

HURRICANE FLORIDA: THE HOT AND COLD FRONTS OF AMERICA'S MOST ACTIVE DEATH ROW

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ABSTRACT

Florida is critical to understanding the modern application of the death penalty in the United States. It has the largest active death row. It sentences more people to death than any other state. It has the worst exoneration record and executes at a rate second only to Texas. The legislative appetite for the continued use of the death penalty has resulted in the re-writing and amending of the law with a haste that has created a state of legal chaos. Florida was the first state to pass a new statute following the finding in *Furman v. Georgia* that the application of the death penalty was unconstitutional. Forty years on, history repeated itself in response to the finding in *Hurst v. Florida* that Florida's system of sentencing people to death was unconstitutional. In less than a year, history repeated once again when the Florida Supreme Court interpreted previous United States Supreme Court decisions by finding the requirement for jury unanimity in the penalty phase of a capital trial in *Hurst v. State*.

This Article examines Florida's application of the death penalty today under its new 2016–17 statute. It highlights the dearth of empirical research into Florida's capital charging and provides an insight into research undertaken by the authors to date. Provisional findings indicate that Florida is arbitrarily and capriciously imposing death sentences, and concludes that *Furman* remains relevant today in Florida. A review of 1051 first-degree murder cases, in which 347

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death cases were identified, indicated significant geographical variance of the application of the death penalty across the state. The variance appears to be a product of prosecutorial discretion, whether that discretion be random and inconsistent, or discriminatory selection of cases in which to seek the death penalty. Similar patterns were identified in a review of 164 death sentences between 2006 and 2016. In addition, 126 of the death cases are resentencings as a result of *Hurst* retroactivity. A review of the remaining 249 cases on death row revealed the extent of the arbitrary line drawn by the Florida Supreme Court in its retroactivity decisions in *Mosley v. State* and *Asay v. State*: 75% of death row was sentenced on the basis of a non-unanimous jury recommendation, yet only 40% will have their death sentences vacated and new penalty phase trials granted. Finally, the authors reflect on the difficulties in data collection and lessons learned before proposing the next steps for future research.

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INTRODUCTION

Fifty years ago, on June 29, 1972, the U.S. Supreme Court declared the death penalty unconstitutional in *Furman v. Georgia*, immediately rendering forty states' statutes violative of the cruel and unusual provision of the Eighth Amendment as applied to the states by the Fourteenth Amendment.¹ The landmark decision was a close one, with all Justices filing separate opinions: five in support of the judgment and four dissenting.² Justices Powell³ and Blackmun, both of whom dissented, later changed their minds.⁴ While the decision went far beyond the three petitioners' cases that were before the court, the key issue was the inconsistent administration of the death penalty, as opposed to the existence of the death penalty as a punishment.

Justice Brennan and Justice Marshall went further in their concurrences, finding the death penalty in violation of the Eighth Amendment per se. The *Furman* decision was largely based on the principles of human dignity and application of the *Trop v. Dulles*⁵ "evolving standards of decency"⁶ interpretation of "cruel and unusual," which led Justices Brennan and Marshall to pronounce that the "matur[e] society" of 1972 found the death penalty distasteful.⁷ The concurrences, however, criticized the legal system for applying the death penalty broadly and providing the sentencing authority (judge or jury) with unfettered discretion to determine whether a death sentence should be imposed.⁸ Without limits on the discretion of the sentencing authority, Justice Douglas concluded that there was a

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Id.* JJ. Douglas, Brennan, Stewart, White, and Marshall filed in support, whereas C.J. Burger and JJ. Blackmun, Powell, and Rehnquist filed dissenting opinions.

3. David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST (June 10, 1994), <https://www.washingtonpost.com/archive/politics/1994/06/10/retired-justice-changes-stand-on-death-penalty/9ccde42b-9de5-46bc-a32a-613ae29d55f3/> (on file with the *Columbia Human Rights Law Review*), citing JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451–52 (1994).

4. Linda Greenhouse, *Death Penalty Is Renounced by Blackmun*, N.Y. TIMES (Feb. 23, 1994), <https://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html> (on file with the *Columbia Human Rights Law Review*).

5. 356 U.S. 86 (1958).

6. *Id.* at 99–101.

7. *Furman*, 408 U.S. at 269–70 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *id.* at 329 (Marshall, J., concurring) (quoting same).

8. *Id.* at 255–56 (Douglas, J., concurring).

substantial risk that the death penalty would be selectively imposed.⁹ Justice Douglas implicitly linked the Fourteenth Amendment with the Eighth Amendment when he commented on the role of discretion in the then-current system: “discretionary statutes are . . . pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”¹⁰

Referencing empirical evidence and studies in support of their opinions, the Justices discussed the potential for discrimination and the factors influencing it, including race, gender, socio-economic status, and politics.¹¹ There was no judicial consensus, other than that those selected to live and die were determined inconsistently and perhaps due to luck. Justice Stewart famously likened the death sentences before the Court as being cruel and unusual “in the same way that being struck by lightning is cruel and unusual,” because those under sentence of death were just “a capriciously selected random handful.”¹² Stewart concluded that “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.”¹³ Justice White agreed, finding the process arbitrary and in need of a “meaningful basis” to be constitutional.¹⁴

By the end of July 1972, Florida’s Supreme Court had interpreted *Furman* to have rendered the state death penalty unconstitutional.¹⁵ Formerly, the law required judges to administer a death sentence over life imprisonment for any person convicted of a capital offense unless a majority of the jury recommended mercy.¹⁶ Accordingly, over the next three months, the Florida Supreme Court automatically resentenced 100 people on Florida’s death row to a term of natural life,¹⁷ while providing the 13 of those convicted of rape with only the opportunity to file a motion to the Circuit Court for mitigation

9. *Id.*

10. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

11. *Id.* at 250; *id.* at 309–10 (Stewart, J., concurring); *id.* at 364 (Marshall, J., concurring).

12. *Id.* at 309–10 (Stewart, J., concurring).

13. *Id.* at 310.

14. *Id.* at 313 (White, J., concurring).

15. *Donaldson v. Sack*, 265 So.2d 499, 505 (Fla. 1972).

16. FLA. STAT. § 775.082(1) (1971); *see also* Tim Thornton, *Florida’s Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U. L. REV. 108, 126 n.94 (1974).

17. *In re Baker*, 267 So.2d 331, 335 (Fla. 1972).

of their sentence.¹⁸ The court reasoned that its decision was not discretionary but mandated by the legislature, which had amended the death penalty statute in March 1972, prior to the *Furman* decision.¹⁹ *Furman* had already been briefed and argued at this time, suggesting the amendment was deliberate on the part of the legislature in preparation for the *Furman* Court holding Florida's death sentences to have been applied in an unconstitutional manner. The amendment also required that sentences re-imposed after October 1, 1972 would be life without the possibility of parole.

Within six months, the Florida Legislature passed a new statute that made Florida the first state to reinstate the death penalty after *Furman*.²⁰ Four years later, the U.S. Supreme Court in *Proffitt v. Florida* and its companion cases declared the death penalty constitutional in three different states, including Florida.²¹ 44 years later, in 2016, the U.S. Supreme Court in *Hurst v. Florida* once again declared Florida's statute and application of its death penalty system unconstitutional.²² *Hurst v. Florida* resulted in further legislative changes over the last few years in order to allow the state to continue to impose the death penalty.

These recent judicial decisions forcing legislative action to continue to impose the death penalty place Florida in the unique position of being a modern-day example of *Furman*. In Florida, history has repeated itself, and it is likely to do so again without further and better legislative change. Quite simply, Florida is in a state of legal chaos. During the immediate aftermath of *Hurst*, the system came to a standstill, with no capital trials or executions taking place for around nineteen months.²³ The decision burdened the state system with a backlog of over 1000 first-degree murder cases, almost 350 of which are current cases in which the death penalty is being sought.²⁴ Rather than

18. *Anderson v. State*, 267 So.2d 8, 10 (Fla. 1972).

19. *Donaldson*, 265 So.2d at 503.

20. FLA. STAT. §§ 782.04(1), 921.141 (Supp. 1976–1977).

21. *Proffitt v. Florida*, 428 U.S. 242, 247–48 (1976); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

22. 136 S. Ct. 616, 619 (2016).

23. Oscar Bolin was executed on January 7, 2016. Mark Asay was originally scheduled for execution on March 17, 2016, but his execution was stayed by the Florida Supreme Court on March 2, 2016, when the Court stayed all executions until August 24, 2017. Nathalie Baptiste, *Here's Another Example of Why the "Death Penalty System in Florida Is in Absolute Chaos,"* MOTHER JONES (Aug. 23, 2017), <https://www.motherjones.com/crime-justice/2017/08/florida-death-penalty-unanimous-jury-mark-asay/> [https://perma.cc/RB88-PPPE].

24. See *infra* Section III.C, Figures 3 and 4.

commute all death sentences to life, as it did post-*Furman*, Florida decided to vacate just under 40% of the 379 death sentences and grant new penalty phase trials in response to *Hurst*.²⁵

In the face of this chaos, Florida has the largest active death row in the nation, with a population of at least 300.²⁶ It continues to add to that population. In 2019, Florida sentenced seven people to death, more than any other state.²⁷ Florida has also executed the second-highest number of people,²⁸ and has the worst exoneration record in the nation.²⁹ Notwithstanding this, there is very little empirical research on Florida's capital charging patterns.

Justice Breyer emphasized the importance of this kind of empirical evidence in his dissent in *Glossip v. Gross*, in which he called for questioning of the death penalty.³⁰ More recently, Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer in a statement respecting the denial of certiorari in *Hidalgo v. Arizona*.³¹ There, Justice Breyer specifically noted that empirical evidence of a failure in the capital sentencing scheme to narrow the number of first-degree

25. See *infra* Section III.C, Figure 5.

26. Excluding California's 727 people on death row due to its current moratorium, Florida ranks first with 348, Texas is second with 219, and Alabama is third with 177. NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. (2019), <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2019.pdf> [<https://perma.cc/AU4M-J8SD>]. The Florida Department of Corrections reports 340 prisoners on death row. *Corrections Offender Network*, FLA. DEP'T OF CORRECTIONS, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> [<https://perma.cc/LN2E-SQ42>]. The authors report 282 after calculating the impact of *Hurst*. See discussion *infra* Section III.C.

27. *Florida Death Penalty Fact Sheet*, FLORIDIANS FOR ALTERNATIVES TO THE DEATH PENALTY, https://www.fadp.org/florida-death-penalty-fact-sheet/#_ftn4 [<https://perma.cc/HB7J-YTDR>].

28. Florida is responsible for 99 executions in the modern era of the U.S. death penalty. Since 2005, Florida has executed more people than any state other than Texas. See *Executions Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview> [<https://perma.cc/A3FX-HHV9>].

