Revisiting the Decision of Death in *Hurst v. Florida*

Brian K. Cooke, MD, Almari Ginory, DO, and Jennifer Zedalis, JD

The United States Supreme Court has considered the question of whether a judge or a jury must make the findings necessary to support imposition of the death penalty in several notable cases, including *Spaziano v. Florida* (1984), *Hildwin v. Florida* (1989), and *Ring v. Arizona* (2002). In 2016, the U.S. Supreme Court revisited the subject in *Hurst v. Florida*. Florida Statute § 921.141 allows the judge, after weighing aggravating and mitigating circumstances, to enter a sentence of life imprisonment or death. Before *Hurst*, Florida's bifurcated sentencing proceedings included an advisory sentence from jurors and a separate judicial hearing without juror involvement. In *Hurst*, the Court revisited the question of whether Florida's capital sentencing scheme violates the Sixth Amendment, which requires a jury, not a judge, to find each fact necessary to impose a sentence of death in light of *Ring*. In an eight-to-one decision, the Court reversed the judgment of the Florida Supreme Court, holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty. The role of Florida juries in capital sentencing proceedings was thereby elevated from advisory to determinative. We examine the Court's decision and offer commentary regarding this shift from judge to jury in the final imposition of the death penalty and the overall effect of this landmark case.

J Am Acad Psychiatry Law 44:483–90, 2016

Timothy Hurst[1] was convicted of murdering his coworker in 1998. At his first trial, the jury voted 11 to 1 to recommend a sentence of death, but Mr. Hurst's first sentence was reversed for reasons separate from the current proceedings. On resentencing, a second jury recommended seven to five that Mr. Hurst receive the death penalty. Under Florida's system, the jurors' recommendation was considered by the judge, but the judge independently weighed the factors necessary to impose a sentence of death. Florida's statute did not require that the jury make the critical findings necessary to impose the death penalty. Although the jury's advisory verdict was death at both of Mr. Hurst's trials, the maximum punishment Mr. Hurst could have received without any independent judicial findings was life in prison without parole. The judge sentenced Mr. Hurst to death based on her independent findings.

Two United States Supreme Court cases became important in the subsequent history of Mr. Hurst's case. In 2000, the United States Supreme Court held in *Apprendi v. New Jersey*[2] that a judge cannot increase a defendant's sentence beyond the statutory maximum based on facts other than those found by the jury. In other words, sentencing enhancements requiring proof of any additional factors must be presented to the jury and proved beyond a reasonable doubt. Independent judicial fact-finding, if used to support an enhanced sentence, violates the Sixth Amendment.

In the New Jersey case, Mr. Apprendi was charged with second-degree possession of a firearm after firing into the home of an African-American family. The charge carried a maximum sentence of 10 years. After Mr. Apprendi pleaded guilty, the prosecutor filed a motion to enhance his sentence based on the state's hate crime statute. New Jersey's hate crime law allowed the judge to enhance a sentence based on a preponderance of the evidence regarding the motiva-

Dr. Cooke is Assistant Professor of Psychiatry, University of Florida College of Medicine, Gainesville, FL. Dr. Ginory is Program Director, University of Central Florida College of Medicine, Hospital Corporation of America Graduate Medical Education Consortium Psychiatry Residency, Gainesville, FL. Ms. Zedalis is Assistant Director of the Criminal Justice Center, University of Florida Levin College of Law, and Affiliate Professor in the Department of Psychiatry, University of Florida College of Medicine, Gainesville, FL. Address correspondence to: Brian K. Cooke, MD, Springhill Health Center, 8491 NW 39th Avenue, Gainesville, FL 32606. E-mail: cooke@ufl.edu.

Disclosures of financial or other potential conflicts of interest: None.

tion for the crime. A hearing was held before the judge based on the state's motion. Prosecutors argued that Mr. Apprendi's crime was motivated by racial bias. Mr. Apprendi's defense argued that his actions were the result of intoxication. The trial court agreed with the prosecution, and Mr. Apprendi was sentenced to 12 years in prison, 2 years more than he could have received based on his guilty plea alone. The Supreme Court reversed Mr. Apprendi's sentence, holding that any finding that increases a sentence beyond the statutory maximum must be proved beyond a reasonable doubt and decided on by a jury. The *Apprendi* decision was cited as precedent by the Court in its consideration of *Ring v. Arizona*.

