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The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After *Hurst v. Florida*

Melanie Kalmanson

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ARTICLES:

The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After *Hurst v. Florida*

MELANIE KALMANSON*

As the federal appeals court with jurisdiction over Florida and Alabama—two leaders in capital punishment in the United States—the Eleventh Circuit reviews several claims each year related to capital punishment. Florida is home to one of the largest death row populations in the country. Thus, understanding Florida's capital sentencing scheme is important for understanding capital punishment nationwide.

This Article analyzes the empirical demographics of Florida's death row population and reviews how defendants are sentenced to death and ultimately executed in Florida. The analysis reveals that although age is not a factor upon which murder/manslaughter defendants are discriminated against in the sentencing process, gender and race are. With respect to the death penalty, gender discrimination appears consistent, but racial discrimination appears inconsistent and, instead, more apparent in the processes that occur before defendants are actually sent to death row. Additionally, the analysis suggests the absence of discrimination in capital sentencing and executions because the racial, age, and

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ethnic makeup of Florida's death row and, more specifically, those who are executed in Florida, are almost completely unpredictable.

Further, the U.S. Supreme Court's 2016 decision in Hurst v. Florida, together with the Supreme Court of Florida's decisions on remand in Hurst v. State and other related decisions, upended capital sentencing in Florida and beyond. This Article examines how the Supreme Court of Florida's post-Hurst framework—which the Eleventh Circuit has also been called upon to review and implement in reviewing several federal habeas claims since Hurst—affected Florida's death row empirically. In doing so, this Article foreshadows how the Court's 2020 decision in State v. Poole, which recedes from the Court's decision on remand in Hurst, and other potential decisions in the future may affect Florida's death row.

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INTRODUCTION

Since the death penalty was reinstated in 1976,¹ Florida has been a leader in capital punishment, making it one of the most death-friendly states in the United States.² When the Supreme Court³ decided *Hurst v. Florida*⁴ in January 2016,⁵ it became clear that Florida had been imposing unconstitutional sentences of death for decades.⁶ The Supreme Court's decision in *Hurst v. Florida* uprooted Florida's capital sentencing scheme.⁷

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (“hold[ing] that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”).

² See *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Apr. 23, 2020). For ease of discussion, the U.S. Supreme Court is referenced as “the Supreme Court.”

³ Throughout this article “Supreme Court” will refer to the United States Supreme Court; “Florida Supreme Court” or “the Supreme Court of Florida” will refer to the Supreme Court of the State of Florida.

⁴ 136 S. Ct. 616 (2016).

⁵ See DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., *DEATH ROW U.S.A. FALL 2019*, at 5 (2019), <https://www.naacpldf.org/wp-content/uploads/DRUSAFall2019.pdf>; *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Apr. 23, 2020).

⁶ Compare *Hurst v. Florida*, 136 S. Ct. at 624 (holding Florida's sentencing scheme unconstitutional), with FLA. STAT. §§ 921.141(1)–(3) (1972) (Florida's sentencing scheme that was found unconstitutional in *Hurst v. Florida*).

⁷ See generally Melanie Kalmanson, *Storm of the Decade: The Aftermath of Hurst v. Florida & Why the Storm is Likely to Continue*, 74 U. MIAMI L. REV. CAVEAT 37 (2020) [hereinafter Kalmanson, *Storm of the Decade*] (explaining how *Hurst v. Florida* affected Florida's capital sentencing scheme and potential future issues that the decision may have created).

Hurst v. Florida impacted both Florida's state courts and the Eleventh Circuit—the Court of Appeals with jurisdiction over Florida.⁸ In attempting to defeat a sentence of death or pending death warrant, Florida defendants almost always raise federal habeas claims,⁹ which are often appealed to the Eleventh Circuit.¹⁰

When the Supreme Court decided *Hurst v. Florida*, Florida's death row housed approximately 390 defendants awaiting execution¹¹—their sentences having been imposed under Florida's now-unconstitutional sentencing scheme.¹² Also, at that time Florida was one of only three states in the country—accompanied by Delaware and Alabama, another state within the Eleventh Circuit—that had

⁸ See, e.g., *Lambrix v. Secretary, DOC*, 872 F.3d 1170, 1182 (11th Cir. 2017) (“No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable.”); *Rivera v. State*, 260 So. 3d 920, 927 (Fla. 2018) (per curiam) (holding that “[b]ecause [the defendant’s] conviction and sentence were final long before *Ring* was issued, our precedent makes it clear that he is not entitled to any *Hurst* relief.”).

⁹ Cf. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS, NAT’L CTR. FOR STATE COURTS 64 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

¹⁰ See, e.g., *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1341 (11th Cir. 2019) (affirming “the district court’s denial of [defendant’s] federal habeas petition.”). For more information on post-warrant litigation, see generally Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, U. PA. J.L. & PUB. AFF., June 2020, at 1 [hereinafter Kalmanson, *Somewhere Between Death Row and Death Watch*].

¹¹ Lizette Alvarez, *Supreme Court Ruling Has Florida Scrambling to Fix Death Penalty Law*, N.Y. TIMES (Feb. 2, 2016), <https://www.nytimes.com/2016/02/03/us/supreme-court-ruling-has-florida-scrambling-to-fix-death-penalty-law.html>; see also Matt Ford, *What’s Next for Florida’s Death Row?*, ATLANTIC (May 5, 2016), <https://www.theatlantic.com/politics/archive/2016/05/whats-next-for-floridas-death-row/481572/>; Adam Liptak, *Supreme Court Strikes Down Part of Florida Death Penalty*, N.Y. TIMES (Jan. 12, 2016), <https://www.nytimes.com/2016/01/13/us/politics/supreme-court-death-penalty-hurst-v-florida.html>.

¹² See *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); see also Liptak, *supra* note 11; *Hurst v. Florida*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/Hurst_v_Florida_Background (last visited Apr. 22, 2020).

not amended their laws to require the twelve-member jury's unanimous recommendation for death before the trial court could sentence a defendant to death.¹³

After *Hurst v. Florida*, the Florida Legislature enacted a new capital sentencing scheme that complies with the new standards.¹⁴ The resulting changes lead to a renewed emphasis on constitutionality and uniformity in capital sentencing. These changes, which the Eleventh Circuit has been called upon to review and implement, caused nationwide effects. For example, Delaware placed a moratorium on capital sentencing,¹⁵ thereby leaving Alabama (another state within the Eleventh Circuit's jurisdiction) as the only state in the country that does not require a jury's unanimous recommendation for death before allowing trial courts to sentence defendants to death.¹⁶

Thus, reviewing the demographics of Florida's capital sentencing scheme is important in understanding one of the nation's largest capital sentencing systems. Scholars have studied the demographics

¹³ See ALA. CODE § 13A-5-43 (2016); DEL. CODE ANN. tit. 11 § 4209 (West 2016); FLA. STAT. § 921.141(2) (2016); see also *Wrongful Capital Convictions May Be More Likely in Cases of Judicial Override, Non-Unanimous Death Verdicts*, DEATH PENALTY INFO. CTR. (Sept. 9, 2016), <https://deathpenaltyinfo.org/news/wrongful-capital-convictions-may-be-more-likely-in-cases-of-judicial-override-non-unanimous-death-verdicts> ("The Delaware Supreme Court has struck down its sentencing statute in light of *Hurst* in August 2016, leaving Florida and Alabama as the only states that still permit non-unanimous jury recommendations of death.").

¹⁴ See S.B. 280, 2017 Leg., Reg. Sess. (Fla. 2017) ("requiring jury unanimity . . . for a sentencing recommendation of death"). On remand from the U.S. Supreme Court, the Supreme Court of Florida decided *Hurst v. State*, 202 So. 3d 40, 44–45 (Fla. 2016) (per curiam), holding that the jury's recommendation for death must be unanimous. That decision led to Florida's new statute. Although the Supreme Court of Florida receded from *Hurst v. State*, 202 So. 3d 40, in *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam), in early 2020, the new statute has not been amended since *Poole*. For more on the rapid changes in Florida jurisprudence since *Hurst v. Florida*, see Kalmanson, *Storm of the Decade*, *supra* note 7.

¹⁵ See *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam) (explaining, in finding the Delaware death penalty statute unconstitutional, that "*Hurst* prompted the question of whether [Delaware's] death penalty statute sufficiently respects a defendant's Sixth Amendment right to trial by jury.").

¹⁶ See ALA. CODE § 13A-5-43 (2020).

of death row populations in various states.¹⁷ These studies are important because, “[c]ontrary to normative expectations and numerous legal guidelines that have been established to channel the discretion of state officials, the [state] administration of capital punishment remains an imperfect embodiment of the promise of governmental power.”¹⁸ Literature has long suggested, “in addition to enumerated statutory factors, extra-legal variables such as race, gender, and location are potentially important independent determinants linking case facts with a prosecutor’s decision to seek the death penalty.”¹⁹ Determining, or at least analyzing, the effect of bias in capital sentencing is even more important in light of the recent constitutional crisis *Hurst v. Florida* created.²⁰

Considering the significance of Florida’s capital sentencing system as a leader in American capital punishment,²¹ this Article analyzes the empirical demographics of Florida’s death row as of January 2016, which consisted of defendants awaiting execution under unconstitutional sentences of death, as determined in *Hurst v. Florida* and further contemplated by the Supreme Court of Florida.²²

¹⁷ E.g., Hemant Sharma et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After Gregg v. Georgia*, 2 TENN. J. RACE, GENDER, & SOC. JUST. 1 (2013); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

¹⁸ Songer & Unah, *supra* note 17, at 162.

¹⁹ *Id.* at 168.

²⁰ See generally Kalmanson, *Storm of the Decade*, *supra* note 7, at 39 (referring to *Hurst v. Florida* as a “hurricane constitutional event”).

²¹ See *Death Sentences in the United States Since 1977*, *supra* note 2.