29. Florida accounts for 20% of all death row exonerations (29 of 165) across the United States, most recently exonerating Clemente Javier Aguirre in 2018 and Clifford Williams, Jr. in 2019. This figure does not include those termed "partially innocent" who accepted a plea deal in exchange for immediate release. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (May 31, 2019), <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf> [<https://perma.cc/BUG9-MEMJ>].

30. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015).

31. 138 S. Ct. 1054 (2018).

murder defendants eligible for the death penalty warranted “careful attention and evaluation” in determining a constitutional violation.³²

This Article focuses on the Florida system fifty years after *Furman*. Part I outlines the Florida system of imposing the death penalty and discusses its evolution post-*Furman* with reference to the recent legal developments of *Hurst*. Part II discusses the issues raised by the modern Florida system. Part III discusses the empirical research undertaken by the authors and highlights the difficulties of data collection in this realm. It provides provisional findings that indicate Florida is failing to narrow the application of its death penalty and continues to randomly select those it sentences to die, not unlike the pre-*Furman* days. Finally, the Article concludes with a proposal for future research and a suggestion for potential solutions that could help address the deficiencies of Florida’s system.

I. THE FLORIDA SYSTEM OF IMPOSING THE DEATH PENALTY

A. The *Proffitt* Statute

In *Proffitt v. Florida*,³³ the Court found Florida’s newly designed death penalty system to be similar to Georgia’s, which was upheld in *Gregg v. Georgia*,³⁴ and held that the new law (“the *Proffitt* statute”) addressed the constitutional deficiencies outlined in *Furman*. Florida’s post-*Furman* legislation had abolished its mandatory death sentencing statute³⁵ and outlined a system for imposing the death penalty only for those convicted of first-degree murder, which included felony murder and deaths arising out of the distribution, production, or preparation of opium.³⁶ It also introduced the concept of weighing

32. *Hidalgo*, 138 S. Ct. at 1056–57.

33. *Proffitt v. Florida*, 428 U.S. 242 (1976).

34. *Gregg v. Georgia*, 428 U.S. 153 (1976).

35. *Hurst v. State*, 202 So.3d 40, 56 (Fla. 2016).

36. FLA. STAT. § 782.04(1)(a) (Supp. 1976–1977):

First Degree Murder:

The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the

aggravators against mitigators in a separate sentencing hearing, which was largely modeled on the Model Penal Code.³⁷ This bifurcated method required the balancing of aggravating and mitigating circumstances by the judge and jury. This process led the sentencing authority to focus on the circumstances surrounding the crime and the character of the defendant following conviction. This was held to provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”³⁸

The *Proffitt* statute included eight aggravating circumstances.³⁹ The jury could recommend a sentence of death, by majority, if they found the existence of sufficient aggravating

unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided by s.775.082.

In all cases under this section, the procedure set forth in s.921.141 shall be followed in order to determine sentence of death or life imprisonment.

37. *Gregg*, 482 U.S. at 193 n.44 (citing Model Penal Code §§ 210.6 (Proposed Official Draft 1962)).

38. *Proffitt*, 482 U.S. at 253; *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

39. *Proffitt*, 482 U.S. at 248 n.6 (citing FLA. STAT. § 921.141(5) (Supp. 1976–1977)):

Aggravating circumstances:

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

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

circumstances as outlined above and determined that these aggravating circumstances were not outweighed by any of the seven statutory mitigating circumstances.⁴⁰ In the event that the aggravating circumstances did not outweigh the mitigating circumstances, a sentence of life without the possibility of parole was to be recommended to the judge. Unlike in the statute at issue in *Gregg*, the jury decision under the *Proffitt* statute was advisory only.⁴¹ The judge, in her role as the sentencing authority, was not bound by the jury decision and was therefore free to reach a different conclusion after undertaking the same weighing exercise. While the Court acknowledged the potential value of jury sentencing in death penalty cases, it confirmed that it was not a constitutional requirement of *Proffitt*.⁴²

If a death sentence was imposed by the judge, the *Proffitt* statute provided for an automatic appeal to the Florida Supreme Court, which would carry out a proportionality review to ensure the punishment was not too excessive.⁴³ The U.S. Supreme Court ultimately concluded that the independent guarantee to review the weighing exercise of the aggravating and mitigating circumstances minimized the risk of the death penalty being imposed in a random

40. FLA. STAT. §§ 921.141(2)(b)–(c), (6) (Supp. 1976–1977):

Mitigating Circumstances:

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

41. FLA. STAT. § 921.141(2)(b)–(c) (Supp. 1976–1977).

42. *Proffitt*, 428 U.S. at 252.

43. FLA. STAT. § 921.141(4) (Supp. 1976–1977); see also *Proffitt*, 428 U.S. at 251 (describing how “meaningful appellate review of each sentence is made possible” by the state statute’s requirements).

and inconsistent manner.⁴⁴ Therefore, the *Proffitt* statute was a “fix” to the constitutional issues in Florida’s system pre-*Furman*.⁴⁵

Florida’s system of imposing the death penalty under the *Proffitt* statute remained largely unchanged until *Hurst v. Florida*,⁴⁶ with the exception of statutory additions of more aggravating and mitigating circumstances. Florida continued to employ what the Court in *Hurst* referred to as a “hybrid” proceeding, whereby the jury rendered an advisory verdict and the judge made the ultimate sentencing determination.⁴⁷ This was despite the holding in *Ring v. Arizona*, in which the Supreme Court held that a jury, not a judge, must find sentencing facts.⁴⁸

B. Florida’s Expansion of Its Aggravating Factors

Since *Proffitt*, the Florida Supreme Court has provided additional guidance on the role of the jury and the judge in sentencing. The judge was to give “great weight” to the jury’s recommendation,⁴⁹ but was required to undertake an independent assessment of the aggravating and mitigating circumstances to be outlined in a sentencing order in the event of a death sentence.⁵⁰ There was no requirement for the jury aggravators and mitigators to be listed in the verdict form; nor were the details pertaining to jury votes in relation to the considerations they had used listed.⁵¹

Significantly, the number of aggravators the modern Florida jury can consider has doubled since *Proffitt*. The current death penalty statute provides an extensive list of sixteen aggravators.⁵²

44. *Proffitt*, 428 U.S. at 254.

45. *Id.* at 258.

46. 136 S. Ct. 616 (2016).

47. *See id.* at 620.

48. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

49. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

50. *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003).

51. *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003).

52. Aggravating Circumstances:

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

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The aggravating circumstance of “especially heinous, atrocious and cruel” (“EHAC”) was added in the 1973 supplement and therefore was included in the draft reviewed by *Proffitt*.⁵³ Some of the other additions were as follows:

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

FLA. STAT. § 921.141(5) (2019) (emphasis added).

53. FLA. STAT. § 921.141(5)(h) (Supp. 1973–1974).

In 1979, that the capital felony was a homicide and was committed in a cold, calculated, and premeditated (“CCP”) manner without any pretense of moral or legal justification.⁵⁴

In the late eighties (based on victim type) capital felonies involving the death of “a law enforcement officer engaged in the performance of his or her official duties”⁵⁵ or “an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim’s official capacity.”⁵⁶

In 1995, victims under 12 years of age.⁵⁷

In 1996, those “particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.”⁵⁸

The 1996 legislative amendments also added further victim types by widening the category of felony murder offenses for which the death penalty was eligible: “rape” became “sexual battery,” and “aggravated child abuse” and “abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement” were added.⁵⁹ The Florida Legislature also narrowed the original aggravator of the capital felony being committed by a person under a sentence of imprisonment, by making it applicable only to those previously convicted of felonies, but widened the provision to include those also “placed on community control or on felony probation.”⁶⁰ It also added the only amendment to the list of mitigating circumstances: an all-inclusive, miscellaneous provision requiring consideration of “the existence of other factors in the defendant’s background that would mitigate against the imposition of the death penalty,”⁶¹ as required to comply with *Lockett v. Ohio*.⁶²

In addition, the 1996 legislation widened the category of offenders eligible for the death penalty to include “criminal street gang member(s).”⁶³ By 2005, this was expanded further to include those

54. FLA. STAT. § 921.141(5)(i) (1979).

55. FLA. STAT. § 921.141(5)(j) (1987).

56. FLA. STAT. § 921.141(5)(k) (Supp. 1997–1988).

57. FLA. STAT. § 921.141(5)(i) (1995).

58. FLA. STAT. § 921.141(5)(m) (1996).

59. FLA. STAT. § 921.141(5)(d) (1996).

60. FLA. STAT. § 921.141(5)(a) (1996).

61. FLA. STAT. § 921.141(6) (1996).

62. 98 S. Ct 2954 (1978).

63. FLA. STAT. § 921.141(5)(n) (1996).

categorized as, or previously categorized as, “sexual predators,”⁶⁴ and in 2010, to those who had been the subject of an injunction pertaining to family, domestic or dating violence.⁶⁵

C. *Hurst v. Florida*

The impact of *Hurst v. Florida* on the expanded *Proffitt* statute was substantial. Previously, *Ring v. Arizona* held that juries, not judges, should determine the facts relevant to sentencing.⁶⁶ On January 12, 2016, fourteen years after *Ring*, the Supreme Court held eight to one that the Florida system of capital sentencing was unconstitutional in *Hurst v. Florida*.⁶⁷ Justice Sotomayor delivered the majority opinion, finding that the Florida system was in violation of the Sixth Amendment: that the Constitutional right to an impartial jury required any fact that renders a death sentence to be found by a jury, not a judge.⁶⁸ Justice Breyer supported the finding that Florida’s system was unconstitutional and issued a concurring opinion outlining his belief, as he had done in *Ring*, that “the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.”⁶⁹

In Timothy Hurst’s penalty phase, the jury recommended a death sentence by a majority, seven to five. The jury was not required by law to provide any factual basis for their decision but returned their recommendation after being instructed that they may only do so if they found at least one aggravating circumstance (that the murder was especially heinous, atrocious or cruel; or that it was committed during a robbery) beyond a reasonable doubt. The judge then sentenced Timothy Hurst to death and provided a written order outlining an independent assessment as to whether the aggravators existed, albeit with great weight given to the jury’s recommendation. However, the Court explained that “a jury’s mere recommendation is not enough”⁷⁰ and dismissed arguments that the judge’s role was simply to provide additional protection. The Court held that Florida’s law requiring “[findings by the court] that such person shall be punished by death”⁷¹

64. FLA. STAT. § 921.141(5)(o) (2005).

65. FLA. STAT. § 921.141(5)(p) (2010).

66. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

67. 136 S. Ct. 616 (2016).

68. *Id.* at 624.

69. *Id.* (quoting *Ring*, 536 U.S. at 614 (White, J., concurring)).

70. *Id.* at 619.