In 2002, the U.S. Supreme Court ruled in *Ring v. Arizona*[3] that a jury must make all factual findings necessary to support a death sentence. Mr. Ring was charged with murder, armed robbery, and related charges. At his trial, the jury found Mr. Ring guilty of first-degree murder, but deadlocked on whether the murder was premeditated. Arizona law permitted the judge to hold a separate hearing and determine the presence or absence of aggravating circumstances required for the imposition of a death sentence. At Mr. Ring's sentencing hearing, the judge made findings that Mr. Ring was the actual shooter, a fact contested in the case, in addition to aggravating circumstances sufficient under Arizona law to support a death sentence (Ref. 3, p 584). The Court found that Arizona's capital sentencing law violated the *Apprendi* rule, because Arizona permitted a judge rather than a jury to find the facts necessary to sentence a defendant to death.

In a divided decision, the Florida Supreme Court declined to apply *Ring v. Arizona* in its 2012 decision regarding Mr. Hurst. The court noted that Florida's death penalty statute had been upheld by the United States Supreme Court in *Hildwin v. Florida*[4] and that *Hildwin* had not been expressly overruled by *Ring*. The court also distinguished Florida's death penalty proceedings from those at issue in Arizona. In Florida, jurors heard and weighed evidence on aggravating and mitigating circumstances, determined whether an aggravator had been proved beyond a reasonable doubt, and rendered an advisory sentence. Arizona's law did not include an advisory sentence from jurors.

On March 9, 2015, the U.S. Supreme Court granted *certiorari* and agreed to hear *Hurst v. Florida* to resolve whether Florida's capital sentencing law violates the Sixth Amendment. The case was decided on January 12, 2016.[5] In an eight-to-one decision, the Court reversed the judgment of the Florida Supreme Court, holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing a death sentence.

The case of Mr. Hurst and the Court's decision are of importance to forensic mental health professionals who provide mitigating evidence at death penalty proceedings. Concerns of testifying experts include an enlarged role for mental health professionals at jury trials and sensitivity to possible differences in the way mental health evidence should be presented and explained to jurors as opposed to judges.

Case Background

In 1998, Timothy Hurst, age 19, was charged with first-degree murder for the death of Cynthia Harrison. On May 2, 1998, Ms. Harrison's body was found in the freezer of the restaurant where she worked. She was bound and gagged with electrical tape, and she had been stabbed approximately 60 times with a box cutter. The restaurant's safe was unlocked and open, with $375 missing. Mr. Hurst was scheduled to work with Ms. Harrison that morning. A nearby worker noted Mr. Hurst arriving at the restaurant earlier that morning and was able to identify him from a police lineup. A friend of Mr. Hurst's, Michael Williams, testified that Mr. Hurst had previously talked about robbing the restaurant and, after the fact, had also confessed to killing Ms. Harrison. In addition, another friend of Mr. Hurst's, Lee-Lee Smith, testified that Mr. Hurst said he was going to rob the restaurant. Mr. Hurst later admitted to killing the victim and asked Mr. Smith to dispose of some items and keep the money for him. Several items were obtained from Mr. Smith's home, including clothing with Ms. Harrison's blood, Ms. Harrison's driver's license, and a bank bag from the restaurant. Mr. Hurst was found guilty of first-degree murder.[1]

During the penalty phase, the judge instructed the jury to consider several mitigating and aggravating factors, including whether the murder was committed during the commission of a robbery and whether the murder was especially heinous, atrocious, and cruel. The jury recommended the death penalty by an 11-to-1 vote.[1] Florida Statute § 921.141 provides that "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of

life imprisonment or death."[6] After a nonjury hearing, as provided by Florida law, the judge sentenced Mr. Hurst to death, finding three aggravating circumstances and rejecting most of the mitigating circumstances. A third aggravator found by the judge, which was not argued by the state at trial or considered by the jury, was that the murder was committed to avoid or prevent a lawful arrest.[1]