²² See *Hurst v. Florida*, 136 S. Ct. 616, 619, 624 (2016) (holding that Florida’s sentencing scheme, which dictated Timothy Hurst’s death sentence, was unconstitutional). The author does not purport to be an expert in analyzing data and does not contend that the statistics reported in this Article are statistically significant. Rather, this Article reviews the data on its face and used a very simple methodology to do so. At the time this author drafted this Article, this Article was the first of its kind in reviewing the demographics of Florida’s capital sentencing scheme. However, since this Article was accepted for publication, Hannah L. Gorman and Margot Ravenscroft published their article *Hurricane Florida: The Hot and Cold Fronts of America’s*, 51 COL. HUMAN RIGHTS L. REV. 938 (2020), as part of *Columbia Human Rights Law Review’s* Symposium regarding the important topic of issues the capital sentencing system has faced since *Furman*. Like this Article, their article also reviews how *Hurst v. Florida* affected Florida’s death row in terms of numbers. The author urges readers to read that Article in conjunction with this Article, as this author believes they complement each other well. To the

Part I explains the necessary precedential landscape for reviewing Florida's capital sentencing system. To contextualize statistics surrounding Florida's imposition of the death penalty, Part II reviews the demographics of all defendants convicted of a homicide offense in Florida, specifically, first-degree murder. In doing so, Part II concludes—consistent with other studies—that gender and race are factors upon which murder/manslaughter defendants are discriminated against, but age is not. Men are consistently prosecuted harsher than women,²³ and non-Whites are generally prosecuted harsher than Whites.²⁴

Part III reviews the demographics of defendants sentenced to death in Florida. In this context, the gender discrimination found in Part II appears consistent; however, the racial discrimination does not. Part III concludes that, if anything, Whites are sentenced to death more often than Blacks when compared to the total population of defendants convicted of murder/manslaughter offenses. Next, Part IV reviews the demographics of defendants executed in Florida before *Hurst v. Florida*. Ultimately, it is clear that the racial, age, and ethnic makeup of Florida's death row and, more specifically, those who are executed in Florida is almost completely unpredictable—suggesting the absence of discrimination in capital sentencing and executions.

Finally, Part V analyzes the defendants who were awaiting execution on Florida's death row when the Supreme Court decided *Hurst v. Florida*, specifically within the context of the framework set forth by the Florida Supreme Court's decision on remand in

extent the numbers presented in this Article differ from the numbers presented in Gorman and Ravenscroft's article, there is likely a reasonable explanation—either due to different methodology, starting from a different set of data, or otherwise. That being said, to the extent there is any material difference, this author defers to the numbers in Gorman and Ravenscroft's article, as those are the numbers practitioners in Florida have used.

²³ See *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (per curiam) (Marshall, J., concurring) (expressing perplexity regarding the “favored treatment” that women have gotten compared to the treatment that men have gotten in receiving the death penalty).

²⁴ See *McCleskey v. Kemp*, 481 U.S. 279, 291 (1986) (McCleskey “argue[d] that race ha[d] infected the administration of Georgia's statute [because] . . . black murderers are more likely to be sentenced to death than white murderers.”).

*Hurst v. State*²⁵ and its progeny regarding the application of *Hurst v. Florida*. This Part finds, in empirical terms, that the Florida Supreme Court’s retroactivity framework²⁶ split Florida’s death row in half as to who was eligible for *Hurst v. Florida* relief. Further, this Part explains the practical significance of Florida requiring unanimity in the jury’s final recommendation for death—at least for the few years that it did between the *Hurst* decisions and the Court’s decision in January 2020 in *State v. Poole* that receded from *Hurst v. State*.²⁷

I. JURISPRUDENTIAL HISTORY OF FLORIDA’S CAPITAL SENTENCING SCHEME

In 1972, the Supreme Court hit the “reset” button on modern capital sentencing in its landmark decision in *Furman v. Georgia*,²⁸ which invalidated “the death penalty statutes of thirty-nine states and the federal government.”²⁹ The per curiam decision in *Furman* merely held “that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”³⁰ Then, in nine separate, additional opinions in *Furman*, the Justices explained their individual reasoning for reaching this result.³¹ In *Furman*, several

²⁵ See *Hurst v. State*, 202 So. 3d 40, 44–45 (Fla. 2016) (per curiam), *receded from by* *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam).

²⁶ See, e.g., *Asay v. State*, 210 So. 3d 1, 15–22 (Fla. 2016) (per curiam) (refusing to apply *Hurst v. Florida* retroactively to defendant’s death sentence based on a lengthy retroactivity analysis); *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) (per curiam) (holding that because defendant’s death sentence came before *Ring*, *Hurst v. Florida* retroactivity did not apply); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (per curiam) (applying *Hurst*-based retroactivity analysis that considers the retroactivity frameworks that other cases set out).

²⁷ See *Poole*, 2020 WL 370302 at *1.

²⁸ 408 U.S. 238 (1972) (per curiam).

²⁹ Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 6 (2007). For more information on the extensive history of capital sentencing in the United States before *Furman*, see generally CAROL STEIKER & JORDAN STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016).

³⁰ *Furman*, 408 U.S. at 239–40.

³¹ See *id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring); *id.* at 375 (Burger, C.J., dissenting); *id.* at 405

justices discussed evidence of bias and discrimination in American capital sentencing.³²

As to the effect of *Furman*, one author wrote that the decision was “a seemingly perfect example of the Court’s ability and inclination to protect capital defendants when no one else will.”³³ Others, such as Carol and Jordan Steiker, argue that the Supreme Court’s willingness to employ the Constitution in addressing capital sentencing ultimately led to the destabilization of the American capital punishment system.³⁴

Reacting to *Furman*, in *Donaldson v. Sack*, the Supreme Court of Florida commuted all previously imposed death sentences to sentences of life imprisonment.³⁵ Following *Donaldson*, convicted capital defendants were automatically sentenced to life imprisonment³⁶ until the Florida Legislature reenacted the death penalty in December 1972.³⁷

Shortly after *Donaldson*, in July 1973, the Supreme Court of Florida determined that *Furman* did not abolish capital punishment

(Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

³² *Id.* at 249–50 (Douglas, J., concurring) (noting that the President’s Commission on Law Enforcement and Administration of Justice concluded that “there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”); *id.* at 293 (Brennan, J., concurring) (finding a strong inference that the death penalty was “not being regularly and fairly applied.”); *id.* at 310 (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”); *id.* at 314 (White, J., concurring) (“Legislative ‘policy’ is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them.”); *id.* at 364–66 (Marshall, J., concurring) (writing that the American capital sentencing system discriminated against Negroes, men, “the poor, the ignorant, and the under privileged members of society.”).

³³ Lain, *supra* note 29, at 1.

³⁴ STEIKER & STEIKER, *supra* note 29, at 255–89 (arguing that “[t]he American death penalty is currently more vulnerable than it has been at any point since its revival in 1976.”).

³⁵ *Donaldson v. Sack*, 265 So. 2d 499, 502–03 (Fla. 1972) (per curiam); see also John Spittler, Jr., *Florida Death Penalty: A Lack of Discretion*, 28 U. MIAMI L. REV. 723, 724 (1974).

³⁶ *Donaldson*, 265 So. 2d at 502–03.

³⁷ See FLA. STAT. § 921.141 (1972).

but, rather, held that “the quality of discretion and the manner in which it was applied . . . dictated the rule of law which constitutes *Furman v. Georgia*” or the constitutionality of a capital sentencing scheme.³⁸ Reviewing the new statute that the Florida Legislature enacted in December 1972, the Supreme Court of Florida determined that the statute properly reserved the death penalty for “only the most aggravated and unmitigated of most serious crimes.”³⁹ Thus, the Court determined that Florida could resume capital sentencing.⁴⁰

Similarly, the Supreme Court soon back-pedaled and declared that the death penalty was, in fact, a viable punishment.⁴¹ In 1976, in *Gregg v. Georgia*, the Supreme Court held “that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”⁴² Thus, after *Gregg*, death was a viable punishment so long as it was enacted by each state’s legislature and imposed with discretion, after consideration of each defendant’s individual characteristics.⁴³

But how effective were *Furman* and the Supreme Court’s several subsequent opinions at eliminating arbitrariness and bias in the imposition of the death penalty? Professor Erwin Chemerinsky wrote that *Furman* was the beginning of a decades-long series of decisions by the Supreme Court that, while each “notable in itself, together . . . indicate a Court that has become quite concerned about the administration of the death penalty.”⁴⁴

For example, fifteen years after *Furman*, the Supreme Court made clear in *McCleskey v. Kemp* that prosecutorial and judicial discretion are advantageous to a capital defendant:

Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. . . . [A] prosecutor can decline to

³⁸ *State v. Dixon*, 283 So. 2d 1, 6 (Fla. 1973) (per curiam).

³⁹ *Id.* at 7.

⁴⁰ *See id.*

⁴¹ *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

⁴² *Id.*

⁴³ *See id.* at 186–87.

⁴⁴ Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty*, 94 GEO. L.J. 1367, 1367 (2006).

charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, “the power to be lenient [also] is the power to discriminate,” but a capital punishment system that did not allow for discretionary acts of leniency “would be totally alien to our notions of criminal justice.”⁴⁵

Likewise, in 2000, the Supreme Court held in *Apprendi v. New Jersey* that the Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to a jury finding that each element of the crime for which the defendant is charged was proven beyond a reasonable doubt.⁴⁶ *Apprendi* initiated a sort of snowball effect of expanding or clarifying capital defendants’ Sixth Amendment rights, which ultimately led to the Supreme Court’s decision in *Hurst v. Florida* in 2016.⁴⁷

Two years after *Apprendi*, in *Ring v. Arizona*, the Supreme Court applied *Apprendi* to capital defendants, holding that a jury, rather than a judge, must find the factors necessary for the death penalty to be imposed.⁴⁸ Although *Ring* would ultimately become a turning point for capital sentencing in Florida,⁴⁹ upon initial review—despite similarities between Florida’s capital sentencing scheme and Arizona’s capital sentencing scheme that the Court invalidated in *Ring*—the Supreme Court of Florida, over several Justices’ dissents, refused to apply *Ring* to Florida’s capital sentencing scheme. The majority of the Court held that Florida’s capital sentencing scheme remained valid under the Sixth Amendment, despite *Ring*.⁵⁰

⁴⁵ *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (citation omitted).

⁴⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000).

⁴⁷ See *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (explaining how the reasoning in *Apprendi* was applied in subsequent death penalty cases).

⁴⁸ *Ring v. Arizona*, 536 U.S. 584, 609 (2002); see also Chemerinsky, *supra* note 44, at 1373 (“In *Ring v. Arizona*, the Court applied its recent decision in *Apprendi v. New Jersey* and held that the jury, not the judge, must find the factors that warrant imposition of capital punishment.”) (citations omitted).

⁴⁹ See 136 S. Ct. at 621–22 (finding that the analysis in *Ring* is applicable to Florida’s capital sentencing scheme and, therefore, the capital sentencing scheme in Florida violates the Sixth Amendment).

⁵⁰ *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002) (per curiam).