71. FLA. STAT. § 775.082(1) (2012).

and “[n]otwithstanding 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,”⁷² made it clear that it was the role of the judge, not the jury, to impose a death sentence.⁷³

After *Hurst*, Florida was once again without a death penalty statute, with a death row almost four times larger than in the *Furman* era, made up entirely of people sentenced under an unconstitutional scheme.⁷⁴ Florida plummeted into chaos. The imposition of the death penalty came to a standstill as almost all capital trial proceedings were granted continuances by the circuit courts, while Timothy Hurst’s case was remanded back to the Florida Supreme Court and the law was reconsidered. With respect to those already under a sentence of death, many motions for state post-conviction relief based on *Hurst v. Florida* had already been filed and many more began to flood Florida’s capital appellate system. The Florida Supreme Court asked for supplemental briefings in light of *Hurst v. Florida*⁷⁵ and issued a stay of execution for Michael Lambrix, who had been scheduled to be executed on February 11, 2016.⁷⁶ Meanwhile, the legislature quickly embarked upon a redrafting of the death penalty statute to address the *Hurst* Court’s Sixth Amendment concerns. The first new death penalty statute (“Post-*Hurst* Statute 1”) was signed into law by the governor on March 7, 2016.⁷⁷

D. Florida’s Current System

Under Florida’s current system the imposition of the death penalty remains limited to first-degree murder, although the definition has been expanded since the *Proffitt* statute to include more offenses

72. FLA. STAT. § 921.141(3) (2012).

73. *Hurst v. Florida*, 136 S. Ct. at 624.

74. 378 people were under a sentence of death as of January 12, 2016, when the Supreme Court decided *Hurst v. Florida*. *Death Row Roster*, FLA. DEP’T CORRECTIONS, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> (last visited Dec. 12, 2016).

75. See Craig Trocino & Chance Meyer, *Hurst v. Florida’s Ha’p’orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. MIAMI L. REV. 1118, 1125 & n.30 (2016) (citing *Lowe v. State*, No. SC12-263 (Fla. Jan. 14, 2016); *Knight v. State*, No. SC14-1775 (Fla. Jan. 19, 2016)).

76. *Lambrix v. State*, 217 So. 3d 977, 980 (Fla. 2017).

77. Jim Rosica, *Rick Scott Signs Death Penalty Overhaul into Law*, FLA. POL. (Mar. 7, 2016), <https://floridapolitics.com/archives/203841-203841> [<https://perma.cc/2SFH-6CWH>].

in the felony murder category.⁷⁸ Under the current statute, the unlawful killing of a human being in the perpetration, or attempted

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78. FLA. STAT. § 782.04(1)(a) (2019):
The unlawful killing of a human being:
1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
 - a. Trafficking offense prohibited by s. 893.135(1),
 - b. Arson,
 - c. Sexual battery,
 - d. Robbery,
 - e. Burglary,
 - f. Kidnapping,
 - g. Escape,
 - h. Aggravated child abuse,
 - i. Aggravated abuse of an elderly person or disabled adult,
 - j. Aircraft piracy,
 - k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
 - l. Carjacking,
 - m. Home-invasion robbery,
 - n. Aggravated stalking,
 - o. Murder of another human being,
 - q. Aggravated fleeing or eluding with serious bodily injury or death,
 - r. Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35, or
 - s. Human trafficking; or
 3. Which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to be the proximate cause of the death of the user:
 - a. A substance controlled under s. 893.03(1);
 - b. Cocaine, as described in s. 893.03(2)(a)4.;
 - c. Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
 - d. Methadone;
 - e. Alfentanil, as described in s. 893.03(2)(b)1.;
 - f. Carfentanil, as described in s. 893.03(2)(b)6.;
 - g. Fentanyl, as described in s. 893.03(2)(b)9.;
 - h. Sufentanil, as described in s. 893.03(2)(b)30.; or
 - i. A controlled substance analog, as described in s. 893.0356, of any substance specified in sub-subparagraphs a.-h., is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

perpetration of trafficking, any sexual battery, escape, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, carjacking, home-invasion robbery, aggravated stalking, murder of another human being, resisting an officer with violence, aggravated fleeing or eluding with serious bodily harm, any felony in the act of terrorism, human trafficking; as well as death resulting from the distribution of certain controlled substances, including opium, cocaine, methadone, alfentail, carfentanil, and sufentani are also included in the list of felonies eligible for felony murder and categorized as first-degree murder. This widens the potential pool of people eligible for the death penalty.

The Post-*Hurst* Statute 1 introduced a number of key changes. First, it amended the name of the list of sixteen aggravators from “aggravating circumstances” to “aggravating factors.”⁷⁹ Second, it required the jury to determine unanimously that the state had proven the existence of at least one of these factors beyond a reasonable doubt prior to entering the same three-stage weighing process⁸⁰ as prescribed under the previous statute. Juries are required to consider: (1) whether sufficient aggravators exist; (2) whether the aggravating factors outweigh the mitigating circumstances; and (3) whether the defendant should be sentenced to death or life without the possibility of parole.⁸¹ Third, it requires each aggravator found by the jury to be identified⁸² in practice, by listing the statutory aggravators as well as the three steps of the weighing exercise in the verdict form.⁸³ Fourth, it required that at least ten jurors agree that a defendant should be sentenced to death in order to return a recommendation that death be imposed.⁸⁴ Fifth, it abolished judicial “death overrides,” making the jury’s recommendation of a life verdict binding upon the judge.⁸⁵ However, this was not the case with respect to a death decision, which was to be treated as a recommendation from the jury only. The judge could sentence a defendant with a jury death recommendation to death by considering each aggravating factor found by the jury and all

79. FLA. STAT. § 921.141(6) (2016).

80. FLA. STAT. § 921.141(2) (2016).

81. FLA. STAT. §§ 921.141(2)(a)–(b) (2016).

82. *Id.*

83. *In re Standard Jury Instruction in Capital Cases*, 214 So. 3d 1236 (Fla. 2017, am. 2018).

84. FLA. STAT. § 921.141(2)(c) (2016).

85. FLA. STAT. § 921.141(2)(b)(1) (2016).

mitigating circumstances.⁸⁶ The judge could no longer find any additional aggravators independently.

Despite the enactment of the new statute, numerous cases argued that the decision in *Hurst v. Florida* required jury unanimity. The lower and appellate courts were once again flooded, and proceedings were stayed in the case of Timothy Hurst, whose additional briefings, supported by amicus curiae, argued that Florida was an outlier state⁸⁷ and that jury unanimity was required to constitutionally sentence a person to death. On October 14, 2016, the Florida Supreme Court agreed and held the Post-*Hurst* Statute 1 to be unconstitutional in *Hurst v. State*⁸⁸ and *Perry v. State*.⁸⁹

In *Hurst v. State*, the Florida Supreme Court interpreted *Hurst v. Florida*, holding that Florida's capital sentencing scheme violated both the Sixth and Eighth Amendments on the basis of its judicial fact-finding and lack of jury unanimity.⁹⁰ It found that the Sixth Amendment required jury fact-finding and unanimity in order to impose a death sentence. In its review of the Florida statute, the court held that the jury must find: (i) the existence of the aggravating factors proven beyond a reasonable doubt; (ii) that the aggravating factors are sufficient to impose death; and, (iii) that the aggravating factors outweigh the mitigating circumstances.⁹¹ It further held that these fact-findings were elements of capital murder and therefore, as Florida law requires for elements of less severe crimes, they must be unanimous.⁹² In addition, it held that the decision as to whether death is appropriate after the three-step process also needed to be unanimous.

Hurst v. State highlighted that most states responded to Eighth Amendment decisions such as *Furman* by developing a system of capital sentencing that required jury fact-finding for the imposition of a death sentence.⁹³ In addition, it held that the Eighth Amendment

86. FLA. STAT. § 921.141(3)(a)(2) (2016).

87. At the time, only Florida, Delaware and Alabama permitted death sentences on the recommendation of a less than unanimous jury decision. Delaware, like Florida, permitted a 7–5, simple majority recommendation whereas Alabama required at least a 10–2 decision. DEL. CODE ANN. tit. 11, § 4209 (2013); ALA. CODE § 13A-5-45 (1975)).

88. *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

89. *Perry v. State*, 210 So.3d 630 (Fla. 2016).

90. *Hurst*, 202 So. 3d at 57.

91. *Id.* at 53.

92. *Id.* at 53–54.

93. *See id.* at 49.

requires jury unanimity because death is different, and unanimity “provide(s) the highest degree of reliability in meeting . . . constitutional requirements.”⁹⁴ Further, unanimity helps to fulfill the narrowing function required by the Eighth Amendment (as outlined in *Furman*),⁹⁵ and finally, fulfills the requirement that the Eighth Amendment “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁹⁶

Lastly, *Hurst v. State* found that in light of *Hurst v. Florida*, the state was not required to vacate all death sentences and automatically resentence everyone to life without the possibility of parole.⁹⁷ It held that section 775.082(2)⁹⁸ of the Florida Statutes (2015) was not applicable, as it was in *Furman*, because *Hurst v. Florida* found a violation on the basis of the Sixth Amendment, not the Eighth Amendment.⁹⁹ *Perry v. State* was decided on the same day as *Hurst v. State*. In *Perry*, the court reiterated the requirement for jury unanimity and its determination that the Florida Constitution did not require all those under a death sentence to be automatically resentenced to life without parole.¹⁰⁰ It also threw out the Post-*Hurst* Statute 1, holding it to be unconstitutional on the basis that it allowed for a death sentence to be imposed when only ten jurors recommended it.¹⁰¹

As a result of these cases, Florida was without a death penalty statute and the legislature immediately proposed a new bill, again. Five months later, the governor signed into law a new statute (“Post-*Hurst* Statute 2”) requiring a unanimous jury to recommend death prior to the court being able to impose a death sentence.¹⁰² This Post-*Hurst* Statute 2 is the current law, but at the time of writing, the

94. *Id.* at 59–60.

95. *See id.* at 60.

96. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1956)).

97. *Id.* at 65.

98. §775.082(2) states that “A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).” *Id.* at 63.

99. *Id.*

100. *Perry v. State*, 210 So.3d 630, 635 (Fla. 2016).

101. *Id.*

102. FLA. STAT. § 921.141(2) (2019).

Florida Supreme Court has rescinded much of *Hurst v. State* in *State v. Poole*.¹⁰³

II. THE ISSUES WITH THE MODERN FLORIDA SYSTEM

A. *State v. Poole*: Uncertain and Unstable Legal System

Nearly three years after the passing of Post-*Hurst* Statute 2, the Florida Supreme Court announced the decision in *State v. Poole* on January 23, 2020.¹⁰⁴ Chief Justice Canady, joined by Justice Polston (both dissenters from *Hurst v. State*), and the newly-appointed members of the Court, Justices Muñiz and Lawson, held that the court had erred in its interpretation of *Hurst v. Florida* in *Hurst v. State*.¹⁰⁵ Former Chief Justice Labarga, from the *Hurst v. State* court, was the lone dissenter.¹⁰⁶ The *Poole* court held that jury unanimity is not required to return a recommendation of death at the penalty phase of a capital trial, nor is unanimity required when determining whether the aggravators are sufficient and whether they outweigh the mitigating circumstances.¹⁰⁷ In addition, the court found that the decision to impose the death penalty is not an element of fact, and as such, the Constitution does not require it to be found by a jury.¹⁰⁸

A mere majority jury decision recommending death, as was the law prior to *Hurst v. Florida*, is now constitutional once again,¹⁰⁹ provided that the jury finds at least one of the aggravators beyond a reasonable doubt.¹¹⁰ In addition, the Florida Supreme Court indicated that a judge can determine whether the aggravators are sufficient, and whether they are outweighed by the mitigating circumstances.¹¹¹ The same is the case for a judge making the decision as to whether a death sentence is appropriate: the judge can determine whether a person receives a death sentence or life without parole.¹¹² The Florida Supreme Court may therefore be suggesting that judicial overrides of

103. *State v. Poole*, No. SC18-245, 2020 WL 370302, at *11–13 (Fla. Jan. 23, 2020).

