida Crime Lab Council -Forensic Chemist Seminar - April, 1993, St. Petersburg, FL
1992 "Chemists and Canines: Developing a Canine Testing Program", Canine Accelerant Detection Association - November 1992, St. Petersburg, Florida.

Teaching Experience:

2015 Challenges in Fire Debris Analysis, AAFS Meeting Workshop, Februrary, 2015
2015 Fire Debris Analysis Workshop, Honolulu Police Department, July, 2015
2014 Comprehensive Fire Debris Analysis Course, Instructor, Largo, FL April, 2012
2008 NCFS-ATF Comprehensive Fire Debris Analysis Course, Orlando, FL
2007 NCFS-ATF Comprehensive Fire Debris Analysis Course, Largo, FL
2006 NCFS – ATF Advanced Fired Debris Analysis Course
2005 NCFS-ATF Advanced Fire Debris Analysis Course, Maine
2004 NCFS-ATF -Basic Fire Debris Analysis Course, Largo, FL
2004 NCFS-ATF Advanced Fire Debris Analysis Course, Largo, FL
2003 NCFS-ATF Advanced Fire Debris Analysis Course, St. Petersburg, FL
2003 NCFS-ATF Basic Fire Debris Analysis Course. Orlando, FL
2002 NCFS-ATF Advanced Fire Debris Analysis Course, Sea Girt, NJ
2002 NCFS-ATF Basic Fire Debris Analysis Course – June, Columbus, Ohio
2002 NCFS-ATF Advanced Fire Debris Analysis Course – March, Lacey, Washington
2001 NCFS-ATF Advanced Fire Debris Analysis Course. Ft. Lauderdale, Florida.

2001	Florida Crime Lab Council Drug Analysis Seminar, "Nitrous Oxide Analysis" - June
2001	NCFS-ATF Basic Fire Debris Analysis Course – Jan. 8 –11, Miami, FL
2000	NCFS-ATF Advanced Fire Debris Analysis Course. St. Petersburg, Florida.
1994-2000	Various Fire and Police Agencies "Forensic Aspects of Fire Investigations, Collection, Packaging and Submission of Fire related Evidence," PCSO-Crime Scene Technicians, Training Academy
1993-2000	St. Petersburg Junior College Police Academy and Multi-Jurisdictional Drug Task Force, "Drug Identification", "Field Testing", "Analysis of Controlled Substances", various dates and locations
1999	Salient Topics in Fire Debris Analysis, International Association of Forensic Science – August 1999, Los Angeles, CA
1996-99	NFSTC-ATF Advanced Fire Debris Analysis Course, St. Petersburg, FL -September 16-19, 1996 and December 1-4, 1996; Sacramento, California - March, 1997; Denver, Colorado - October 27-30,1997; Portland, Oregon - May 4-7, 1998; Albany, New York, June 1-5, 1998; Lansing, Michigan - September 7-10, 1998, Sacramento, California - October 1999
1998	NFSTC-AAFS Salient Issue in Fire Debris Analysis, American Academy of Forensic Science Meeting, San Francisco, California, February 14, 1998.
1995	PARCO Conference "Forensic Aspects of Fire Investigations" - March 2, 1995, St. Petersburg, FL.
1992	St. Petersburg Junior College - Fire Investigation Course Guest Speaker "Role of Laboratory in Fire Investigations - June, 1992, Clearwater, FL
1992	PARCO Annual Seminar for Fire Investigators, "Evidence Handling and Packaging" - February, 1992, St. Petersburg, FL

Workshop Coordination:

2006	Florida Forensic Advisory Council Drug Analysis QA/QC Seminar, Orlando
2001	Florida Crime Lab Council Drug Analysis Seminar
1999	NFSTC-AAFS. Salient Issue in Fire Debris Analysis, American Academy of Forensic Science Meeting, San Francisco, California, February 14, 1998
1996	NFSTC-ATF Basic Fire Debris Analysis Course. Southeastern Public Safety Institute - September 9-12, 1996, St. Petersburg, FL.
1996	NFSTC-ATF Advanced Fire Debris Analysis Course. Southeastern Public Safety Institute -September 16-19, 1996 and December 1-4, 1996, St. Petersburg, FL, California Institute of Criminalistics, March, 1997, etc.
1995	Contemporary Issues of Fire Investigations Workshop, American Academy of Forensic Sciences, February 14, 1995, Seattle, WA.