For years, capital defendants in Florida unsuccessfully sought relief under *Ring*.⁵¹ Defendants argued that Florida's capital sentencing scheme was unconstitutional under *Ring* for (1) not requiring the jury to make the requisite findings required to impose a sentence of death, including each aggravating factor; and (2) requiring only a majority of the twelve-member jury to recommend death, rather than unanimity.⁵² Nevertheless, capital sentencing in Florida continued. Linroy Bottoson was executed on December 9, 2002—less than six months after the Supreme Court decided *Ring*.⁵³

Finally, fourteen years after *Ring*, the Supreme Court agreed to review whether Florida's capital sentencing scheme met the constitutional demands of the Sixth Amendment.⁵⁴ In *Hurst v. Florida*, the Supreme Court validated the argument defendants had presented unsuccessfully for years, determining that the analysis from *Ring* applied equally to Florida's capital sentencing scheme.⁵⁵ The Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment and remanded to the Florida Supreme Court.⁵⁶

On remand, the Florida Supreme Court held in *Hurst v. State* that the Sixth Amendment, as well as article I, section 22, of the Florida Constitution and the Eighth Amendment to the U.S. Constitution, require that “all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury.”⁵⁷ As to Florida's capital sentencing statute, the Court explained the following:

In capital cases in Florida, these specific findings required to be made by the jury include the existence

⁵¹ See, e.g., *Marshall v. Crosby*, 911 So. 2d 1129, 1133–34, 1134 n.5 (Fla. 2005) (per curiam) (“In over fifty cases since *Ring*'s release, we have rejected *Ring* claims.”).

⁵² See, e.g., Opening Brief in Support of Petition for Writ of Habeas Corpus at 25–28, *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (No. SC02-1455).

⁵³ *Linroy Bottoson*, CLARK PROSECUTOR, <http://www.clarkprosecutor.org/html/death/US/bottoson813.htm> (last visited Apr. 23, 2020).

⁵⁴ See 136 S. Ct. at 621.

⁵⁵ See *id.* at 621–22.

⁵⁶ *Id.* at 624.

⁵⁷ *Hurst v. State*, 202 So. 3d 40, 44, 59 (Fla. 2016) (per curiam) *receded from* by *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam).

of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. . . . [Also,] in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.⁵⁸

Further, unlike its reaction to *Furman*, the Florida Supreme Court determined that Florida Statutes did not require the court to commute all existing death sentences to a sentence of life imprisonment.⁵⁹ Rather, the Court determined the appropriate relief for a harmful *Hurst v. Florida* error is a new penalty phase.⁶⁰ Finally, the Court determined that *Hurst v. Florida* applied retroactively only to sentences of death that became final after *Ring*.⁶¹ On the basis of this framework, numerous defendants were granted resentencing proceedings, many of whom were resentenced to life.⁶²

However, at the end of January 2020, the Supreme Court of Florida receded from its decision in *Hurst v. State*.⁶³ In *State v. Poole*,

⁵⁸ *Id.* at 44.

⁵⁹ *Id.* at 64–65.

⁶⁰ *Id.* at 69; see *Davis v. State*, 207 So. 3d 142, 173–75 (Fla. 2016) (per curiam); see also *Rogers v. State*, 285 So. 3d 872, 885–86 (Fla. 2019) (per curiam); *Evans v. State*, 213 So. 3d 856, 859 (Fla. 2017) (per curiam). For more on the Supreme Court of Florida's analysis of *Hurst* harmless error, see Kalmanson, *Storm of the Decade*, *supra* note 7, at 45–47.

⁶¹ See *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) (per curiam); *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) (per curiam); *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) (per curiam). For more on the Supreme Court of Florida's analysis of the retroactivity of *Hurst v. Florida* and why it may not be the final framework, see Kalmanson, *Storm of the Decade*, *supra* note 7, at 47–49. Note, however, the Eleventh Circuit held in early 2020 that in federal habeas proceedings *Hurst v. Florida* does not apply retroactively to *any* defendants. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1338 (11th Cir. 2019).

⁶² See, e.g., *Sexton v. State*, 221 So. 3d 547, 559 (Fla. 2017) (per curiam); see also Steve Bousquet, *Murderers Leave Florida's Death Row After Hurst Ruling: System 'A Mess,' Expert Says*, TAMPA BAY TIMES (July 3, 2017), <https://www.tampabay.com/news/politics/stateroundup/murderers-leave-floridas-death-row-after-hurst-ruling-system-a-mess-expert/2329030/>.

⁶³ See *State v. Poole*, No. SC18-245, 2020 WL 370302, at *15 (Fla. Jan. 23, 2020) (per curiam) (“Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the

the Supreme Court of Florida held that the Court erred in its holding in *Hurst*.⁶⁴ Again upending Florida's capital sentencing scheme, the Supreme Court of Florida held that the only finding a jury must unanimously make in a capital sentencing proceeding is "the existence of one or more statutory aggravating circumstances."⁶⁵ The Court explained that "[n]either *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury" make any other statutory finding *or* recommend a sentence of death.⁶⁶ What *Poole* actually means for Florida's capital sentencing laws and death row inmates remains to be seen.⁶⁷

Based on this legal history, Parts II through IV analyze data regarding Florida's capital sentencing scheme, exploring any indication of discrimination in Florida's death penalty both before and after *Hurst v. Florida* and *Hurst v. State* (collectively "*Hurst*"). Part V then reviews how *Hurst* and its progeny affected defendants who were on death row when *Hurst* was decided.

II. DEFENDANTS CONVICTED OF HOMICIDE OFFENSES

In fiscal year 2014–2015, the Florida Department of Corrections ("DOC") reported 942 admissions for homicide offenses ("murder/manslaughter").⁶⁸ These admissions comprised 3.1% of DOC's total admissions that year.⁶⁹ The next year, DOC reported 987 ad-

extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt.").

⁶⁴ *Id.* at *11–13, 15.

⁶⁵ *Id.* at *11.

⁶⁶ *Id.* at *11.

⁶⁷ *Cf.* Kalmanson, *Storm of the Decade*, *supra* note 7, at 39–40, 67 (predicting, just before *Poole*, that future decisions would create future storms of litigation related to *Hurst*).

⁶⁸ FLA. DEP'T OF CORR., ANNUAL REPORT: FISCAL YEAR 2014–2015, at 27 (2015) [hereinafter ANNUAL REPORT 2014–2015], http://www.dc.state.fl.us/pub/annual/1415/FDC_AR2014-15.pdf.

⁶⁹ *Id.* As far as methodology for the statistics cited herein, I used the raw data from the Florida Department of Corrections—number of inmates in most instances—to calculate statistics in a way that is understandable and communicable. For example, to calculate this statistic, I would divide the total number of DOC admissions for fiscal year 2014–2015 by 942, which produces .031, which can then be converted to a percentage of total admissions.

missions for murder/manslaughter—3.3% of DOC’s total admissions that year.⁷⁰ Of those 987 admissions for murder/manslaughter in fiscal year 2015–2016, 323 (or 32.7%) were admitted for first-degree murder,⁷¹ the only murder offense for which death is a viable punishment in Florida.⁷² In other words, 1.07% (32.7% of 3.3%) of DOC admissions for fiscal year 2015–2016 were for first-degree murder.

On June 30, 2015, DOC reported 14,576 inmates in custody for the primary offense of murder/manslaughter, which accounted for 14.6% of DOC’s inmate population at that time.⁷³ A year later, DOC reported 14,722 inmates for the primary offense of murder/manslaughter, accounting for 14.9% of DOC’s inmate population at that time⁷⁴—an increase of 0.3% from the prior year. Of those 14,722 inmates, 7,275 inmates were in custody for the specific primary offense of first-degree murder.⁷⁵ Therefore, in 2016, first-degree murder was the primary offense for 7.3% of inmates within DOC’s general population, and 49.4% of defendants incarcerated for murder/manslaughter were incarcerated for the primary offense of first-degree murder.

This Part reviews the demographic information of these defendants admitted to DOC for murder/manslaughter—specifically, (A) the age of homicide defendants, (B) the gender of homicide defendants, and (C) the race of homicide defendants. Note that this Part does not consider the sentences each defendant received for their conviction, which is discussed in Part III, *infra*.

⁷⁰ FLA. DEP’T OF CORR., ANNUAL REPORT FISCAL YEAR 2015–2016, at 27, (2016) [hereinafter ANNUAL REPORT 2015–2016], http://www.dc.state.fl.us/pub/annual/1516/FDC_AR2015-16.pdf.

⁷¹ See FLA. DEP’T OF CORR., *Inmate Admissions: Admissions by Primary Offenses FY 2015-16*, http://www.dc.state.fl.us/pub/annual/1516/stats/ia_primary.html (last visited July 26, 2017) [https://web.archive.org/web/20170726160536/http://www.dc.state.fl.us/pub/annual/1516/stats/ia_primary.html] [hereinafter *Admissions: Primary Offenses*].

⁷² See FLA. STAT. §§ 775.082, 921.141 (2016).

⁷³ ANNUAL REPORT 2014–2015, *supra* note 68, at 28.

⁷⁴ ANNUAL REPORT 2015–2016, *supra* note 70, at 28.

⁷⁵ FLA. DEP’T OF CORR., *Inmate Population*, http://www.dc.state.fl.us/pub/annual/1516/stats/ip_primary.html (last visited Aug. 27, 2017) [https://web.archive.org/web/20170827110347/http://www.dc.state.fl.us/pub/annual/1516/stats/ip_primary.html] [hereinafter *Inmate Population*].

A. Age of Defendants

This Section reviews the age of defendants when they were admitted to DOC for homicide offenses. Admissions give an accurate depiction of this information because it is the defendant's age at the time he or she is imprisoned for the crime, which is closest to the time of the offense.

In fiscal year 2014–2015, the average age of all defendants admitted to DOC for murder/manslaughter was 34.3 years.⁷⁶ That age dropped by 1.4 years in fiscal year 2015–2016, when the average age of the 987 defendants admitted to DOC for murder/manslaughter was 32.9 years.⁷⁷ On June 30, 2016, the average age of all defendants in DOC's population for murder/manslaughter was 28.4 years.⁷⁸ This indicates that the defendants admitted for murder/manslaughter between 2014 and 2016 were, on average, older than all defendants in DOC's population.⁷⁹

In fiscal year 2015–2016, of the 987 admissions for murder/manslaughter, 118 or 12% were “elderly” (50 years of age or older), 81 or 8.2% were “youthful” (17 years of age or younger), leaving 788 or 79.8% of all defendants admitted to DOC for murder/manslaughter between the ages of 17 and 50.⁸⁰ Table 1 below summarizes this information.