In 2002, Mr. Hurst appealed to the Florida Supreme Court, raising four claims. He argued that the trial court erred in considering the aggravating circumstance that the crime was committed to avoid a lawful arrest, as this aggravator was never presented to jurors and it was not supported by the evidence. He also argued that the court failed to give proper weight to the mitigating factor of his age and that it failed to give weight to evidence about his family background, contributions to the community, and church attendance. He also argued that a death sentence was disproportionate in his case. In addition, he averred that failure to require jurors to decide all evidence necessary to support the death penalty violated the rule of *Apprendi v. New Jersey*, which had recently been decided.

The Florida Supreme Court agreed with Mr. Hurst on the first claim. It held that the trial court erred in finding the aggravator that the murder was committed to avoid or prevent a lawful arrest. However, this error was found to be harmless, as the death penalty could still have been imposed on the basis of the other two aggravators (Ref. 1, p 696). On the second point, the Florida Supreme Court found that the trial court did not err in assigning very little weight to the mitigating factors, and even if there were an error, it was harmless in light of the aggravating circumstances (Ref. 1, pp 697–700). Mr. Hurst's argument of disproportionality was rejected after consideration of the two significant aggravators, with the third being struck, and minimal mitigating circumstances. Finally, regarding the fourth point, the court rejected Mr. Hurst's claim that the *Apprendi* rule applied to Florida's capital sentencing process (Ref. 1, p 703). Mr. Hurst's conviction and sentence of death were affirmed.

In 2009, Mr. Hurst returned to the Florida Supreme Court, raising the question of ineffective assistance of counsel in addition to claims of newly discovered evidence and that the state withheld favorable evidence from the defense.

Mr. Hurst argued that that the state failed to present favorable material evidence during the guilt phase of his trial: for example, that a witness saw several men in the parking lot or that Mr. Smith was also charged in connection with this case. These claims were rejected.[7] Mr. Hurst's second claim was that there was newly discovered evidence that necessitated a new trial. This evidence included changes in testimony and Mr. Smith's post-trial conviction. This claim was also rejected (Ref. 7, p 990). Mr. Hurst also claimed ineffective assistance of counsel during the guilt phase of the trial, a claim that was also rejected (Ref. 7, p 995).

Mr. Hurst received relief on his remaining claim that his counsel was ineffective during the penalty phase in failing to develop and present mental health mitigation. Mr. Hurst's trial counsel failed to have him examined by a mental health professional to evaluate for low IQ or for possible damage secondary to fetal alcohol syndrome. A mental health evaluation had been requested by his previous counsel but not pursued. The Florida Supreme Court agreed that counsel was ineffective during the penalty phase for failure to present mental health evidence. The sentence of death was vacated, and Mr. Hurst's case was remanded for a new penalty phase (Ref. 7, pp 1015–16).

In 2012, a new penalty phase was held in which mental health factors, such as Mr. Hurst's low IQ and the effects of *in utero* exposure to alcohol, were presented as mitigating circumstances. The judge instructed the jury that the death penalty could be recommended if it found that the murder was especially heinous, atrocious, or cruel, and the murder occurred while a robbery was committed. The jury voted seven to five to recommend the death penalty. The judge then sentenced Mr. Hurst to death based on the jury's recommendation, as well as her independent findings that two aggravating circumstances were present.

Mr. Hurst's case was again appealed to the Florida Supreme Court in 2014, and his second death sentence was upheld. In this appeal, Mr. Hurst argued that the trial court failed to address evidence of his intellectual disability adequately. This claim was considered and rejected by the court. Mr. Hurst again argued that under *Ring*, every factor necessary to support a death sentence must be presented to a jury and proved beyond a reasonable doubt. He also argued that a unanimous jury verdict was necessary

on at least one aggravating factor. The court rejected these arguments and affirmed Mr. Hurst's sentence. Three justices dissented from the portion of the majority's opinion finding that *Ring* was not applicable.[8] Mr. Hurst then sought relief in the United States Supreme Court.