104. *Id.*

105. *Id.* at *9.

106. *Id.* at *16.

107. *Id.* at *11.

108. *Id.* at *12.

109. *Id.* at *13.

110. *Id.* at *12.

111. *Id.*

112. *Id.*

jury determinations are once again acceptable. However, while the court stated that these are not constitutional requirements, they are legal requirements under Florida law because Post-*Hurst* Statute 2 remains good law.¹¹³ The court recognized the distinct roles of the judiciary and the legislature by stating:

We acknowledge that the Legislature has changed our state's capital sentencing law in response to *Hurst v. State*. Our decision today is not a comment on the merits of those changes or on whether they should be retained. We simply have restored discretion that *Hurst v. State* wrongly took from the political branches.¹¹⁴

This ruling presents two major concerns. First, the Florida Supreme Court's change in position creates further instability and uncertainty in the application of the death penalty in Florida. The *Poole* court acknowledged that the doctrine of stare decisis "provides stability to the law and to the society governed by that law" but also indicated that "it does not command blind allegiance to precedent."¹¹⁵ Second, if the legislation is amended, it places Florida back in outlier status.

In its analysis the court noted its previous decisions, stating that "stare decisis bends where there has been an error in legal analysis"¹¹⁶ and that a prior decision should be abandoned if it is "unsound in principle."¹¹⁷ The court also acknowledged that the principle of precedent allows for honest disagreement and being open to the "possibility of reasonable differences of an opinion."¹¹⁸ It also stated that if a precedent clearly conflicts with a higher legal authority, precedent must typically yield: once the court "comes to a conclusion that it (precedent) is clearly erroneous, the proper question becomes whether there is a valid reason not to recede from the precedent."¹¹⁹ The Florida Supreme Court determined that a party's reliance on the precedent is a valid reason but concluded that reliance issues "lean heavily in favor of the victims of Poole's crimes and of society's interest in holding Poole to account and in the substantial resources that have

113. *Id.* at *15.

114. *Id.*

115. *Id.* at *14 (quoting *Shepard v. State*, 259 So.3d 701,707 (Fla. 2018)).

116. *Id.* (quoting *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002) (internal quotation marks omitted)).

117. *Id.* (internal quotation marks omitted).

118. *Id.*

119. *Id.* at *15 (italics omitted).

been spent litigating and adjudicating Poole's cases."¹²⁰ The court therefore found in favor of the state, and reinstated Poole's death sentence.¹²¹

The justification for the departure from the *Hurst* precedent is difficult to accept. As Justice Labarga stated, "the majority gives the green light to return to a practice that is not only inconsistent with laws of all but one of the twenty-nine states that retain the death penalty, but inconsistent with the law governing the federal death penalty."¹²²

The impact on resentencing and pre-trial chaos was evident less than two weeks after *Poole*. Within two days of the decision, state attorneys started to file motions for continuances and to modify jury instructions.¹²³ These are premature given that Post-*Hurst* Statute 2 is still good law. They have also started to file motions in the circuit courts to reinstate death sentences that were previously vacated on the basis of *Hurst*.¹²⁴ Of the no fewer than ten filings at the time of writing, four have been decided, three on the basis of lack of jurisdiction.¹²⁵ There have been two reinstatements of death sentences: Thomas

120. *Id.*

121. *Id.*

122. *Id.* at *19 (Labarga, J., dissenting).

123. See Mot. to Reinstate Death Penalty, State of Fla. v. Bessman Okafor, 2012-CF-014950 (Orange Cty. Circuit Ct. Jan. 29, 2020); Jeff Allen, *Prosecutors Fight to Have Bessman Okafor Face Death Penalty*, SPECTRUM NEWS 13 (Jan. 30, 2020), <https://www.mynews13.com/fl/orlando/public-safety/2020/01/30/prosecutors-to-fight-to-have-bessman-okafor-face-death-penalty> [https://perma.cc/K3S6-RZUS]; Mot. for Special Jury Instr., State of Fla. v. Paul Hildwin, 1985-CF-499, (Hernando Cty. Circuit Ct. Feb. 6, 2020), Dkt. No. 2733. Case to be Reopened, State of Fla. v. Miles Luke Anchondo, 2017-CF-002328 (Hernando Cty. Circuit Ct. Feb. 19, 2020).

124. *E.g.*, Robert Bailey, 2005-CF-001093 (Bay Circuit Ct.); Johnny Calhoun, 2011-CF-000011 (Holmes Circuit Ct.); Mathew Caylor, 2008-CF-002244 (Bay Circuit Ct.); David Frances, 2000-CF-016204 (Orange Circuit Ct.); John Huggins, 1998-CF-007190 (Orange Circuit Ct.); State's Motion to Dismiss Sentencing Proceeding and Maintain the Sentence of Death, State of Florida v. Jackson, 2005-CF-10263; (Duval Cty. Circuit Court Feb. 4, 2020), Dkt. No. 1183; Motion to Reinstate Death Sentence, State of Florida v. Bessman, 2012-CF-014950 (Orange Cty. Circuit Ct. Jan. 29, 2020); State of Florida v. Smith, 2004-CF-002129; (Sarasota Cty. Circuit Court); Motion to Reinstate Death Sentence, State of Florida v. Sean Smith, 1997-CF-007497-(Orange Cty. Circuit Court Jan. 29, 2020); Motion to Reinstate Death Sentence, State of Florida v. Zommer, 2005-CF-001200 (Osceola Cty. Circuit Court Feb. 11, 2020).

125. The circuit courts denied the State's Motion to Reinstate Death in David Frances v. State, No. 2000-CF-016204 (2000); Michael Jackson v. State, No. 2005-CF-10263 (2005); and Sean Smith v. State, No. 1997-CF-007497 (1997).

McCoy had his death sentence reinstated as a case status hearing sua sponte¹²⁶ and James Belcher had his death sentence reinstated at the request of the State.¹²⁷ At least two continuances have been granted to date and likely many more will follow. In addition, in *Kocaker v. State*, in which the Florida Supreme Court upheld a circuit court's decision to vacate a death sentence in light of *Hurst*, the State has filed a motion for rehearing and requested the reinstatement of the death penalty.¹²⁸ The legislature has indicated that it will not amend the Post-*Hurst* Statute 2 in the current session.¹²⁹

B. *Furman* to *Hurst* to *Poole*: Direct Absolute Outlier Constitutional Violations

Post-*Hurst* Statute 2 Florida was similar to the *Furman* era of 1972, although the constitutional violations related to different amendments: *Hurst* focused on the Sixth Amendment and *Furman* involved the Eighth and Fourteenth Amendments. However, the distinctions do not matter. In the same way that Justice Douglas succinctly connected the Fourteenth and Eighth Amendments in *Furman*, the Florida Supreme Court related the Sixth and Eighth Amendments in *Hurst v. Florida*, as outlined by *Hurst v. State* discussed above.

Craig Trocino and Chance Meyer found further support for this and address it in their call for Florida to revisit *Proffitt*: “Whilst *Hurst* is, by its terms, a Sixth Amendment case describing a Sixth Amendment error, it has profound implications on the applicability in Florida of several Eighth Amendment precedents.”¹³⁰ Trocino and Meyer found support in Florida Supreme Court Justice Pariente's dissenting comments in Timothy Hurst's direct appeal, in which the Justice explained, “[a]lthough those calls for legislative action have arisen primarily due to *Ring* and Sixth Amendment concerns, the

126. State of Florida v. Thomas McCoy (2009) (No. 2009-CF-000257).

127. State of Florida v. James Belcher (1999) (No. 1999-CF01156).

128. Appellee's Motion for Rehearing/Clarification or for Remand for Reconsideration in Light of *State v. Poole*, *Kocaker v. State*, No. SC17-1975 (Fla. Jan. 30, 2020).

129. News Serv. of Fla., *Florida Senate Not Expected to Take Up Death Penalty Issue*, W. PALM BEACH TV (Jan. 30, 2020), <https://www.wptv.com/news/state/florida-senate-not-expected-to-take-up-death-penalty-issue> [https://perma.cc/9PVQ-9C9S].

130. Trocino & Meyer, *supra* note 75, at 1128.

Eighth Amendment ramifications of Florida's outlier status are clear."¹³¹

While Justice Pariente's focus was on the issue of jury unanimity, he also pointed to the wide acknowledgment that the reliability of a death sentence is contingent upon "adhering to guided procedures that promote a reasoned judgement by the trier of fact."¹³² Jury unanimity clearly enhances reliability.

Regardless of any change in the law, the problem as to whether the jury can adhere to the procedures—which is distinct from the issue of whether the procedures provide the guidance necessary to promote a reasoned judgment—remains. If a statute fails to sufficiently narrow the scope of death penalty eligibility, it cannot provide adequate guidance, and therefore, the decision-makers cannot produce reasoned decisions. A death sentence will be either a product of the random, lightning-like selection found to be unconstitutional by the majority in *Furman*, or less random but discriminatory, which was the key issue of focus for Justice Douglas in *Furman*. Most likely it will be both. Either way the result is the same: a system that cannot meet constitutional requirements, raising serious concerns for public policy makers and requiring reconsideration by the legislature.

C. Florida's Statute Fails to Narrow Death Eligibility

When considering current "narrowing" principles in a capital statute, all eyes are on *Hidalgo*. *Hidalgo* was an Arizona state supreme court decision, holding Arizona's capital punishment system constitutional; the Supreme Court declined to review the decision.¹³³ Like Florida, Arizona had a large number of statutory aggravators, one or more of which must have been in place to constitute a capital charge. In *State v. Hidalgo*, the defendant argued that Arizona's numerous aggravators meant that the statute failed to "genuinely narrow the class of persons eligible for the death penalty" because many murder cases contain multiple statutory aggravators,¹³⁴ with any murder case

131. Hurst v. State, 147 So. 3d 435, 451 (Fla. 2014) (Pariente, J., concurring in part and dissenting in part).

132. *Id.* at 451 (quoting Steele v. State, 921 So. 2d 538, 549 (Fla. 2005)).