⁷⁶ ANNUAL REPORT 2014–2015, *supra* note 68, at 27.

⁷⁷ *Compare id.*, with ANNUAL REPORT 2015–2016, *supra* note 70 at 27.

⁷⁸ ANNUAL REPORT 2015–2016, *supra* note 70 at 27.

⁷⁹ *Compare* FLA. DEP'T OF CORR., *Inmate Population: General Characteristics of Population*, http://www.dc.state.fl.us/pub/annual/1516/stats/ip_general.html (last visited Aug. 27, 2017) [https://web.archive.org/web/20170827110531/http://www.dc.state.fl.us/pub/annual/1516/stats/ip_general.html] [hereinafter *Population: General*], with ANNUAL REPORT 2014–2015, *supra* note 68, at 271, and ANNUAL REPORT 2015–2016, *supra* note 70 at 27.

⁸⁰ FLA. DEP'T OF CORR., *Inmate Admissions: Elderly (50 or Older) Admissions*, http://www.dc.state.fl.us/pub/annual/1516/stats/ia_elderly.html (last visited July 26, 2017) [https://web.archive.org/web/20170726161143/http://www.dc.state.fl.us/pub/annual/1516/stats/ia_elderly.html] [hereinafter *Admissions: Elderly 2015–16*]; FLA. DEP'T OF CORR., *Inmate Admissions: Youthful (17 or Under at Offense) Admissions*, http://www.dc.state.fl.us/pub/annual/1516/stats/ia_youthful.html (last visited July 26, 2017) [https://web.archive.org/web/20170726161158/http://www.dc.state.fl.us/pub/annual/1516/stats/ia_youthful.html] [hereinafter *Admissions: Youthful 2015–16*].

Murder/Manslaughter Admissions (2015–16)		
Youthful	81	8.2%
Elderly	118	12%
18–50	788	79.8%
Total	987	

Table 1: Age of DOC Admissions for Murder, Manslaughter (2015–16)

On July 1, 2016, 20.1% of Florida’s general population was younger than eighteen, and 19.9% of the population was older than sixty-five.⁸¹ Comparing this to the data above, there is no indication that youthful or elderly people are committing, or at least being imprisoned for, homicide offenses disproportionately to Florida’s general population. If anything, both youthful and elderly people are committing homicide offenses less than the population distribution would suggest. This seems natural because there will usually be a law-abiding portion of the population. Thus, there appears to be no indication that age is a basis for discriminatory prosecution or conviction in Florida.

Further, it is worth noting that the average age of female offenders at the time of admission was 36.5 years old⁸²—almost four years older than the average age of all defendants admitted for murder/manslaughter in the same year.⁸³ This may indicate that the women who commit homicide offenses do so later in life when compared to male offenders. Section B below reviews the gender of defendants imprisoned for homicide offenses in Florida.

⁸¹ JIM FARRELL, CENT. FLA. DEV. COUNCIL 3 (2017), <https://cfdc.org/wp-content/uploads/Demographics-Analysis-for-Polk-County-2017.pdf> [hereinafter FLORIDA CENSUS DATA].

⁸² FLA. DEP’T OF CORR., *Inmate Admissions: Female Offender Admissions*, http://www.dc.state.fl.us/pub/annual/1516/stats/ia_female.html (last visited July 6, 2017) [https://web.archive.org/web/20170625085205/http://www.dc.state.fl.us/pub/annual/1516/stats/ia_female.html] [hereinafter *Admissions: Female*].

⁸³ ANNUAL REPORT 2015–2016, *supra* note 70, at 27.

B. Gender of Defendants

As to gender, literature suggests that, in general, men are arrested, victimized, and incarcerated more often than women.⁸⁴ In 2012, Professor Sonja Starr of the University of Michigan wrote that “[i]n the United States, men are fifteen times as likely to be incarcerated as women are.”⁸⁵ Table 2 below reflects the gender composition of Florida’s population as compared to DOC’s general population and DOC’s murder/manslaughter population.

	Florida Population	DOC Population	DOC Murder, Manslaughter Population	DOC First-Degree Murder Population
Male	48.9%	93.1%	93.4%	95.6%
Female	51.1%	6.9%	6.6%	4.4%

Table 2: Gender Composition of Florida and DOC Population (2016)⁸⁶

According to this information, men are almost twice as likely as women to be imprisoned for crime. This is consistent with evidence that men generally commit violent offenses more often than women.⁸⁷ Further, women are slightly underrepresented compared to the general DOC population and the DOC’s murder/manslaughter population.⁸⁸ In addition, women were underrepresented by 2.5% in the first-degree murder population, which is 2.2% less compared to the murder/manslaughter population.⁸⁹

⁸⁴ E.g., J.L. Miller et al., *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 L. & SOC’Y REV. 313, 317 (1986).

⁸⁵ Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* 1 (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 12-018, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144002.

⁸⁶ FLORIDA CENSUS DATA, *supra* note 81, at 3; *Population: General, supra* note 79; *Inmate Population, supra* note 75.

⁸⁷ See e.g., Darrell Steffensmeier et al., *Gender Gap Trends for Violent Crimes, 1980 to 2003*, 1 FEMINIST CRIMINOLOGY 72, 89–90 (2006).

⁸⁸ Compare *Population: General, supra* note 79, with *Inmate Population, supra* note 75. Obviously, the murder/manslaughter population is not exhaustive of the population incarcerated for violent offenses.

⁸⁹ See *Inmate Population, supra* note 75.

In fiscal year 2015–2016, 8.8% (87 out of 987) of defendants admitted to DOC for murder/manslaughter were women.⁹⁰ Therefore, 2.2% more women were admitted to DOC in 2015–2016 for murder/manslaughter, as compared to the DOC population for the primary offense of murder/manslaughter, of which 6.6% was women.⁹¹

Going a step further and looking only to the 323 defendants admitted for first-degree murder, males comprised 93.8% of the admissions for first-degree murder in 2015–2016, accounting for 303 or 93.8% of the defendants.⁹² Only 20, or 6.2%, of first-degree murder defendants were female, 2.6% less than the percentage of female representation in all murder/manslaughter admissions for the same year.⁹³ Table 3 below summarizes the information presented in this Section regarding the gender of defendants admitted to DOC for murder/manslaughter in 2015–2016:

	DOC Population	Murder, Manslaughter Admissions		First-Degree Murder Admissions	
Men	93.1%	900	91.1%	303	93.8%
Women	6.9%	87	8.8%	20	6.2%
Total		987		323	

Table 3: Gender of DOC Admissions (2015–2016)

Based on this information, it appears that women commit more non-capital homicide offenses than capital offenses. To the contrary, it appears that men are convicted of capital crimes more often than women. These findings support what Justice Marshall suggested in

⁹⁰ See *Admissions: Female*, *supra* note 82; *Admissions: Primary Offenses*, *supra* note 71.

⁹¹ See *Admissions: Female*, *supra* note 82; *Inmate Population*, *supra* note 75; *Population: General*, *supra* note 79; see also *supra* Table 2.

⁹² See *Admissions: Primary Offenses*, *supra* note 71; see also *infra* Table 3.

⁹³ *Admissions: Primary Offenses*, *supra* note 71; *Admissions: Female*, *supra* note 82.

Furman,⁹⁴ and what other authors have argued since: women generally receive more lenient convictions and sentences.⁹⁵

The next Section addresses the racial composition of the population of defendants convicted of homicide offenses.

C. Race of Defendants

For decades, discussions about the death penalty have addressed whether racial discrimination affects capital sentencing in the United States.⁹⁶ Indeed, evidence of racial disparities in capital sentencing was one of the primary reasons for the Supreme Court's opinion in *Furman*.⁹⁷ Many have and would still argue that discretion in the capital sentencing process—for example, prosecutorial discretion to decide whether to seek death in a capital prosecution,⁹⁸ jury discretion to recommend life or death, and judicial discretion to impose life or death—results in racial discrimination.⁹⁹ In other words, discretion is employed in a racially discriminatory manner against Blacks, resulting in a system that disproportionately sentences Blacks to death for crimes identical to those committed by Whites, for which a sentence of life imprisonment without parole is imposed.

⁹⁴ See *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (per curiam) (Marshall, J., concurring) (“There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate.”).

⁹⁵ See e.g., Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L. J. 609, 613–15, 620–27 (2006).

⁹⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 56 (2010) (discussing the advent of “mass incarceration” of African Americans, partly exacerbated by the introduction of dozens of new federal capital crimes in 1994).

⁹⁷ See *Furman*, 408 U.S. at 249–51 (Douglas, J., concurring).

⁹⁸ See John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2576 (1997) (“Although the dangers of prosecutorial discretion exist throughout the criminal process, they are most problematic in the context of the death penalty, where prosecutors are likely to have the greatest influence on whether a defendant is sentenced to death.”).

⁹⁹ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987) (arguing, in part, that “race has infected the administration of Georgia’s statute [because] . . . black murderers are more likely to be sentenced to death than white murderers.”); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 156–57 (2014); Sharma et al., *supra* note 17, at 4.

Others argue that race inevitably plays a role in capital sentencing.¹⁰⁰ Some argue that the victim's race is the determinative factor when reviewing whether discrimination exists in capital sentencing.¹⁰¹ Indeed, this was the basis of the equal protection claim in *McCleskey*.¹⁰² Likewise, in his dissent from the Florida Supreme Court's opinion in *Asay v. State* ("Asay V"), former Justice Perry noted that Mark James Asay, the first defendant to have a death warrant issued by the Governor of Florida after *Hurst*,¹⁰³ would "be the first white person executed for the murder of a black person in [Florida]." ¹⁰⁴ Justice Perry stated, "This sad statistic is a reflection of the bitter reality that the death penalty is applied in a biased and discriminatory fashion, even today."¹⁰⁵

Finally, some argue that we have effectively reduced the improper influence of race, and the "death penalty system is no longer characterized by the systemic discrimination against Black defendants that existed in many states before *Furman v. Georgia*."¹⁰⁶ This Section reviews the racial composition of DOC's population of defendants admitted for homicide offenses, setting the background for later discussion reviewing race in capital sentencing.