The Decision

In an eight-to-one decision, the U.S. Supreme Court reversed the judgment of the Florida Supreme Court and remanded the case. Justice Sotomayor, writing for the majority, stated that the necessity was "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*" (Ref. 5, p 621). Justice Breyer filed a concurring opinion. Justice Alito submitted a dissenting opinion.

Justice Sotomayor opined 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" (Ref. 5, p 619). Drawing on *Ring* as precedent, the maximum punishment Mr. Hurst could have received without any judge-made findings was life in prison without parole.

The Court criticized Florida's failure to "appreciate the central and singular role the judge plays under Florida law" (Ref. 5, p 622). Striking down Florida's capital sentencing law, Justice Sotomayor focused on a key provision that calls for the judge, and not the jury, to make specific findings. These judicial findings are necessary to impose a death sentence in Florida, despite two separate jury proceedings and an advisory sentencing verdict. In Florida's bifurcated system, jurors determine whether the defendant is guilty of first-degree murder in a guilt phase. In the event of a guilty verdict, jurors then sit through a second penalty phase proceeding. If they determine that at least one statutory aggravating factor has been proved beyond a reasonable doubt, they must also weigh any mitigating evidence.[6] In *Tedder v. State*, the Florida Supreme Court found the jurors' "advisory" verdict should be given "great weight" by the judge (Ref. 9, p 910). Florida's hybrid sentencing proceedings in which the jury provides an "advisory sentence" of life or death without specifying the factual basis for its recommendation[6] is insufficient to meet the necessary factual finding required by *Ring*.

The state also argued that *stare decisis* compelled the Court to uphold Florida's capital sentencing scheme. The Court acknowledged its own precedent in Florida death cases, *Spaziano v. Florida*[10] and *Hildwin v. Florida*,[4] where it twice upheld Florida's hybrid scheme and permitted judicial fact-finding for sentencing purposes. Speaking for the majority, Justice Sotomayor wrote, "Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent that they allow a sentencing judge to find an aggravating circumstance, independent of the jury's fact-finding, that is necessary for imposition of the death penalty" (Ref. 5, p 624).

Justice Breyer wrote a concurring opinion, explaining that he concurred in the majority judgment based on his view that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death" (Ref. 5, p 624). He emphasized that it was quite clear that Florida's judges, not juries, sentence capital defendants.

Justice Alito, writing in dissent, argued that he would not overrule *Hildwin* and *Spaziano* without reconsidering later cases on which the Court's present decision is based (including *Ring*). He also would not extend *Ring*, based on the view that Florida's sentencing scheme is quite different from Arizona's, and his belief that the Florida jury "plays a critically important role" (Ref. 5, p 626).

Discussion

In *Hurst v. Florida*, the Supreme Court brought forward not only the reasoning of its earlier decisions in *Apprendi* and *Ring*, but the theme that jurors, not judges, are the ultimate decision makers in our justice system.

The roles of juror and judge are traditionally separate: jurors decide the facts of the case and apply the law to those facts; judges decide the sentence when there is a verdict of guilt. Judges also perform a gatekeeping function in trials, ruling on admissibility of evidence, resolving questions of which laws apply in given situations, and ruling on matters that affect the fairness and integrity of the proceedings. For example, judges decide whether evidence such as a confession or a recording has been lawfully obtained as a threshold requirement for its use by the state. To make these threshold decisions, judges must often hear testimony and make factual findings. The authority to sentence has always been a major role of judges in the U.S. justice system.

The idea that jurors hold the fate of the accused in their hands has not always been at odds with that of the role of the judge. Until *Apprendi* was decided, the Court's safeguarding of the Sixth Amendment right to trial by jury stopped short of sentencing. In *Ring*, the Court recognized this separation of power in the context of death penalty proceedings.