133. State v. Hidalgo, 390 P.3d 783, 798 (Ariz. 2017), *cert. denied*, 138 S. Ct. 1054 (2018).

134. See State v. Hidalgo, 390 P.3d 783, 789–91 (Ariz. 2017) ("To be constitutionally sound, 'a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the

by nature having one or more of the statutory aggravators. Therefore, the current narrowing in Arizona death penalty cases did not pass “constitutional muster.”¹³⁵

The Arizona Supreme Court rejected Hidalgo’s claim, and the U.S. Supreme Court declined to review the decision.¹³⁶ Key to the denial was the failure of the state courts to fully examine the empirical data presented, not the substance of the actual claim. Justice Breyer directly pointed to relevant empirical evidence, which had arrived in the Supreme Court without being evaluated by experts and the courts below.¹³⁷ Echoing the dissent in *Glossip*,¹³⁸ Justice Breyer wrote that future capital defendants “may have the opportunity to fully develop a record . . . [making the issue] better suited for certiorari,”¹³⁹ inviting empirical studies as part of a more fully developed record.

Florida, with more statutory aggravators than Arizona, is in a similar position with respect to the method of narrowing death-eligible cases in its capital sentencing scheme. The doubling of aggravators, as described in Part I, underlines the extensive categories of first-degree murders that are eligible for the death penalty in Florida. With the addition of the categories of felony murder, the broad-ranging EHAC and CCP aggravators, and the insertion of victim types, one would be hard-pressed to find a murder that does not fit within the eligibility criteria.

The legislation is blatantly insufficient to provide the narrowing necessary to comply with the Constitution. The same is true with respect to providing guidance to the prosecution and the judiciary. As Trocino and Meyer stated: “the channeling of judicial discretion achieved by the statutory enumeration of a finite number of aggravating circumstances has diminished.”¹⁴⁰

imposition of a more severe sentence on the defendant compared to others found guilty of murder.” (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)); *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054 (2018) (Breyer, J., respecting the denial of certiorari).

135. *Lowenfield*, 484 U.S. at 244.

136. *Hidalgo*, 390 P.3d at 798, *cert. denied*, 138 S. Ct. 1054 (2018).

137. *Id.* at 1057.

138. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

139. *Hidalgo*, 138 S. Ct. at 1057 (Breyer, J., respecting the denial of certiorari).

140. Trocino & Meyer, *supra* note 75, at 1172.

D. Unfettered Discretion

The role of prosecutors is key to the narrowing process, but often overlooked:

In order for the sentencer to impose death, the prosecutor must first decide to seek death. The decision of the prosecutor to seek the death penalty, like most prosecutorial charging decisions, is a low-visibility, high-discretion decision which has critical implications for the subsequent handling of the case.¹⁴¹

Cases that could be prosecuted as death penalty cases are narrowed to those actually pursued by the prosecutor's informed legal discretion. Initial observations of charging decisions demonstrate a random pattern, with prosecutors acting with unfettered discretion and using very different standards. In Florida, there are twenty prosecutors elected as Chief State Attorneys, one for each of the twenty judicial circuits making up the sixty-seven counties across the State. There is no standardized system for determining in which cases to file for death beyond what is contained in the statute discussed above.

This role of the prosecutor in the narrowing process was considered in *Hidalgo*. Justice Breyer acknowledged Arizona's argument that prosecutorial discretion formed part of its method of constitutional narrowing but rejected it outright, holding that narrowing should take place at "the stage of legislative definition."¹⁴² The same could be said in respect to judicial discretion, although the post-*Hurst* statute has gone some way to correct this deficiency by making the jury decision of life imprisonment binding upon the judge, as discussed in Part I.

141. Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437, 438 (1984).

142.

[T]he Arizona Supreme Court seemed to suggest that *prosecutors* may perform the narrowing requirement by choosing to ask for the death penalty only in those cases in which a particularly wrongful first-degree murder is at issue However, that reasoning cannot be squared with this Court's precedent—precedent that insists that States perform the 'constitutionally necessary' narrowing function 'at the stage of *legislative* definition.'

Hidalgo v. Arizona, 138 U.S. 1054, 1057 (Breyer, J., respecting the denial of certiorari) (internal citations omitted).

E. Retroactive Application of *Hurst* is Arbitrary and in Violation of the Constitution

Rather than commute all those under a sentence of death to life imprisonment without the possibility of parole in response to *Hurst*, as it did in its response to *Furman*, the Florida Supreme Court instead drew an arbitrary line through death row. In its decisions in *Mosley v. State*¹⁴³ and *Asay v. State*,¹⁴⁴ the Florida Supreme Court held that those whose death sentences were final at the time of *Ring*, on June 24, 2002, were not eligible for *Hurst* relief. All those whose death sentences were not final at that time were eligible for relief under *Hurst*, but if the jury unanimously voted for death even if it was incorrectly informed that it was not required to do so,¹⁴⁵ or if the defendant waived a jury at penalty proceedings¹⁴⁶ or post-conviction proceedings,¹⁴⁷ the error was harmless.

The Florida Supreme Court has recently invited a full briefing on whether it should reverse its original decisions (*Asay*, *Mosley*, and *James*).¹⁴⁸ As noted above in the discussion regarding *Poole*, the composition of the Florida Supreme Court has changed since *Mosley* and *Asay* and only three of the same justices remain. Significantly, this includes Justice Charles Canady, who now sits as Chief Justice, and Justice Ricky Polston, both of whom dissented from every resentencing decision. *Poole* has provided insight as to where the Florida Supreme Court is going: it is likely that the court will reverse its ruling on retroactivity entirely, or on only those cases that require additional fact-finding by the jury. This raises additional concern regarding the arguments laid out in Section III.C on Florida's failure to narrow the application of the death penalty: the majority of the aggravators will not require fact-finding by a jury but will be simply established by a record. For example, confirming that a person was on probation will be established by probation papers when there is no record of a jury's unanimous finding in respect to past cases. In addition, of course, the issue remains as to how the Florida Supreme Court will reconcile its recent and new decisions with the final judgments vacating the death sentences of those eligible for *Hurst* relief, a significant number of

143. See *Mosley v. State*, 209 So.3d 1248, 1276 (Fla. 2016).

144. *Asay v. State*, 210 So.3d 1, 11 (Fla. 2016).

145. See *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016).

146. See *Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016).

147. See *State v. Silvia*, 253 So.3d 349, 351–52 (Fla. 2018).

148. *Owen v. State*, Case No. SC18-810, 2019 Fla. LEXIS 1643, at *1 (Fla. Apr. 24, 2019).

whom had already been resentenced to life. The precise numbers are discussed below in the provisional findings.

III. EMPIRICAL RESEARCH

Empirical evidence examining the application of the death penalty across the USA is of paramount importance. As discussed above, the courts over the last fifty years have consistently referred to research that suggests the system is continuously failing to impose the death penalty in a manner which meets the requirements of the Constitution. Its impact is best demonstrated by the finding in *State v. Gregory*, where Washington State found its capital sentencing system to be in violation of its state constitution, on the basis of empirical evidence proving its imposition in a racially biased manner.¹⁴⁹ This empirical data was outlined in the “Beckett Report.”¹⁵⁰

The Beckett Report described significant county-to-county variation in seeking the death penalty across Washington, and ruled out population density, political orientation or fiscal capacity as explaining the differences.¹⁵¹ Rather, the evidence demonstrated that only a small portion of the variance could be explained by case characteristics, and the most significant influencing factor on jurors was the race of the defendant.¹⁵² Beckett found that black defendants were four-and-a-half times more likely to be sentenced to death than similarly situated white defendants and convinced the court to find Washington’s system of imposing death in violation of the state constitution.¹⁵³

The Beckett Report’s empirical evidence demonstrates that race should be a key concern and a central factor tested in any empirical research on the imposition of the death penalty in the United States, especially in the South, due to its history and the practice of slavery. Additional support is found in David C. Baldus’ 1983 study, which indicated that black defendants who were convicted of killing white victims had a higher likelihood of receiving the death penalty,

149. *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018).

150. KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981–2014 (Oct. 13, 2014), <https://files.deathpenaltyinfo.org/legacy/documents/WashRaceStudy2014.pdf> [https://perma.cc/3THJ-989W].

151. *Id.* at 31.

152. *Id.*

153. *Id.* at 30.

all else equal.¹⁵⁴ Admittedly, the Supreme Court held that Baldus' findings were not sufficient to demonstrate purposeful discrimination or a significant risk of racial bias affecting Georgia's system.¹⁵⁵

A. Methodology

The first step in data collection was identification of all persons facing the death penalty in Florida, beginning in March of 2016. Research to date was inconclusive, and it became evident that no one in Florida had any idea of the critical information confirming how many people were at the time indicted and eligible for the death penalty across the state. Indeed, oral argument before the Florida Supreme Court in *Durousseau v. State*¹⁵⁶ indicated uncertainty around how many people faced a sentence of death at the time, despite tracking by the Department of Corrections¹⁵⁷ and the work of Professor Michael Radelet.¹⁵⁸ At the time, Florida was a no-notice state, meaning that the law did not require prosecutors to file a notice of intention to seek the death penalty. However, Post-*Hurst* Statute 1 introduced the requirement of a notice listing the aggravators the prosecutor intended to prove within forty-five days of arraignment.¹⁵⁹ Therefore, effective March 7, 2016, the prosecutor's application of the aggravating factors in first-degree murder cases could be more easily and accurately monitored. The authors identified and monitored first-degree murder cases.

Data were collected on whether a notice of intention to seek death was filed and, if so, the aggravators listed, as well as information relating to the prosecuting jurisdiction, the demographics of the

154. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 684 (1983).

155. *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

156. Appeal of denial of Post-Conviction Relief, *Durousseau v. State*, No. SC15-1276 (Fla. 9, 2016), <https://thefloridachannel.org/videos/6916-florida-supreme-court-oral-arguments-paul-durousseau-v-state-sc15-1276/> [<https://perma.cc/FN65-YDF6>] (last visited Jan. 31, 2020).

157. See *Death Row Roster*, *supra* note 74

158. See, e.g., Michael Radelet & Ben G. Cohen, *The Predictable Disarray: Ignoring the Jury in Florida Death Penalty Cases* (2017) (unpublished manuscript) (available on SSRN) (reviewing the history of death penalty statutes in Florida while providing a census of cases in Florida); see also Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793 (2011) (noting instances in which trial judges have overridden jury recommendations to impose the death penalty).

159. FLA. STAT. § 782.04(1)(b) (2016).

defendant and victims. The key actors, such as state attorneys, defense attorneys, and judges, were noted. In addition, information pertaining to jury decision-making was also sought for cases that resulted in capital trials.