1. DOC GENERAL POPULATION

On June 30, 2016, DOC reported a total population of 99,119 inmates.¹⁰⁷ Blacks comprised the highest percentage of that population at 48.1%; Whites comprised 47.6%; other races comprised the remaining 4.5%.¹⁰⁸ On July 1, 2016, one day after DOC's report, the

¹⁰⁰ See *McCleskey*, 481 U.S. at 292; see also *Race and the Death Penalty*, AM. C.L. UNION, <https://www.aclu.org/other/race-and-death-penalty> (last visited Mar. 29, 2020) ("The color of a defendant and victim's skin plays a crucial and unacceptable role in deciding who receives the death penalty in America.").

¹⁰¹ See *McCleskey*, 481 U.S. at 291 (defendant arguing, in part that "persons who murder whites are more likely to be sentenced to death than persons who murder blacks").

¹⁰² See *id.*

¹⁰³ See *Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (per curiam).

¹⁰⁴ *Asay v. State*, 210 So. 3d 1, 37 (Fla. 2016) (per curiam) (Perry, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ Sharma et al., *supra* note 17, at 3.

¹⁰⁷ ANNUAL REPORT 2015–2016, *supra* note 70, at 24.

¹⁰⁸ *Population: General*, *supra* note 79.

population of the State of Florida was 20,612,439.¹⁰⁹ Table 4 below summarizes and compares the racial composition of Florida's population and DOC's population at those reporting times:

	Florida Population	DOC Population
Black	16.8%	48%
White	77.6%	47.5%
Other	5.6%	4.5%

Table 4: Racial Composition of DOC and Florida Population (2016)

Considering this information, Blacks are overrepresented in Florida's prisons by a staggering 31.2%. To the contrary, Whites are underrepresented in Florida's prisons by 30.1%, and other races are slightly underrepresented by approximately 1%. The question is whether this is a result of Blacks committing crimes at a disproportionately higher rate than Whites, or something else, such as racial bias in prosecutions and/or convictions.

Obviously, extraneous factors—socioeconomics, education, etc.—may affect whether someone commits or is victimized by a crime.¹¹⁰ For example, uneducated and unskilled people, regardless of race, are less likely to secure employment and may be more inclined to commit crime as a result of economic deprivation.¹¹¹ In 2016, the poverty rate in Florida was 14.7%, down from 15.7% in 2015.¹¹² However, when viewed by race, the poverty rate

¹⁰⁹ FLORIDA CENSUS DATA, *supra* note 81, at 3.

¹¹⁰ See, e.g., John A. Arthur, *Socioeconomic Predictors of Crime in Rural Georgia*, 16 CRIM. JUST. REV. 29, 36 (1991) (finding “that socioeconomic variables such as unemployment, poverty, percentage of families receiving aid, and race have significant, positive effect on violent crimes and property crime at the county level” in South Georgia); see also Jason DeParle, *The American Prison Nightmare*, 41 CLEARINGHOUSE REV. 238, 239–40 (2007) (“[B]y 2009, high school dropouts of either race were being locked up three as often as they had been two decades before.”).

¹¹¹ See Arthur, *supra* note 110, at 36–37.

¹¹² *Poverty Rate in Florida from 2000 to 2016*, STATISTA, <https://www-statista.com/statistics/205451/poverty-rate-in-florida/> (last visited Mar. 29, 2020); see also Florida, *Poverty by State*, TALKPOVERTY, <https://talkpoverty.org/state-year-report/florida-2017-report/> (last visited Mar. 29, 2020).

changes.¹¹³ Table 5 below indicates the percentage of Florida’s population that was in poverty in 2016 by race/ethnicity, as compared to the overall Florida and DOC populations.

	Percent of Florida Population in Poverty	Florida Population	DOC Population
Black	22.8%	16.8%	48%
White	12.8%	77.6%	47.5%

Table 5: Poverty Rates by Race

Thus, in Florida, Blacks experience poverty at a higher rate than Whites. Based on this information, we may expect Blacks to be imprisoned slightly more than Whites. But should we expect them to be imprisoned over 30% more than their population representation would suggest?

Sources indicate that “criminal justice laws and policies disproportionately incarcerate African Americans.”¹¹⁴ In addition, data shows that Blacks are disproportionately victimized by crime.¹¹⁵ Even considering the disparity in poverty rates, “blacks are twice as likely as whites to be unemployed, [but] they now go to prison eight times as often.”¹¹⁶ Furthermore, while “[m]uch about black underclass life is tragic . . . the racial imbalance in the prison population is particularly extreme.”¹¹⁷ Additionally, “Black men in their early thirties are imprisoned at seven times the rate of whites in the same age group.”¹¹⁸

Analyzing the DOC population suggests that, even considering disparities in poverty, Blacks are generally imprisoned disproportionately more than Whites, in Florida. The next Section narrows in on defendants who are imprisoned in Florida for homicide offenses and, specifically, first-degree murder.

¹¹³ See *Florida, Poverty by State*, *supra* note 112.

¹¹⁴ E.g., Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 760 (2015) (citing generally ALEXANDER, *supra* note 96).

¹¹⁵ See, e.g., Miller et al., *supra* note 84, at 317; Brenda L. Vogel & James W. Meeker, *Perceptions of Crime Seriousness in Eight African-American Communities: The Influence of Individual, Environmental, and Crime-Based Factors*, 18 JUST. Q. 301, 302 (2001).

¹¹⁶ DeParle, *supra* note 110, at 240.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 239.

2. DEFENDANTS CONVICTED OF PRIMARY HOMICIDE OFFENSES

Looking only at inmates imprisoned for the primary offense of murder/manslaughter, which includes first-degree murder, the disproportionate conviction of Blacks versus Whites becomes more significant.¹¹⁹ Table 6 below summarizes the racial composition of the DOC population imprisoned for the primary offense of murder/manslaughter defendants as of June 30, 2016:

	Murder, Manslaughter		First-Degree Murder	
Black	7,414	50.4%	3,114	42.8%
White	6,521	44.3%	3,810	52.4%
Other	787	5.3%	351	4.8%
Total	14,722		7,275	

Table 6: Race of Homicide Population

Based on this information, Blacks comprise 2.4% more of the murder/manslaughter population than the DOC population in general.¹²⁰ Compared to the population of Florida, of which Blacks represent 16.8%,¹²¹ Blacks are overrepresented in the murder/manslaughter population by 33.6% and overrepresented in the first-degree murder population by 26%.¹²² Thus, even if one adjusted for disproportionate rates of poverty and other factors that may instigate criminal behavior, an argument could still be made that: (A) Blacks are convicted of higher offenses more often than Whites, as are defendants who are neither White nor Black; or (B) Whites are committing first-degree murder less often than Blacks and those listed as “Other.”

However, not all first-degree murder defendants are sentenced to death.¹²³ A significant portion of first-degree murder defendants are instead sentenced to life imprisonment without the possibility of parole. In fact, in 2007, Songer and Unah wrote that between 1981

¹¹⁹ See *Inmate Population*, *supra* note 75.

¹²⁰ Compare *Population: General*, *supra* note 79, with *Inmate Population*, *supra* note 75.

¹²¹ See FLORIDA CENSUS DATA, *supra* note 81, at 3.

¹²² See *Inmate Population*, *supra* note 75.

¹²³ John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL L. STUD. 165, 171 (2004).

and 2006, only “approximately 2% of murders committed by known offenders in the United States resulted in death sentences.”¹²⁴ Part III below focuses on only those defendants convicted of first-degree murder and sentenced to death in Florida.

III. DEFENDANTS SENTENCED TO DEATH

Florida has always been a leader in capital sentencing.¹²⁵ It houses one of the largest death rows in the country.¹²⁶ Between June 30, 2011, and June 30, 2015, the DOC reported an average of 399 inmates awaiting execution on Florida’s death row.¹²⁷ That number peaked at 405 in 2013.¹²⁸

Historically, Florida has been a leader in the number of death sentences imposed each year;¹²⁹ and, the State is unfortunately known for having more “exonerations from death row . . . than any other state.”¹³⁰ When awaiting execution on “death row” in Florida,¹³¹ pending any appeals,¹³² the defendant lives in a death row cell that is 6 feet by 9 feet by 9.5 feet high.¹³³

Once the defendant’s appellate rights expire, the Governor signs a death warrant, certifying that the defendant may be executed and

¹²⁴ Songer & Unah, *supra* note 117, at 162.

¹²⁵ See *Death Sentencing Graphs by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/state-death-sentences-by-year> (last visited Mar. 29, 2020).

¹²⁶ See *Death Row*, *supra* note 5.

¹²⁷ See ANNUAL REPORT 2014–2015, *supra* note 68, at 37. Specifically, on June 30, 2011, there were 399 inmates on Florida’s death row; on June 30, 2012, there were 402 inmates on death row in Florida; on June 30, 2013, there were 405 inmates on death row in Florida; on June 30, 2014, there were 396 inmates on death row in Florida; and, on June 30, 2015, there were 395 inmates on death row in Florida.

¹²⁸ *Id.*

¹²⁹ See *Death Sentencing Graphs by State*, *supra* note 125.

¹³⁰ *Florida*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/florida-1> (last visited Mar. 29, 2020).

¹³¹ See *Death Row*, FLA. DEP’T OF CORR., <http://www.dc.state.fl.us/ci/deathrow.html> (last visited Mar. 29, 2020).

¹³² See Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, at 6–13 (describing the “long capital appellate process.”).

¹³³ *Death Row*, *supra* note 5.

scheduling the execution.¹³⁴ When the Governor signs the defendant's death warrant, the defendant is moved to a "Death Watch" cell, which is a bit larger than the former cell at 12 feet by 7 feet by 8.5 feet high.¹³⁵ According to the DOC's 2014–2015 Annual Report, defendants spent an average of 17.2 years on death row between their offense and execution.¹³⁶

Section A below reviews the gender of defendants sentenced to death in Florida.

A. Gender of Defendants

Men and women on Florida's death row are housed separately.¹³⁷ Men are housed at Florida State Prison and Union Correctional Institution in Raiford, Florida.¹³⁸ Women are housed at Lowell Correctional Institution Annex in Lowell, Florida.¹³⁹ Table 8 below shows the gender composition of Florida's death row as of August 28, 2018:

	Male		Female		Total
White	204	59.64%	1	33.3%	59.42%
Black	129	37.72%	2	66.7%	37.97%
Other	9	2.63%	0	0%	2.61%
Total	342	99.13%	3	0.87%	

Table 7: Gender Composition of Florida's Death Row¹⁴⁰

¹³⁴ For more on the death warrant process, see Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, at 6–13.

¹³⁵ *Death Row*, *supra* note 5.