The Supreme Court's review and subsequent reversal of *Apprendi* and *Ring* demonstrate intent to safeguard the jury's role in the justice system. Defining any factor that subjects a defendant to punishment greater than that allowed by verdict alone as "the functional equivalent of an element," the Court made it clear that the right to trial by jury is a reservation of power. *Apprendi* defines elements as "any facts that increase the prescribed range of penalties to which a criminal defendant is exposed" (Ref. 2, p 490).

The Court's scrutiny of sentencing enhancements in light of *Apprendi* and *Ring* is likely to be far reaching. When the prosecution seeks to submit sentencing factors to the judge not expressly found by jurors to obtain an enhanced penalty, it will be frustrated by *Apprendi* and its progeny. *Hurst* is the latest in this line of cases.

Under *Hurst,* the judge's independent fact-finding of sentencing factors is contrary to rights guaranteed by the Sixth Amendment to the U.S. Constitution. The Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, guarantees the right to a public trial by an impartial jury. These rights attach to any factor that exposes a defendant to greater punishment than that permitted by the jury's verdict alone. In any circumstances where the judge imposes a sentence above the statutory maximum allowed by verdict alone, the judge is infringing on these rights (Ref. 5, pp 621–2).

The theme of juror supremacy, or of faith in jurors as "more attuned to the community's moral sensibility," is far reaching (Ref. 3, p 615, internal citations omitted). The Court's willingness to recognize distinct limits on judicial power in this context suggests the value it places on participatory justice. Judicial power at sentencing is now circumscribed by facts and circumstances expressly found by a jury: "When the judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority" (Ref 11, p 304).

As demonstrated by *Apprendi*, the same reasoning has been applied in cases where the defendant does not choose to exercise the constitutional right to trial by jury, but instead enters a guilty plea. This point is significant, because it underscores the Court's view of the Sixth Amendment and its limits on judicial power.

In *Blakely v. Washington* (2004),[11] the Supreme Court reversed Ralph Blakely's 90-month sentence for kidnapping involving domestic violence and use of a firearm because it exceeded the permissible range he could have received after a jury trial by 37 months. Although the case was resolved with a guilty plea as opposed to a trial, 53 months was the statutory maximum for the offense, absent any exceptional circumstances. Mr. Blakely did not admit any exceptional circumstances as a condition of his plea, and he did not consent to a nonjury determination of any factors not admitted as part of his plea.

Mr. Blakely's sentencing judge enhanced the sentence beyond the 53-month cap after an independent sentencing hearing. During the three-day hearing, the judge heard testimony from Mr. Blakely's estranged wife as well as medical experts. Mr. Blakely had a history of mental illness, and his attorneys called mental health experts on his behalf. The enhanced sentence was based on the judge's finding that the acts were committed with deliberate cruelty (Ref. 11, pp 299–301).

Finding this sentencing proceeding in violation of Mr. Blakely's Sixth Amendment rights, Justice Scalia noted, "Our commitment to *Apprendi* in this context reflects not just respect for long standing 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" (Ref. 11, pp 305–6).

In this context, we see the Court's intent to limit judicial power even in cases where a defendant has waived a jury trial. The focus is on the separate role of the judge, and the rulings turn on this question: Is the judge enhancing a sentence based on facts that have not been proved to a jury beyond a reasonable doubt or admitted by the accused?

In the Court's review of death penalty decision-making, *Hurst* represents a strong affirmation of the power of the jury. Jurors bring collective experience, attitudes, and reactions into the jury room. In Flor-

ida, 12 jurors are empaneled in death penalty cases. Using Florida's law as an example, jurors may ascribe any weight they choose to mitigating evidence, and they are not limited in their consideration of specifically enumerated factors. They may consider "any factor in the defendant's background that would mitigate against the imposition of the death penalty" (Ref. 6, (7)(h)).