Uniquely, this database is live, actively reviewing and tracking cases as they proceed through the system in Florida. Upon identification, each case is allocated to and reviewed by a team, whereby a pro bono attorney and/or legal research assistant reviews each case. The team possesses a wide range of expertise from a variety of legal backgrounds. Each member is trained to review capital cases and code the information in accordance with a standardized form linking to the database.

The identification of cases made use of Florida's "open sunshine" laws which promote freedom of information¹⁶⁰ and enable easy access to data from almost all sixty-seven counties in Florida. Public information requests for a list of all open, predisposed, first-degree murder indictments were submitted to all sixty-seven county clerks of court across Florida. The authors prioritized the rankings based on a ten-year duration, but also calculated alternative durations in their preliminary research. Data were collected on whether a notice of intention to seek death was filed and, if so, whether the aggravators were listed. Data also included information relating to the prosecuting jurisdiction, the demographics of the defendant and victims, as well as key actors such as state attorneys, defense attorneys, and judges. These results are reported in Figures 1 and 2 in the provisional findings below.

The public record requests were also submitted to all twenty state attorneys and the relevant county clerks. Between the two sources, a response from all circuits was achieved: around 78% of clerks and 60% of state attorneys responded. The extent of the information received varied greatly depending upon the systems in place in each office. Since this time, a further three cycles of requests to update the data with new indictments of first-degree murder have been processed.

In 2018, state attorneys were also asked to confirm any policy or procedure they had in place for determining which cases were death eligible and when a notice of intention to seek death would be filed. The response rate was much lower: just 40%. One office attracted high profile attention on its decision-making process as a result of Chief State Attorney Aramis Ayala's public announcement that she would

160. FLA. STAT. § 119.01 (2019).

not be seeking the death penalty in any of the cases arising in the Ninth Circuit. This prompted statewide criticism and the transfer of twenty-nine first-degree murder cases, by executive order, to a prosecutor who would review death eligibility.¹⁶¹ Ayala challenged the governor's removal of cases from her jurisdiction. The Florida Supreme Court ruled against her, holding that the governor had "good and sufficient reason" to remove the cases on the basis of Ayala's "blanket refusal to pursue the death penalty in any case despite Florida law establishing the death penalty as an appropriate sentence under certain circumstances."¹⁶² Ayala then announced the establishment of a seven-person panel to determine in which cases one should seek the death penalty.¹⁶³

In addition to the public record requests, a review of all cases of those already on death row was required in order to identify those that were eligible for *Hurst* relief. Death finality dates and jury votes were collected ahead of the *Mosely* and *Asay* decisions in prediction of the Florida Supreme Court's retroactive application of *Hurst*. As such, the researchers were able to quickly identify those that would return for new penalty phase trials and track the orders vacating their death sentence. These cases were added into the pre-trial database to accurately predict the number of death penalty cases being prosecuted across Florida and better monitor the ultimate re-decision-making under the new capital sentencing system.

B. The Challenges to Empirical Research in Florida

One challenge is the lack of a centralized system across Florida. In undertaking the data collection, the authors identified between seven and thirteen different software systems that were employed by the clerks across the sixty-seven counties. In addition, each clerk adopts different administrative procedures. Almost half rely upon a particular platform to enable electronic access to the court docket and documents. However, there remain sixty-seven different administrative procedures which result in varying levels of access to

161. Gal Tziperman Lotan, *State Attorney Ayala Rescinds Her Death-Penalty Ban*, ORLANDO SENTINEL (Sept. 1, 2017), <https://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-press-conference-20170831-story.html> [https://perma.cc/T8CT-BYLV].

162. *Ayala v. Scott*, 224 So.3d 755, 757–58 (Fla. 2017).

163. Merrit Kennedy, *After Losing in Court, Florida Anti-Death-Penalty Prosecutor Charts Way Forward*, NPR (Sept. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/09/01/547985395/after-losing-in-court-florida-anti-death-penalty-prosecutor-charts-way-forward> [https://perma.cc/V7H5-9QNS].

documents online. For example, Miami-Dade County allows for docket access online but little to no documents are scanned and uploaded. Reviewing the court files still requires a public record request to access files in person. Taylor County does not provide access without a \$10 fee, and Suwanee County provides no electronic access at all. In contrast, Hillsborough County provides full access electronically, including the ability to review scanned copies of key documents uploaded to the file. The county is also the only one coding capital offenses, enabling easy identification of death cases and access to key documents.¹⁶⁴

The ability of the remaining courts to identify the first-degree murder indictments and further identify those where the death penalty was being sought was severely limited. This was exacerbated by the high number of first-degree murder prosecutions, producing a large number of cases. There are currently over 1500 entries in the database, though this includes cases which have been disposed of since March 1, 2016. In addition, many counties requested payment in order to be able to provide the information. If the authors had been in a position to pay for the information and not negotiated extensively for a method enabling free access, the costs of obtaining a simple list of current first-degree murder cases could have reached a total of \$500,000, with \$160,000 being paid yearly to maintain the database. The issue of centralization is a matter that the authors have been liaising on with clerks and policymakers. It is clear that without legislation that more sophisticated monitoring procedures will not be adopted.

Over the duration of the research, great strides have been made with respect to the centralization of data. Florida's recent criminal justice data transparency law now requires all state entities to collect and report data to the Florida Department of Law Enforcement ("FDLE").¹⁶⁵ This indicates an increased awareness of the gaps in knowledge of how the criminal justice system is operating, as well as an understanding of the importance of empirical evidence for policymakers making decisions. However, the development is expensive—with a price tag of \$1.75 million¹⁶⁶—and progress has been slow, with FDLE's director of Criminal Justice Information Services

164. All information regarding data collection recorded and noted by authors in the process of their research.

165. FLA. STAT. § 943.6871 (2018).

166. *Landmark Florida Legislation Sets New Standard for Data Collection and Transparency*, COUNCIL OF STATE GOV'TS (Apr. 18, 2018), <https://csgjusticecenter.org/jr/posts/landmark-florida-legislation-sets-new-standard-for-data-collection-and-transparency/> [<https://perma.cc/RE62-GJHK>].

pointing to the fact that sixty-seven counties continue to use “slightly different systems.”¹⁶⁷ In addition, the statute does not address how decisions are being made as to when to pursue the death penalty. It focuses on bail, race, probation/parole revocations, and plea deal terms.¹⁶⁸ Importantly, the key issue is how the prosecutors are applying the legislation to determine who should live and who should die, and how the issues such as race, and gender factor into these decisions. This application in practice is an issue the authors continue to raise and are yet to be successful in including as one of the items of data to be reported.

The live nature of the data that is being recorded is unique, and regular updates on each dataset are required in order to keep a current and meaningful record. For this analysis, a snapshot of the data in a fixed time period is used.

The authors are conscious of the importance of robust coding and have ploughed a large amount of resources into detailed training. The coding training also covers an overview of the Florida system, the overarching aims of the data collection and the very specific coding requirements for this data set. In addition to this training, the authors host a monthly online meeting open to all participants and ad hoc continued training on issues as they arise. Before more deeply delving into this data to a greater extent, we acknowledge that the robust coding needs independent verification.

C. Provisional Findings

With the difficulties described above, we have been limited in undertaking the necessary steps for solid statistical testing and therefore rely on descriptive statistics only at this stage. In addition, as we go about updating, reviewing, and further preparing the data collected to date, we are mindful that the only position we can provide is insight at the time of writing. This is especially the case as the state resolves more cases by waiving death, often in exchange for a guilty plea. As such, the following findings are all provisional.

An examination of the number of death sentences across Florida as detailed in Figures 1 and 2 below reveal that over the ten-year period of 2006–2016, five of the twenty judicial circuits were

167. Jacob Ogles, *Criminal Justice Database Moving Slowly*, FLA. POL. (Sept. 17, 2019), <https://floridapolitics.com/archives/306027-criminal-justice-database-moving-slowly> [<https://perma.cc/3Z78-GLQR>].

168. FLA. STAT. § 943.6871 (2018).

responsible for 54% of the total sentences across Florida: 21% occurring in the Fourth; 10% in the Eighteenth; 9% in the Seventh; and 7% in the Fifth and Sixth Circuits (see Appendix A for list of counties in each circuit). With respect to counties, nine of the sixty-seven counties account for 55% of all death sentences in Florida during this ten-year period. Duval County accounted for a massive 17% followed by: Brevard, Broward, Miami-Dade, Pinellas, and Volusia Counties at 5%; and Hillsborough, Polk, and Seminole Counties at 4%. The findings support the rankings referred to by Justice Breyer in *Glossip* which covered a different time period (2010–2014) in that Duval, Miami-Dade and Hillsborough Counties all feature in the top sentencing jurisdictions. However, a review of the wider time frame also demonstrates that Brevard and Broward Counties are key jurisdictions ranking higher than Miami-Dade. The same is true in respect of Pinellas and Volusia Counties with reference to Hillsborough.

It is critical to place these numbers into context in order to provide an accurate comparison from county to county. On calculating the number of death sentences per capita (Appendix A), Jefferson has a rate three times that of Okeechobee, and seven times that of Duval. Union, Walton, Holmes, Gadsden, Seminole, Washington and Bradford are all between Okeechobee and Duval. However, all rates but Seminole, including Okeechobee, are the product of just one to four death sentences over ten years and low populations under 65,000. These rates do not reflect a systematic high rate of sentencing people to death.

A better comparison is to group the counties into their circuits to allow for a larger sample size and reflect the overall decision-making of the Chief State Attorney. In this analysis, there is a smaller variance between circuits (0 to 2.8) but the Fourth Circuit (Duval, Clay, Nassau) ranks first, followed by the Eighteenth (Brevard, Seminole) once again. The Second (Franklin, Gadsden, Jefferson, Leon, Liberty, Wakulla) and Fourteenth (Bay, Calhoun, Gulf, Holmes, Jason, Washington) follow with the Seventh (Flagler, Putnam, St. Johns, Volusia) and Fifth (Citrus, Hernando, Lake, Marion, Sumter) remaining in the upper percentile. The Thirteenth (Hillsborough) and Seventeenth (Broward) fall in ranking significantly, and the Eleventh (Miami-Dade) now ranks seventeenth above only the Eighth (Alachua, Baker, Bradford, Gilchrist, Levy, Union), the Fifteenth (Palm Beach), and Sixteenth (Monroe), both with no death sentences during this period. Therefore, there is a geographical variance in the application of the death penalty during this period that cannot be explained by population size; one

explanation may be that it is due to elected State Attorneys' decision-making in choosing whether to seek death by filing a notice of intention outlining the aggravators upon which they wish to rely.

Fig. 1: Map of Death Sentences in Florida by Judicial Circuit and County Across Florida 2006–2016 (see Appendix A for data).