¹³⁶ ANNUAL REPORT 2014–2015, *supra* note 68, at 36.

¹³⁷ *Death Row*, *supra* note 5.

¹³⁸ *Id.* As of July 1, 2016, the population of Raiford was 237. *Raiford, Florida Population 2020*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/raiford-fl-population/> last visited Mar. 29, 2020).

¹³⁹ *Death Row*, *supra* note 5.

¹⁴⁰ FLA. DEP'T OF CORR., 2017–18 ANNUAL REPORT, at 26 (2018), http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf [hereinafter ANNUAL REPORT 2017–2018]; *Corrections Offender Network: Death Row Roster*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/OffenderSearch/deathrow-roster.aspx> (last visited Aug. 28, 2018) [<https://web.archive.org/web/20180828015944/http://www.dc.state.fl.us:80/OffenderSearch/deathrow-roster.aspx>] [hereinafter *Death Row Roster*].

It is interesting to compare these numbers to the DOC's population.¹⁴¹ Of the DOC's first-degree murder population, 4.4% were women and 95.6% were men.¹⁴² However, only 0.87% of Florida's death row is female, while 99.13% of Florida's death row is male.¹⁴³ This data overwhelmingly suggests that men are sentenced to death disproportionately more than women.

In fact, this seems to be a constant trend in Florida and across the nation.¹⁴⁴ DOC reports the following gender breakdown for death row over between 2012 and 2016, all of which suggest the same disproportionate gender distribution:

	2012	2013	2014	2015	2016
Males	398	400	391	390	384
Females	4	5	5	5	4

Table 8: Death Row Gender Composition (2012–2016)¹⁴⁵

Similarly, “[s]tudies of gender disparity . . . have usually found that women receive shorter sentences.”¹⁴⁶ For example, Professor Starr reported gender disparities throughout the federal criminal system, showing that women are favored throughout the sentencing process.¹⁴⁷

Section B below addresses the race of defendants sentenced to death.

B. *Race of Defendants*

Between 2011 and 2015, Whites accounted for an average of 237 inmates or 59.4% of Florida's death row, and Blacks accounted for an average of 148 inmates or 37% of Florida's death row.¹⁴⁸

¹⁴¹ See *supra* Table 2.

¹⁴² See *Inmate Population*, *supra* note 75.

¹⁴³ See ANNUAL REPORT 2017–2018, *supra* note 140, at 26.

¹⁴⁴ See *Current Female Death Row Prisoners*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/women> (last visited Mar. 29, 2020) (showing that there are only 53 women on death row in the United States as of January 1, 2020).

¹⁴⁵ ANNUAL REPORT 2015–2016, *supra* note 70, at 37.

¹⁴⁶ Starr, *supra* note 85, at 3.

¹⁴⁷ See *id.* at 11.

¹⁴⁸ See ANNUAL REPORT 2014–2015, *supra* note 68, at 37.

Other races accounted for the remaining 15 inmates or 3.8% of Florida's death row.¹⁴⁹ Figure 1 below indicates the racial composition of Florida's death row, in number of defendants, between 2011 and 2015.

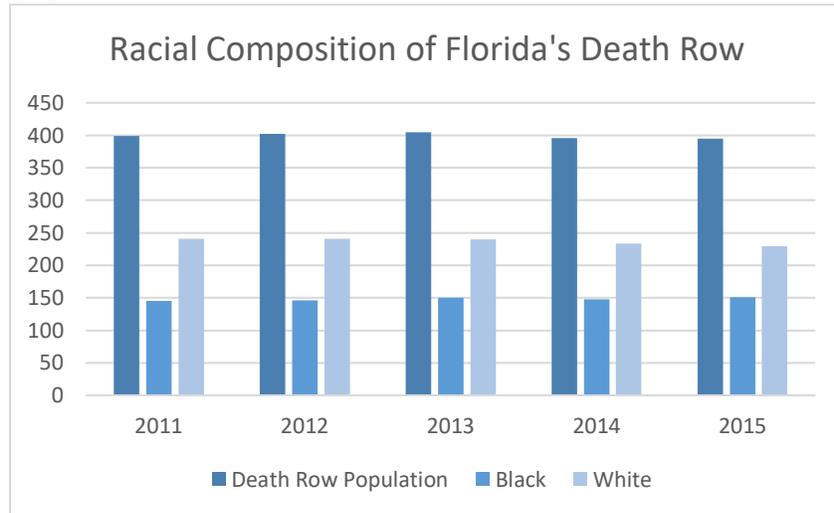


Figure 1: Racial Composition of Florida's Death Row

Comparing this information to the racial composition of defendants imprisoned for first-degree murder from Table 3, *supra*, the following becomes clear: the racial composition of Florida's death row varies from the racial composition of the DOC's general population. As of June 30, 2016, the DOC's general population (99,119 inmates) was 47.6% white, 48.1% black, and 4.5% other.¹⁵⁰ Therefore, contrary to what some would expect, Whites are overrepresented on death row compared to the DOC's general population while Blacks are underrepresented.

More importantly, the racial composition of Florida's death row is different than the racial composition of the DOC population of first-degree murder defendants.¹⁵¹ As stated above, between 2011 and 2015, Florida's death row averaged 59.4% white, 37% black, and 3.8% other; whereas,¹⁵² whereas, the population of first-degree murder defendants was 42.8% white, 52.4% black, and 4.8%

¹⁴⁹ *See id.*

¹⁵⁰ ANNUAL REPORT 2015–2016, *supra* note 70, at 28.

¹⁵¹ Compare *supra* Table 6, with *supra* Figure 1.

¹⁵² See ANNUAL REPORT 2014–2015, *supra* note 68, at 37.

other.¹⁵³ Therefore, Whites are overrepresented by almost 17% on death row compared to the DOC population of first-degree murder defendants. This suggests—contrary to skepticism of racial discrimination in the capital sentencing process—that Whites are sentenced to death disproportionately more than Blacks. Of course, this number may be skewed if Blacks are prosecuted for crimes—specifically first-degree murder—disproportionately more than Whites because the number of Blacks convicted of first-degree murder would, therefore, be too high to accurately compare in this context.

Having reviewed several racial disparities in Florida’s criminal justice system, it becomes clear that Blacks are generally over-prosecuted and convicted. However, the racial disparities decrease as one focuses on first-degree murder convictions and capital sentencing. Perhaps this is because, as some argue, a lot of racial disparity and biased prosecution occurs outside the capital sentencing arena—for example, in the prosecution of drug charges.¹⁵⁴ Part IV below reviews the demographics of defendants executed in Florida before the paradigm shift caused by the Supreme Court’s 2016 decision in *Hurst v. Florida*.

IV. EXECUTIONS IN FLORIDA BEFORE *HURST V. FLORIDA* IN JANUARY 2016

“Florida was given the authority to execute inmates by the 1923 Legislature.”¹⁵⁵ In the 1990s, Florida switched to “using lethal injection as its execution method,”¹⁵⁶ which remains the primary method of execution today.¹⁵⁷ The first execution in Florida after 1923 was of Frank Johnson on October 7, 1924.¹⁵⁸ From 1923 until

¹⁵³ See *Inmate Population*, *supra* note 75.

¹⁵⁴ See ALEXANDER, *supra* note 96, at 112–14.

¹⁵⁵ ANNUAL REPORT 2014–2015, *supra* note 68, at 36.

¹⁵⁶ *Florida*, *supra* note 130; see also ANNUAL REPORT 2014–2015, *supra* note 68, at 36.

¹⁵⁷ FLA. STAT. § 922.105(1) (2020); see also *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Mar. 29, 2019). For more on the history of execution methods, see STEIKER & STEIKER, *supra* note 29, at 13–17.

¹⁵⁸ ANNUAL REPORT 2014–2015, *supra* note 68, at 36.

Florida's last execution before the Supreme Court's decision in *Furman*, Florida executed 196 defendants.¹⁵⁹ Executions in Florida resumed after *Furman* on May 25, 1979, with the execution of John Spenkellink.¹⁶⁰ Between *Furman* and *Hurst*, Florida executed ninety-two defendants.¹⁶¹ The year with the highest number of executions in Florida was 2014 with eight executions.¹⁶² Also between *Furman* and *Hurst*, twenty-seven Florida death row defendants were exonerated.¹⁶³

Oscar Ray Bolin, Jr., who was convicted of crimes committed in 1986¹⁶⁴—was executed an eerie five days before the Supreme Court released its opinion in *Hurst v. Florida*, invalidating Florida's capital sentencing scheme under which Bolin was sentenced.¹⁶⁵ Since *Hurst*, Florida has executed seven inmates, the most recent of whom was Gary Bowles on August 22, 2019.¹⁶⁶ Also since *Hurst*, two death row defendants in Florida were exonerated.¹⁶⁷

¹⁵⁹ See *Execution List: 1924–1964*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/ci/execlist2.html> (last visited Mar. 29, 2019) [hereinafter *Execution List: 1924–1964*].

¹⁶⁰ *Execution List: 1976–Present*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/ci/execlist.html> (last visited Mar. 29, 2020) [hereinafter *Execution List: 1976–Present*].

¹⁶¹ See *id.*; *Death Row*, *supra* note 5.

¹⁶² *Death Row*, *supra* note 5. For information on the number of executions each year, see *Execution List: 1976–Present*, *supra* note 160.

¹⁶³ See *Florida*, *supra* note 130. Florida has exonerated a total of twenty-nine death row defendants; however, two exonerations were after *Hurst v. Florida* was decided in 2016. See *Execution List: 1976–Present*, *supra* note 160.

¹⁶⁴ *Execution List: 1976–Present*, *supra* note 160; Sara DiNatale & Dan Sullivan, *Oscar Ray Bolin Jr. Executed After Four-Hour Delay for Final Appeal*, TAMPA BAY TIMES (Jan. 8, 2016), <https://www.tampabay.com/news/publicsafety/execution-of-oscar-ray-bolin-under-delay-for-final-appeal-to-us-supreme/2260491/>.

¹⁶⁵ 136 S. Ct. 616 (decided on January 12, 2016).

¹⁶⁶ *Execution List: 1976–Present*, *supra* note 160; see also Kalmanson, *Storm of the Decade*, *supra* note 7, at 54.