How is the reservation of power in the jury significant? Both the prosecution and the defendant stand in a different posture before a jury than they do before an elected or appointed judge. This difference is especially true because the prosecution is an arm of the state. Through the process of jury selection, both sides play a role in the ultimate makeup of the jury. Once selected to serve, jurors are the collective and diverse eyes, ears, and voices of the community. The right of accused citizens to be judged by their "equals and peers" on any fact or aspect of an offense requiring proof has come to us from the common law of England, as noted by Justice Scalia in *Blakely* (Ref. 11, pp 301–2). The service of jurors in our country was guaranteed at its inception. "The Framers' paradigm for criminal justice is the common law ideal of limited state power accomplished by strict division of authority between judge and jury" (Ref. 11, p 296).

How may these decisions affect mental health professionals, who are often called to give evidence at sentencing hearings? One outcome will be the increase in presentations to jurors, as opposed to judges, on a range of points. For example, if the state seeks an enhanced sentence based on specific findings, such as racial motivation or deliberate cruelty, jurors will have the power and the responsibility to weigh the evidence and determine the facts, just as they do other elements of the offense.

This weighing of evidence will also be true in death penalty cases, where mental health experts often testify regarding the existence of mitigating evidence and the mental state of the defendant at the time of an offense. Jurors will listen, weigh, and evaluate expert witness testimony in circumstances where judges previously exercised autonomy when considering these claims. Jurors will make their own determinations about the credibility and expertise of the witnesses in this process. They will collectively decide what matters to them in deciding the verdict.

In *Apprendi* and *Blakely*, mental health experts testified in nonjury hearings (Ref. 2, p 470; Ref. 11, p 300). Although there is no precise way to characterize the differences between judicial fact-finding and juror fact-finding, the constitutional right of defendants to present this evidence to a jury and the jury's power over its ultimate value are at the heart of these decisions.

In *Hurst*, advisory juries twice handed down death recommendations (Ref. 5, p 620). It is notable that Mr. Hurst's second advisory death sentence was recommended by the smallest majority possible, seven to five rather than the earlier vote of 11 to 1. Unlike the first trial, jurors in the second trial were provided with mitigating mental health evidence. No information is available to indicate the impact of this evidence, and juror deliberations are off limits in general. It is a question of the jury's role and its power, as opposed to that of the judge.

Judges pronounce sentences; they technically impose sentences and sometimes have continued jurisdiction over aspects of sentences, such as the terms of probation. However, the power to impose punishment does not carry with it the independent power to find facts necessary for that punishment. This fact-finding power is guarded by the Sixth Amendment as a power of jurors and not of judges. The blurring of roles is what led to the decisions discussed herein, including the *Hurst* decision.

In addition, the *Hurst* ruling underscores challenges facing all participants in the court system because of the proliferation of special sentencing laws. State and federal legislators are actively passing laws aimed at increasing punishments for various crimes beyond existing statutory maximums. Florida, for example, now has 16 different statutory aggravating factors in its capital sentencing scheme.[6] The New Jersey hate crime law at issue in *Apprendi* permitted the judge to exceed the statutory maximum of 10 years for a second-degree offense by another 10 years (Ref. 2, pp 468–9).

Now, none of the special sentencing factors appearing across the country can be used by judges alone to increase penalties. This includes the imposition of special fines,[12] sentencing guidelines that exceed statutory maximums,[13] and minimum mandatory terms.[14]

In *Hurst*, the Supreme Court reaffirmed the Constitution's reservation of power in the jury already noted in *Apprendi*, *Blakely*, and *Ring*. These cases will continue to raise questions about the use of sentencing enhancement laws. Prosecutors are now faced

with the task of presenting and proving additional elements to a jury to argue for a sentence that departs upward from the statutory maximum for an offense. Guidelines that provide for terms exceeding the stated maximum based on special criteria will now necessarily be viewed as laws with added elements for jury consideration. The process of seeking enhanced sentences is likely to take more time and more resources.

One possible outcome would be an overhaul of the federal sentencing guidelines and any state guidelines with similar provisions. However, whether there will be such a broad revision remains to be seen.

It is important to note that Sixth Amendment protections also apply in cases where a defendant enters a guilty plea. Judges may only sentence defendants in excess of a statutory maximum where the facts necessary to increase the sentence inhere in the verdict; the defendant expressly waives his right to a jury finding; or the defendant admits the fact necessary for the increase (Ref. 11, pp 303–4).