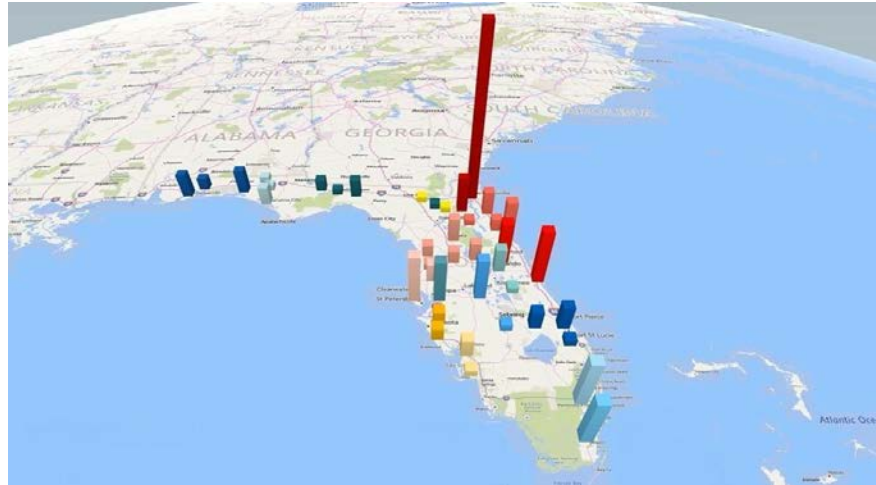
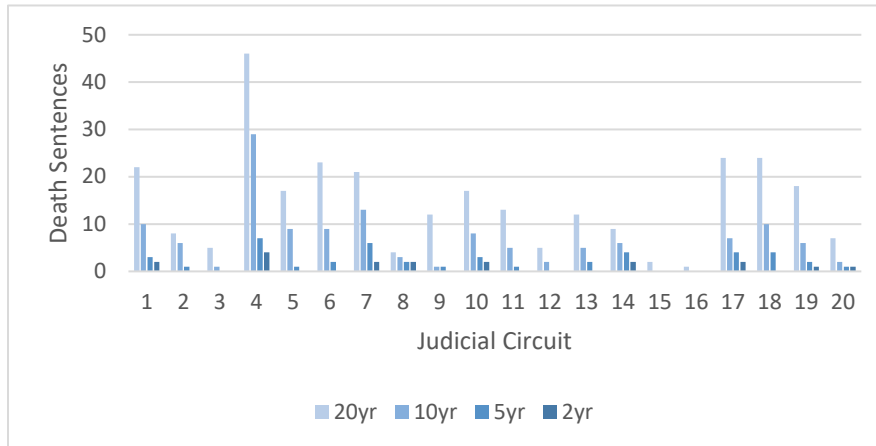


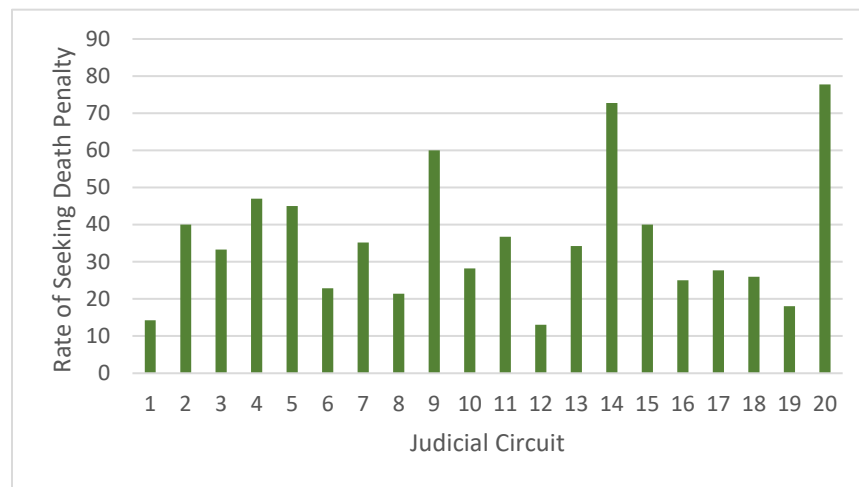
Fig. 2: The Number of Death Sentences Across Florida by Circuit and Duration (20 years, 10 years, 5 years and 2 years) Since 2000 (see Appendix B).



The number of first-degree murders being prosecuted is outlined in Figure 3 below. From March 2016 to November 2019, the authors identified 1051 pending first-degree murders across Florida, 347 of which are death-eligible cases. The data indicates that five

circuits account for 54% of cases being prosecuted in which the death penalty is being sought: The Eleventh, Fourth, Seventeenth, Thirteenth, and Ninth. The Eleventh Circuit (Miami-Dade County) leads with 18%, followed by the Fourth (Duval, Clay, Nassau) with 11%, the Seventeenth (Broward) with 10%, and, the Thirteenth (Hillsborough) and Ninth (Orange and Osceola) with 7%. At the opposite end of the spectrum are the Sixteenth (Monroe) with zero, and the Third (Columbia, Dixie, Hamilton, Lafayette, Madison, Suwanee, Taylor), Eighth (Alachua, Baker, Bradford, Gilchrist, Levy, Union) and Twelfth (Desoto, Manatee, Sarasota) with just three death cases each.

Fig. 3: Death Penalty Cases Prosecuted in Florida by Circuit 2016–2019 (see Appendix C).



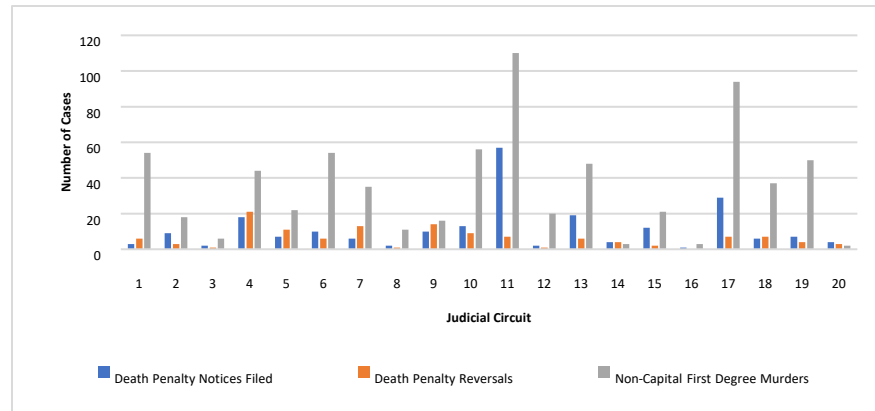
It is interesting to note the ratios of death penalty sought cases to death penalty not pursued or non-capital cases range between zero and 78% (Appendix C). Different jurisdictions are doing different things in regard to death eligibility notices: what is a death penalty case in Duval does not appear to be a death penalty case in Miami. While factors such as population and murder rates explain some differences between jurisdictions, the ratios provide a comparison taking into account these factors. Therefore, the variance suggests that it is very likely that other factors such as finances, the demographics of the defendant and victim, and the key actors within the administration of the case are also at play, warranting further analysis. Hence, the authors seek to run regression statistical modeling to investigate the relationships between the rate of seeking death in first-degree murder cases and these various variables.

With respect to different decision-making processes employed across the circuits, responses were received from the First, Third, Eighth, Sixteenth, Seventeenth, Eighteenth and Nineteenth, while the position of the Ninth is well-known.¹⁶⁹ The Seventeenth Circuit confirmed that it follows the procedure set out by statute and the Nineteenth indicated that the assistant state attorney outlines all aggravators and mitigators. The Third and Sixth Circuits indicated that a decision on filing for the death penalty is made after consultation with other attorneys in the office. The First, similarly to the position of the Ninth, indicated that a committee of experienced prosecutors and investigators decide based on the aggravators and mitigators. The Eighth and Eighteenth confirmed that the attorney responsible for the case liaises with the rest of the attorneys in the office and consults with members of law enforcement and the victim's family. It is not clear at what stage of the case consideration of mitigation takes place, or what consultation with the defense legal team who is charged with the task of conducting the mitigation investigation occurs. There is no standardized practice, which is likely to produce varying outcomes tantamount to the random, lightning-like selection resulting in the finding of a system unconstitutional in *Furman*.

The 347 death cases in Figure 3 include those people who have had their conviction and/or sentence vacated and granted a new trial. A different "Death Status" of "DP Reversal" was allocated to these cases to distinguish between the new files of a death notice and to ensure those people were accounted for regardless of whether a notice was then filed. There are an additional twenty-one cases yet to be reviewed and entered into the pre-trial dataset which accounts for the difference in numbers in Appendices D and E. Figure 4 below extracts the number of resentencings in the dataset from the newly filed death notices to provide a comparison between the two and highlight the impact of *Hurst*.

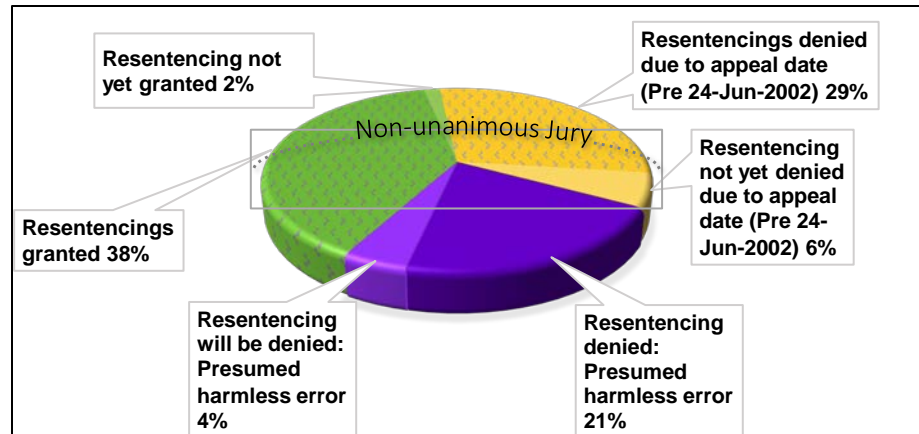
169. See discussion of Ninth Judicial Circuit panel policy, *supra* Section III.A.

Figure 4: Number of First-Degree Murder, Death Penalty Notices, and Death Penalty Reversals Pending in Florida by Circuit 2016–2019 (see Appendix D for data)



The impact of *Hurst* on death row is highlighted in Figure 5 below. The spotted shading represents the 282 people under a sentence of death following a non-unanimous jury recommendation. The green represents the 151 *Mosley* wins: the number of people that were under a sentence of death at the time of *Hurst*, the majority of which (144) have since been granted a new penalty phase trial. The yellow represents the 131 *Asay* losses, who despite their non-unanimous jury death recommendation, will not receive relief on the basis of their death sentences being final pre-*Ring*. The green and yellow demonstrate the arbitrary line that was drawn by the courts in their retroactive application of *Hurst*: over a third of death row, despite having been sentenced to death on a majority jury recommendation, now known to be unconstitutional, will not receive relief like the rest.

Fig. 5: Death Row Population by *Hurst* Eligibility and Order Vacating Death Sentences as of Jun. 27, 2019 (see Appendix E for data).