¹⁶⁷ *Florida*, *supra* note 130; see also *Clemente Aguirre Exonerated From Florida's Death Row After DNA Implicates Prosecution Witness*, DEATH PENALTY INFO. CTR. (Nov. 7, 2018), <https://deathpenaltyinfo.org/node/7238> (discussing the exoneration of Clemente Aguirre); *Florida Man Exonerated 42 Years After Wrongful Conviction and Death Sentence*, DEATH PENALTY INFO. CTR. (Mar. 29, 2019), <https://deathpenaltyinfo.org/news/florida-man-exonerated-42-years-after-wrongful-conviction-and-death-sentence> (discussing the exoneration of Clifford Williams, Jr.).

This Part reviews the demographics of defendants executed in Florida since executions resumed after *Furman*, finding that Florida's system of execution does not indicate bias in the selection for execution.

A. Age of Executed Defendants

The age at which a capital defendant commits a crime and is executed has long been a topic of constitutional discussion.¹⁶⁸ In 1994, the Florida Supreme Court held that “the death penalty is either cruel or unusual punishment if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution.”¹⁶⁹ At that time, “more than half a century ha[d] elapsed since Florida last executed one who was less than sixteen years of age at the time of committing an offense. In the intervening years, only two death penalties [were] imposed on such persons, and both of these later were overturned.”¹⁷⁰

It was not until 2005 that the Supreme Court determined in *Roper v. Simmons* that executing defendants who were under the age of eighteen when they committed the offense for which they received a sentence of death violates the Eighth Amendment.¹⁷¹ The *Roper* Court explained that differences between juveniles under the age of 18 and adults made it impossible to classify juveniles “among the worst offenders.”¹⁷² Specifically, the Court explained that juveniles lack the requisite maturity to render “their irresponsible conduct . . . as morally reprehensible as that of an adult.”¹⁷³

¹⁶⁸ For an explanation of cases on this topic, see generally Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151 (2005).

¹⁶⁹ *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (per curiam).

¹⁷⁰ *Id.*

¹⁷¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹⁷² *Id.* at 569–70 (describing “[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).

¹⁷³ *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

Prior to *Roper*, Florida did not execute any defendants under the age of eighteen between 1979 and 2004.¹⁷⁴ Nor were any of the defendants executed in Florida during that time eighteen or younger when they committed the offense.¹⁷⁵ Of the ninety-two executions in Florida between *Furman* and *Hurst*,¹⁷⁶ Richard Henyard—who was executed in September 2008, after *Roper*—was the youngest defendant to be executed; he was eighteen years old at the time of his offense.¹⁷⁷ The average age at the time of the offense, since the execution of John Spengelink in 1979, is 29.8 years old, and the average age at the time of execution is 46.6 years old.¹⁷⁸

Figure 2 below illustrates the age at the time of the offense and at the time of execution of the ninety-two defendants executed in Florida between *Furman* and *Hurst*.¹⁷⁹

¹⁷⁴ See *Execution List: 1976–Present*, *supra* note 160.

¹⁷⁵ See *id.* However, before 1979, Florida executed at least four defendants who were younger than eighteen years old at the time of execution. See *Execution List: 1924–1964*, *supra* note 159. Fortune Ferguson, executed April 27, 1927, Edward Powell, executed December 29, 1941, Willie Clay, executed December 29, 1941, and James Davis, executed October 9, 1944, were the youngest to be executed in the State of Florida. See *id.* All four were black males who were 16 years old at the time of execution. See *id.*

¹⁷⁶ See *Execution List: 1976–Present*, *supra* note 160; *Death Row*, *supra* note 5.

¹⁷⁷ *Execution List: 1976–Present*, *supra* note 160; see also *Henyard v. State*, 689 So. 2d 239, 242 (Fla. 1996) (per curiam). Although *Execution List: 1976–Present*, *supra* note 160, indicates that Darious Kimbrough was 18 years old at the time of the offense, the Florida Supreme Court’s decision on direct appeal indicated that he was actually 19 years old at the time of the offense. *Kimbrough v. State*, 700 So. 2d 634, 637 (Fla. 1997) (per curiam).

¹⁷⁸ *Death Row Facts*, FLA. DEP’T OF CORR., <http://www.dc.state.fl.us/secretary/press/2014/Death-Row-Fact-Sheet.pdf> (last revised Oct. 2015) [<https://web.archive.org/web/20171215173829/http://www.dc.state.fl.us/secretary/press/2014/Death-Row-Fact-Sheet.pdf>]; see also *Execution List: 1976–Present*, *supra* note 160.

¹⁷⁹ See *Execution List: 1976–Present*, *supra* note 160.

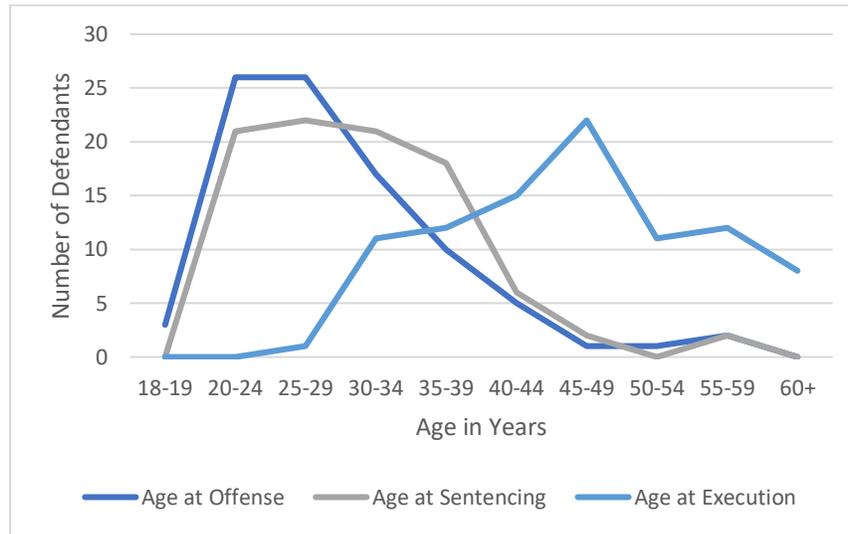


Figure 2: Age of Defendants at Offense and Execution

A close review of Figure 2 indicates the following: (1) consistent with the discussion above, defendants convicted of first-degree murder are generally younger than forty years old when they commit the offense, (2) the time between a defendant committing the offense and sentencing is fairly consistent, and (3) the time of execution is unpredictable.

First, as to the defendants' age at the time of the offense, fifty-two, or 56.5%, of the ninety-two defendants executed in the State of Florida between *Furman* and *Hurst* were between the ages of twenty and twenty-nine years old at the time of the offense.¹⁸⁰ Twenty-seven, or 29.3%, of the defendants, were between the ages of thirty and thirty-nine years old at the time of the offense.¹⁸¹ The remaining nine, or 9.8%, of the defendants, were older than forty years of age at the time of the offense.¹⁸² Table 9 below summarizes this information, as well as the defendants' age at sentencing and age at execution.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

	Age at Offense	Age at Sentencing	Age at Execution
18-20	3.3%	0%	0%
20-29	56.5%	46.7%	1.1%
30-39	29.3%	42.4%	25%
40-49	6.5%	8.7%	40.2%
50-60+	3.3%	2.2%	33.7%

Table 9: Age of Defendants Executed in Florida

Second, Figure 2 indicates that the time between a defendant committing the offense and sentencing is fairly consistent among defendants because the “Age at Offense” line follows the “Age at Sentencing” line very closely, with a slight gap between ages of thirty and thirty-nine. This consistency is likely attributable to Florida’s speedy trial rules, which place stringent timelines on the State for bringing defendants to trial.¹⁸³

Finally, unlike the time between the offense and sentencing, the time between the offense and/or sentencing and execution is not consistent among defendants.¹⁸⁴ If the time between the offense and/or sentencing and execution was consistent, we would expect the “Age at Execution” line to closely follow the “Age at Offense” and/or “Age at Sentencing” line. Therefore, Figure 2 confirms what is often discussed as a flaw in the capital sentencing system and argued in court as a violation of defendants’ constitutional rights: the unpredictability of the time of execution.¹⁸⁵ Defendants often wait

¹⁸³ See FLA. R. CRIM. P. 3.191(a); see also U.S. CONST. amend. VI; FLA. CONST. art. I, § 16(a).

¹⁸⁴ See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> (last visited Mar. 29, 2020).

¹⁸⁵ See, e.g., Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, at 8–9. Defendants have argued for years that the time spent on death row awaiting execution amounts to a violation of their Eighth Amendment right against cruel and unusual punishment. See, e.g., *Lambrix v. State*, 217 So. 3d 977, 988 (Fla. 2017) (per curiam) (“In his final postconviction claim, Lambrix alleges that the totality of the punishment the State has imposed on him, which now includes not just execution, but also more than three decades of being on death row, violates the Eighth Amendment.”).

years, even decades, between sentencing and execution.¹⁸⁶ While some states have attempted to remedy this inconsistency, the problem remains because the executive branch has essentially unfettered discretion in choosing defendants for execution and scheduling executions.¹⁸⁷

Part B below reviews the gender of defendants executed in Florida since 1979.

B. Gender of Executed Defendants

Only two of the ninety-two inmates executed in Florida since *Furman* were females: Judias Buenoano in March 1998, and Aileen Wuornos in October 2002.¹⁸⁸ Both Buenoano and Wuornos were White females,¹⁸⁹ meaning that Florida did not execute any Black female between 1979 and the Supreme Court's 2016 decision in *Hurst v. Florida*. Wuornos was ultimately convicted of six murders and confessed to a seventh, garnering her the title of "America's first female serial killer."¹⁹⁰ Therefore, since 1976, only 2.2% of the ninety-two inmates executed in Florida were female and 97.8% were male.¹⁹¹

Compared to the 2016 DOC population of defendants convicted for the primary offense of first-degree murder (95.6% male and 4.4% female), it appears that men are executed more often than women.¹⁹² However, that would inaccurately include capital defendants not sentenced to death. Comparing the gender composition of Florida's death row (99.13% male and 0.87% female) to the gender distribution of these ninety-two executions, it would seem that females are executed relatively more than males.¹⁹³ This information

¹⁸⁶ See *Time on Death Row*, *supra* note 184; see also *Execution List: 1976–Present*, *supra* note 160.

¹⁸⁷ See Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, 23–30. Defendants also argue that the unfettered discretion in choosing defendants and scheduling executions amounts to a violation of due process and separation of powers. See, e.g., *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017) (per curiam).

¹⁸⁸ ANNUAL REPORT 2014–2015, *supra* note 68, at 36; *Execution List: 1976–Present*, *supra* note 160.