In *Hurst*, the third condition is relevant; the state argued that the defendant "admitted" a statutory aggravator based on his appellate lawyer's decision not to challenge the judge's finding that the murder was committed in the course of a robbery. This argument was rejected by the Supreme Court for lack of merit, indicating a defendant's admission of facts for purposes of a sentence enhancement must be of record, knowing, and voluntary. "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" (Ref. 5, pp 622–3).

Aftermath of the Decision and Conclusions

Hurst and its predecessors have restrained the power of judges over sentencing. The Court has demonstrated a clear intent to place sentencing facts within the jurors' domain. The decision's impact on cases now in progress, on appeal, or in collateral proceedings is the next question.

The decision in *Hurst* will affect the long list of capital punishment cases in Florida, which has the second highest number of death row inmates in the United States. As of January 1, 2016, California had 743, Florida had 396, and Texas had 263.[15] Will all capital felonies for which death sentences were imposed under procedures subsequently determined by the U.S. Supreme Court to be unconstitutional have to be resentenced? Although Florida has a "brisk pace of executions"[16] among the 32 states that have capital punishment, death penalty cases have mostly stalled in response to the Court's holding.

After the *Hurst* decision, Florida Governor Rick Scott signed a legislative overhaul of the death penalty sentencing law (HB 7101) in March 2016.[17] The law took effect as soon as Governor Scott signed the bill. Some have called the new law "hurriedly crafted."[18] Florida's new capital sentencing law includes, among other changes, the following:

> Penalty-phase juries must unanimously find a sufficient number of aggravating circumstances for the state to impose a death sentence.
>
> Prosecutors must notify defendants before trial that they intend to seek the death penalty and to identify the aggravating circumstances the state intends to prove.
>
> The decision to impose a death sentence requires at least 10 of 12 jurors.
>
> Judges can no longer override a jury's recommendation of life in order to impose a death sentence.[19,20]

On May 9, 2016, Florida Circuit Judge Milton Hirsch declared the fix unconstitutional and struck down the new law (Florida Statute § 921.141), believing that anything less than unanimity for penalty phase jury findings of aggravators and the recommendation of death would not protect Florida's capital-case sentencing scheme from further constitutional attack.[21] He was the first state judge to rule on the constitutionality of the revised death-penalty sentencing law, issuing his order in the case of *Fla. v. Karon Gaiter*.[22] Mr. Gaiter is awaiting trial for first-degree murder for fatally shooting a man in 2012.

Circuit Judge Hirsch opined, "[a] decedent cannot be more or less dead. An expectant mother cannot be more or less pregnant. And a jury cannot be more or less unanimous. Every verdict in every criminal case in Florida requires the concurrence, not of some, not of most, but of all jurors—every single one of them." (Ref. 22, p 9). Because even second-degree misdemeanor defendants cannot be convicted except upon the unanimous verdict of a jury, then it follows that, "[w]e take no Floridian's life upon a less-than-unanimous verdict" (Ref. 22, p 16).

If the Florida Supreme Court finds that the decision is retroactive, death row inmates should be afforded new sentencing hearings or have their death sentences commuted to life. Similar considerations followed the *Ring* decision, when several states rewrote their statutes so that juries, not judges, determine when the death penalty will be imposed.[23] In response to *Ring*, the Arizona legislature met and adopted a new capital sentencing procedure, which requires complete jury participation regarding the imposition of the death sentence. The statute also prohibited retroactive application of jury sentencing, limiting the application of *Ring* to only those cases that were pending on direct appeal at the time *Ring* was decided.[24] Then in 2004, the U.S. Supreme Court held in *Schriro v. Summerlin*[25] that its 2002 decision in *Ring* is not retroactive to cases already final on direct review, thereby denying new sentencing hearings for death row inmates in states whose sentences were originally imposed by judges.