Publications:

2016	"Chapter 4: Forensic Fire Debris Analysis" in Forensic Chemistry: Fundamentals and Applications, Jay A Siegel, Editor, Wiley Blackwell, New Jersey, 2016.
2007	Stauffer, Dolan, Newman. Fire Debris Analysis. New York, 2007.
2004	"Chapter 5: Modern Laboratory Techniques Involved in the Analysis of Fire Debris Samples", in Fire Investigation, Niamh Nic Daeid, editor. CRC Press, New York, 2004.
2004	"Chapter 6: Interpretation of Laboratory Data", in Fire Investigation, Niamh Nic Daeid, editor. CRC Press, New York, 2004
2004	"Chapter 5: ASTM Approach to Fire Debris Analysis", in Fire Scene Evidence, Jose Almirall and Kenneth Furton, editors. CRC Press, New York, 2004.
1997	The GC-MS Guide to Ignitable Liquids, CRC Press, New York, 1998.
1996	"The Use of Activated Charcoal Strips for Fire Debris Extractions by Passive Diffusion. Part 1: "The Effects of Time, Temperature, Strip Size and Concentration in the use of Activated Charcoal Strips in Fire Debris Analysis." Journal of Forensic Sciences, Volume 41, Number 3, May 1996, pp. 361-370.
1995	"An Evaluation of 42 Accelerant Detection Canine Teams," Journal of Forensic Sciences, JFSCA, Vol. 40, No. 4, July, 1995, pp. 561-564.
1995	"New and Unusual Ignitable Liquids," SAFS Newsletter, VOL XXIII, No. 2, September 1995, pp. 27-31.

DAVID COFFMAN

EDUCATION

University of Houston, 1982
Bachelor of Science degree, Chemistry

PROFESSIONAL EXPERIENCE

October 2012 – present Florida Department of Law Enforcement
Director of Forensic Services

October 2006 – October 2012 Florida Department of Law Enforcement
Chief of Forensic Services, Tallahassee Regional Crime Laboratory

1994 – 2006 Florida Department of Law Enforcement
Crime Laboratory Analyst Supervisor, DNA Database

February 1987 – 1994 Florida Department of Law Enforcement
Crime Laboratory Analyst, Biology and DNA Database

1985 – 1987 Houston Police Department Crime Laboratory
Criminalist, , Biology, DNA Controlled Substances, Crime Scene, Bloodstain Pattern Analysis

PROFESSIONAL MEMBERSHIPS

Member of the Accreditation Council ASCLD/LAB-ANAB
American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) member 2013-2016. Served as ASCLD/LAB Board Chairman 2015-2016
FBI Rapid DNA CJIS Task Force Member 2009- Present
Member of Criminal Justice Advisory Board for Tallahassee/St. Leo Colleges/Community Colleges
SWGDAM, Scientific Working Group on DNA Analysis Methods, 1991-2007; (The early years of my tenure I was an invited guest)

- Chairman 2004-2007
- Vice Chairman 2002-2004
- Subcommittee Member, CODIS, Mass Disaster/Missing Person, and Expert System

National DNA Advisory Board Member 1997-2000
NDIS, National DNA Index System Procedures Board, 2002-2007
Attorney General Ashcroft's Laboratory Funding Working Group member
Attorney General Janet Reno Laboratory Funding Working Group member
Subcommittee member Missing and Exploited Children Information Clearing House 1995-1996