The purple represents the ninety-four who failed, or would fail if their death sentence had not been final at the time of *Ring*, on harmless error: those people who either received a unanimous jury recommendation or waived a jury at the penalty phase and/or waived their post-conviction proceedings. This too is problematic for the sixty-four unanimous jury death sentences in which there are no records of the jury's fact-finding, and therefore no evidence that at least one aggravator was found, beyond a reasonable doubt, by a unanimous jury. Post-*Hurst* Statute 2 makes it clear that anything less than this results in an unconstitutional death sentence. It is possible that those cases involving aggravators that did not require any fact-finding by the jury and could be substantiated in the record elsewhere could meet this standard, but to make an automatic, blanket reference on all cases is a stretch. With regard to the twenty waiver cases, those people waived an unconstitutional system and should arguably be entitled to participate in a system now deemed constitutional. It is very likely that a number of these people would not have waived their right to a jury at penalty phase had the system required a unanimous decision.

The treatment of two otherwise identical groups of people differently by virtue of the *Ring* cut-off date is discriminatory. The Florida Supreme Court could address this in its pending decision in *Owen* and adopt a narrower retroactivity analysis finding that no one

is entitled to relief.¹⁷⁰ However, at least 280, if not all people on death row having been sentenced under an unconstitutional system will remain on death row. At least thirty-three, who have already been resentenced to life without the possibility of parole, also face discrimination.

Finally, there have been seventy capital trials under Florida's new system: nineteen have resulted in a death sentence, and forty in life without parole or less (alternative verdicts/acquittals). The rest are pending final sentence. With respect to the forty life recommendations, at least nine juries found that there were not sufficient aggravators and did not therefore go on to weigh them against the mitigating circumstances. At least another ten found sufficient aggravators but concluded that they were outweighed by the mitigating circumstances.

In relation to the death recommendations, a review of the verdict forms has indicated some concerning results that suggest prima facie misunderstanding of mitigation by the jury. For example, mitigating circumstances that required no independent fact-finding by the jury and were extensively listed on a special verdict form were rejected 12–0 by the jury in one case. This included factors such as “Mr. X graduated high school.” In another, the jury appeared to reject the mitigator that “Mr. Y served in the military” despite admission by the prosecution. Whether this jury found the mitigating circumstances but assigned zero weight to it or whether a jury that could not consider mitigation at all cannot be determined without further information from the jurors.

CONCLUSION

All key Supreme Court decisions on the matter of the death penalty since *Furman* have referenced the critical role of empirical evidence in determining the constitutionality of a state's system and aiding legislative change. Florida's history and recent plight reinforces the need for this type of evidence and exposes the challenges in collecting the key information to undergo statistical analysis. The situation requires a coordinated wealth of empirical studies. The Florida data collection and analysis will add to the body of research in this area; the authors envision that this data will be a key contributor to much ongoing analysis, providing a rich and fertile body of empirical evidence.

170. See *Owen v. State*, Case No. SC18-810, 2019 Fla. LEXIS 1643, at *1 (Fla. Apr. 24, 2019).

With this in mind, it is vital that the data be kept up-to-date and that research continues within Florida. The authors plan to develop the database and are currently seeking further funding streams to assist the cleaning and coding of the data, carry out independent audits, verify the current coding and run a variety of statistical analysis models. The factors to add are those that could explain the differences in death-seeking rates. For example, testing the demographics of the defendant and victim, testing for any correlation with race, as well as age and type of victim will be critical. In addition, further research is required into the impact of the new legislative guidance on the jury's decision-making processes. The authors are closely liaising with the Capital Jury Project to prepare for future interviews that will provide a greater understanding of the decision-making factors in play, and how they tally with the intention of the legislation in narrowing. Particularly, the authors will focus on the aggravating factors set out in the statute and the decision-making processes they inform.

Provided this is undertaken, there should be solid evidence to support extensive legislative change that could address the issues discussed above. The authors predict that this will demonstrate the need to: (1) redraft the Florida statute to redefine the aggravators and narrow death-eligibility appropriately; (2) introduce a standardized system of filing death notices, involving a committee consisting of independent members of the legal and criminal justice communities responsible for reviewing information from the state and defendants; (3) grant resentencings to all those under a sentence of death at the time of *Hurst*; and, (4) standardize jury fact-finding forms with mitigators as well as aggravators and jury-selection questionnaires.

APPENDICES

Appendix A: Florida Death Sentences 2006-2016			
Circuit & County	Death Sentences	2016 Resident Population¹⁷¹	Rate of Death Sentences per 100,000 people
1	10	817333	1.223491527
Escambia	4	315187	1.269087875
Okaloosa	0	201170	0
Santa Rosa	2	235087	0.850748872
Walton	4	65889	6.070816069
2	7	414872	1.687267398
Franklin	0	11901	0
Gadsden	2	46006	4.347259053
Jefferson	3	13906	21.57342154
Leon	1	287822	0.347436958
Liberty	0	8202	0
Union	1	15142	6.604147405
Wakulla	0	31893	0
3	1	192770	0.518752918
Columbia	1	69299	1.443022266
Dixie	0	16300	0
Hamilton	0	14361	0
Lafayette	0	8617	0
Madison	0	18224	0
Suwannee	0	43794	0
Taylor	0	22175	0
4	34	1215188	2.79792098
Clay	6	208311	2.880308769

171. U.S. CENSUS BUREAU, U.S. *Census Annual Estimates of the Resident Population* (Apr. 10, 2010–July 1, 2016), <https://data.census.gov/cedsci/> [<https://perma.cc/SY2G-624Y>].

Duval	28	926255	3.022925652
Nassau	0	80622	0
5	12	1134868	1.057391697
Citrus	2	143621	1.392554014
Hernando	1	182835	0.546941231
Lake	3	335396	0.89446505
Marion	4	349020	1.146066128
Sumter	2	123996	1.612955257
6	11	1473098	0.746725608
Pasco	3	512368	0.58551666
Pinellas	8	960730	0.832700134
7	15	1122520	1.336279086
Flagler	2	108310	1.846551565
Putnam	1	72277	1.383566003
St. Johns	4	412569	0.969534793
Volusia	8	529364	1.511247459
8	1	375532	0.266288891
Alachua	0	263496	0
Baker	0	27937	0
Bradford	1	26926	3.713882493
Gilchrist	0	17212	0
Levy	0	39961	0
9	5	1650382	0.302960163
Orange	4	1314367	0.304329004
Osceola	1	336015	0.297605762
10	8	794426	1.007016387
Hardee	0	27360	0
Highlands	1	100917	0.990913325
Polk	7	666149	1.050815959
11	8	2712945	0.294882499
Miami-Dade	8	2712945	0.294882499

12	4	718195	0.556951803
DeSoto	0	35800	0
Manatee	2	375888	0.532073384
Sarasota	2	306507	0.652513646
13	7	1376238	0.508632954
Hillsborough	7	1376238	0.508632954
14	5	306672	1.630406428
Bay	3	183974	1.630665203
Calhoun	0	14423	0
Gulf	0	15990	0
Holmes	1	19487	5.131626212
Jackson	0	48229	0
Washington	1	24569	4.070169726
15	0	1443810	0
Palm Beach	0	1443810	0
16	0	79077	0
Monroe	0	79077	0
17	8	1909632	0.418928883
Broward	8	1909632	0.418928883
18	16	749627	2.134394839
Brevard	9	579130	1.554055221
Seminole	7	170497	4.105644088
19	8	806057	0.992485643
Indian River	0	151563	0
Martin	1	158701	0.630115752
Okeechobee	3	40314	7.441583569
St. Lucie	4	455479	0.87819636
20	4	1319197	0.303214759
Charlotte	3	178465	1.681001877
Collier	0	365136	0
Glades	0	13970	0

Hendry	0	39290	0
Lee	1	722336	0.138439729
Total	164	20612439	

Appendix B: Florida Death Sentences by Circuit & Duration Since 2000				
Circuit	20yrs (2000+)	10yrs (2009+)	5yrs (2014+)	Post Hurst/New Statute (2017+)
1	22	10	3	2
2	8	6	1	0
3	5	1	0	0
4	46	29	7	4
5	17	9	1	0
6	23	9	2	0
7	21	13	6	2
8	4	3	2	2
9	12	1	1	0
10	17	8	3	2
11	13	5	1	0
12	5	2	0	0
13	12	5	2	0
14	9	6	4	2
15	2	0	0	0
16	1	0	0	0
17	24	7	4	2
18	24	10	4	0
19	18	6	2	1
20	7	2	1	1
Total	290	132	44	18

Appendix C: Death Penalty Cases Prosecuted in Florida by Circuit 2016-2019			
Circuit	Cases in which DP is being Sought (Noticed & Reversals)	First-Degree Murder Indictments	Ratio of Death Cases to Murder Cases
1	9	63	14.28571429
2	12	30	40
3	3	9	33.33333333
4	39	83	46.98795181
5	18	40	45
6	16	70	22.85714286
7	19	54	35.18518519
8	3	14	21.42857143
9	24	40	60
10	22	78	28.20512821
11	64	174	36.7816092
12	3	23	13.04347826
13	25	73	34.24657534
14	8	11	72.72727273
15	14	35	40
16	1	4	25
17	36	130	27.69230769
18	13	50	26
19	11	61	18.03278689
20	7	9	77.77777778
Total	347	1051	32.95238095

Appendix D: Number of First-Degree Murders, Death Penalty Notices and Death Penalty Reversals Pending in Florida by Circuit 2016-2019				
Circuit	Death Penalty Notices Filed	Death Penalty Reversals	Non-Capital First-Degree Murders	Total First-Degree Murder Indictments
1	3	6	54	63
2	9	3	18	30
3	2	1	6	9
4	18	21	44	83
5	7	11	22	40
6	10	6	54	70
7	6	13	35	54
8	2	1	11	14
9	10	14	16	40
10	13	9	56	78
11	57	7	110	174
12	2	1	20	23
13	19	6	48	73
14	4	4	3	11
15	12	2	21	35
16	1	0	3	4
17	29	7	94	130
18	6	7	37	50
19	7	4	50	61
20	4	3	2	9
Total	221	126	704	1051

Appendix E: Data for Figure 5—Death Row Population by Hurst Eligibility and Order Vacating Death Sentences			
<i>Hurst</i> Decision Category	#	%	Unanimous Jury
Resentencings granted	144	38	N
Resentencings not yet granted	7	2	N
Resentencings denied due to appeal date (Pre 24-Jun-2002)	107	29	N
Resentencings not yet denied due to appeal date (Pre 24-Jun-2002)	24	6	N
Resentencings denied: Presumed harmless error	76	21	Y plus Waivers
Resentencings will be denied: Presumed harmless error	17	4	Y plus Waivers
Total on Death Row at the time of <i>Mosley & Asay</i> 22-Dec-16 <i>(* 374 taking into account nine people being removed from death row due another type of relief and additional four receiving death sentence post-Hurst 12-Jan-16).</i>	375	100	