At the least, the *Hurst* decision will apply to inmates who, although sentenced to death, have not finished their initial direct appeals to the Florida Supreme Court. There are 37 direct appeals (so-called pipeline cases) pending before the Florida Supreme Court.[26]

Delaware and Alabama are now the only remaining states that allow judges to override a jury's recommendation of a life sentence. In contrast to Florida, however, Delaware has only 14 men on death row, and its last execution was in 2012.[27] Alabama has 196 inmates on death row.[15] All other states with a death penalty require a unanimous jury verdict to impose the death sentence. The Court's decision in *Hurst* will affect hundreds of death sentences in the United States, but it is already clear that the interpretation of the decision will remain contested.

References

1. Hurst v. State, 819 So.2d 689 (Fla. 2002)
2. Apprendi v. New Jersey, 530 U.S. 466 (2000)
3. Ring v. Arizona, 536 U.S. 584 (2002)
4. Hildwin v. Florida, 490 U.S. 638 (1989)
5. Hurst v. Florida, 136 S. Ct. 616 (2016)
6. Fla. Stat. § 921.141 (2015)
7. Hurst v. State, 18 So. 3d 975 (Fla. 2009)
8. Hurst v. State, 147 So. 3d 435 (Fla. 2014)
9. Tedder v. State, 322 So. 2d 908 (Fla. 1975)
10. Spaziano v. Florida, 468 U.S. 447 (1984)
11. Blakely v. Washington, 542 U.S. 296 (2004)
12. Southern Union Co. v. United States, No. 11-94 (U.S. June 21, 2012)
13. United States v. Booker, 543 U.S. 220 (2005)
14. Alleyne v. United States, 133 S. Ct. 2151 (2013)
15. Death row inmates by state. Available at: http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year/. Washington, DC: Death Penalty Information Center. Accessed June 16, 2016
16. Alvarez L: Florida revamps death penalty, making it harder to sentence someone to die. New York Times, March 3, 2016. Available at: http://www.nytimes.com/2016/03/04/us/florida-revamps-death-penalty-making-it-harder-to-sentence-someone-to-die.html?_r=0/. Accessed June 16, 2016
17. Bousquet S: Revamped Florida death penalty on trial before Supreme Court. Bradenton Herald, May 5, 2016. Available at: http://www.bradenton.com/news/local/crime/article75967722.html/. Accessed June 16, 2016
18. Kam D: Florida Supreme Court tries to sort out new death penalty law. Orlando Weekly, June 7. 2016. Available at: http://www.orlandoweekly.com/Blogs/archives/2016/06/07/florida-supreme-court-tries-to-sort-out-new-death-penalty-law/. Accessed June 16, 2016
19. 2016 Fla. Sess. Law Serv. 13 (H.B. 7101)
20. Death-penalty law under fire in Florida. Orlando Sentinel, May 20, 2016. Available at: http://www.orlandosentinel.com/opinion/os-ed-death-penalty-the-interview-20160520-story.html/. Accessed June 16, 2016
21. Ovalle D: Judge says state death-penalty law is unconstitutional. Miami Herald, May 9, 2016. Available at: http://www.miamiherald.com/news/local/community/miami-dade/article76520707.html/. Accessed June 16, 2016
22. State v. Gaiter, NO. F01–128535 (Fla. Cir. Ct. 2016)
23. Scott CL, Gerbasi JB: Ring v. Arizona: who decides death? J Am Acad Psychiatry Law 31:106–9, 2003
24. Shapiro M: Re-evaluating the role of the jury in capital cases after *Ring v. Arizona.* N.Y.U. Ann Surv Am L 59:633–66, 2004
25. Schriro v. Summerlin, 542 U.S. 348 (2004)
26. Condemned on Florida's death row hope to get new sentences. Watertown Herald, Published in the Daily Times, June 12, 2016. Available at: http://www.watertowndailytimes.com/national/condemned-on-floridas-death-row-hope-to-get-new-sentences-20160612/. Accessed June 16, 2016
27. Reyes JM: Delaware court considers constitutionality of death penalty. Delaware online, June 15, 2016. Available at: http://www.delawareonline.com/story/news/local/2016/06/15/arguments-wednesday-over-delawares-death-penalty-law/85885106/. Accessed June 16, 2016