¹⁸⁹ *Execution List: 1976–Present*, *supra* note 160.

¹⁹⁰ *Florida*, *supra* note 130.

¹⁹¹ See *Execution List: 1976–Present*, *supra* note 160.

¹⁹² See *supra* Table 2.

¹⁹³ See *supra* Table 7.

is similar to the gender distribution of executions across the United States. Of the 1,422 defendants executed in the United States between *Furman* and *Hurst*, only 16, or 1.13%, were female, meaning 98.87% of executed defendants were male.¹⁹⁴

Part C analyzes the race of executed defendants.

C. Race of Executed Defendants

Of the ninety-two inmates executed in Florida since *Furman*, fifty-nine, or 64.1%, were White, twenty-nine, or 31.5%, were Black, one, or 1%, was Hispanic, and three, or 3.3%, were another race.¹⁹⁵ Obviously, factors such as pending and outstanding appeals affect whose sentence may matriculate to an execution.¹⁹⁶ However, on average, as compared to Florida's inmate population, there is indication that Florida executes Whites more than Blacks.

Similarly, and more specifically, between 2011 and 2015, Whites represented 59.4% of Florida's death row.¹⁹⁷ In the same time, Florida conducted 23 executions, 16, or 69.6%, of which were White, and 7, or 30.4%, of which were Black.¹⁹⁸

Table 10 below indicates the racial breakdown for the 1,422 defendants who were executed across the United States from 1976 to 2015.¹⁹⁹

	Race of Executed Defendants
White	55.41%
Black	34.74%
Hispanic	8.23%
Other	1.62%

Table 10: Race of Defendants Executed in United States

¹⁹⁴ See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> (last visited Mar. 29, 2020).

¹⁹⁵ See *Execution List: 1976–Present*, *supra* note 160.

¹⁹⁶ See Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, at 6–13.

¹⁹⁷ See *supra* Table 7.

¹⁹⁸ See *Execution List: 1976–Present*, *supra* note 160.

¹⁹⁹ See *Execution Database*, *supra* note 194.

Compared to executions across the United States, Whites are executed in Florida 8.7% more, while Blacks are executed 3.24% less.²⁰⁰ Finally, Hispanics are executed 7.23% less in Florida than in the United States generally.²⁰¹ Thus, contrary to popular arguments, the demographics of those who Florida has executed does not suggest racial bias.

Theoretically, that the statistics suggest an absence of discrimination in Florida's capital sentencing system is favorable because it suggests the absence of discrimination in capital sentencing and executions. However, this could be more hopeful than reality. The statistics suggesting a lack of discrimination could also be a result of other factors that inhere discrimination or bias, such as unilateral prosecutorial discretion in determining whether to seek death as a punishment and executive discretion in choosing defendants for and scheduling executions.²⁰²

Having reviewed Florida's death row as it was when the Supreme Court decided *Hurst v. Florida*, Part V seeks to explain the practical implications of this recent paradigm shift and how it affected those who were awaiting execution on Florida's death row when the Supreme Court issued its decision.

V. REVIEWING FLORIDA'S DEATH ROW IN LIGHT OF *HURST V. FLORIDA* AND ITS PROGENY

As explained above, the Supreme Court's 2016 decision in *Hurst v. Florida*²⁰³ invalidated Florida's capital sentencing scheme under the Sixth Amendment. But *Hurst v. Florida* left several unanswered questions—harmless error, the proper remedy, retroactivity, etc.²⁰⁴—that the Florida Supreme Court first answered on remand in

²⁰⁰ Compare *Execution List: 1976–Present*, *supra* note 160, with *supra* Table 10.

²⁰¹ Compare *Execution List: 1976–Present*, *supra* note 160, with *supra* Table 10.

²⁰² See, e.g., Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 10, at 10. Of course, this unilateral discretion begs the question of whether we have effectively removed arbitrariness from capital sentencing.

²⁰³ 136 S. Ct. 616 (2016).

²⁰⁴ See *id.* at 624 (refusing to reach the State's assertion of harmless error).

*Hurst v. State*²⁰⁵ and other, related decisions.²⁰⁶ However, as explained above, the answers to those post-*Hurst v. Florida* questions are not set in stone and, instead, seem to remain in flux—as indicated by recent decisions from the Supreme Court of Florida.²⁰⁷

This Part reviews Florida’s death row in the context of the jurisprudence developed in *Hurst* and its progeny, using data from Florida’s death row population when *Hurst v. Florida* was decided.²⁰⁸

A. Date Sentence Became Final

In *Hurst v. Florida*, the Supreme Court declared that “[t]he analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s” capital sentencing scheme.²⁰⁹ Because *Ring* was the precursor to the rights announced in *Hurst v. Florida*,²¹⁰ the Florida Supreme Court determined in *Asay V* that the rights announced in *Hurst v. Florida* did not apply retroactively to sentences of death that were final before June 28, 2002, the date the Supreme Court decided *Ring*.²¹¹ In *Mosley v. State*, the Florida Supreme Court clarified that *Hurst v. Florida* applies retroactively to sentences of death that were final after the Supreme Court’s decision in *Ring*.²¹²

Although this framework may not be the Court’s final say as to *Hurst v. Florida* retroactivity,²¹³ it is the framework the Court applied in reviewing hundreds of appeals in which defendants sought

²⁰⁵ See *Hurst v. State*, 203 So. 3d 40, 66–69 (Fla. 2016) (per curiam) (performing harmless error analysis).

²⁰⁶ See, e.g., *Asay v. State*, 210 So. 3d 1, 15–22 (Fla. 2016) (per curiam) (refusing to apply *Hurst v. Florida* retroactively to defendant’s death sentence based on a lengthy retroactivity analysis).

²⁰⁷ See, e.g., *State v. Poole*, No. SC18-245, 2020 WL 370302, at *9, *15 (Fla. Jan. 23, 2020) (per curiam); see also Kalmanson, *Storm of the Decade*, *supra* note 7, at 60–61.

²⁰⁸ See *supra* note 5.

²⁰⁹ 136 S. Ct. at 621–22 (2016); see also *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury finding of enumerated aggravating factors under Arizona law).

²¹⁰ See 136 S. Ct. at 621–22.

²¹¹ *Asay v. State*, 210 So. 3d 1, 11, 15–22 (Fla. 2016) (per curiam).

²¹² *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) (per curiam).

²¹³ See Kalmanson, *Storm of the Decade*, *supra* note 7, at 64–65 (explaining how the Supreme Court has indicated it may recede from *Asay* and *Mosley* in *Owen v. State*).

relief after *Hurst v. Florida*.²¹⁴ Therefore, this Part reviews the time at which the sentences of death imposed before *Hurst v. Florida* became final. In other words, this Part reviews the breakdown of sentences to which *Hurst v. Florida* applied retroactively under *Asay* and *Mosley*. Likewise, this Part explains how a change in the *Asay/Mosley* framework would affect capital defendants in Florida.²¹⁵

Of the approximately 390 defendants awaiting execution under sentences of death when *Hurst v. Florida* was decided,²¹⁶ 44.6% became final before *Ring*.²¹⁷ Another 44.6% became final after *Ring*.²¹⁸ The other 42 or 10.8% were not yet final when *Hurst v. Florida* was decided; they were pending on direct appeal.²¹⁹ This information is demonstrated in Table 11 below.

When Death Sentence Became Final	
Before <i>Ring</i>	44.6%
After <i>Ring</i>	44.6%
After <i>Hurst v. Florida</i>	10.8%

Table 11: Date Sentences Became Final

Several Florida cases make clear that the Supreme Court's line-drawing with *Ring* in its retroactivity framework created constitutional significance for capital defendants in the difference of one day.²²⁰ For example, Bradley's sentence became final on November

²¹⁴ See *id.* at 49.

²¹⁵ See *id.* at 64–65.

²¹⁶ See ANNUAL REPORT 2014–2015, *supra* note 68, at 37.

²¹⁷ See *Death Row Roster*, *supra* note 140.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *Bradley v. State*, 787 So. 2d 732, 745–47 (Fla. 2001) (per curiam); *Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001) (per curiam); *Looney v. State*, 803 So. 2d 656, 682–83 (Fla. 2001) (per curiam).

26, 2001,²²¹ less than two months before the Supreme Court accepted certiorari in *Ring* on January 11, 2002.²²² Bowles's sentence became final on June 17, 2002²²³—eleven days before the U.S. Supreme Court issued its decision in *Ring*.²²⁴ And, Looney's sentence became final on June 28, 2002²²⁵—one month after the *Ring* decision was released.²²⁶ Of the three, only Looney would be entitled to the retroactive application of *Hurst v. Florida* under *Mosley* and *Asay V*.

Defendant	Date of Offense	Date Sentence Final
Bradley	November 7, 1995 ²²⁷	November 26, 2001
Bowles	November 16, 1994 ²²⁸	June 17, 2002
Looney	July 27, 1997 ²²⁹	June 28, 2002

Table 12: Demonstration of Ring Distinction for Retroactivity of *Hurst*

In essence, *Asay V* drew a line down the middle of Florida's death row: defendants standing on one side were precluded from claiming a right to *Hurst* relief and the defendants whose sentences were imposed recently enough that they could raise a claim to *Hurst* relief stand on the other.²³⁰

B. Jury Vote to Recommend Death

Before *Hurst v. Florida*, Florida's capital sentencing scheme required that only a majority of the twelve-member jury recommend

²²¹ See *Bradley v. Florida*, 534 U.S. 1048 (2001) (cert. denied on Nov. 26, 2001).

²²² *State v. Ring*, 25 P.3d 1139 (Ariz. 2001) (en banc), cert. granted, *Ring v. Arizona*, 534 U.S. 1103, 1103 (2002).

²²³ See *Bowles v. Florida*, 536 U.S. 930 (2002) (cert. denied on Jun. 17, 2002).

²²⁴ See *Ring*, 536 U.S. at 584 (decided June 24, 2002).

²²⁵ See *Looney v. Florida*, 536 U.S. 966, 966 (2002) (cert. denied on June 28, 2002).

²²⁶ See *Ring*, 536 U.S. at 584 (decided June 24, 2002).

²²⁷ *Bradley v. State*, 787 So. 2d 732, 735 (Fla. 2001) (per curiam).

²²⁸ Amended Answer Brief of Appellee at *8, *15–16, *Bowles v. Florida*, 804 So.2d 1173 (Fla. 2001) (No. 96,732).

²²⁹ *Looney v. State*, 803 So. 2d 656, 662 (Fla. 2001) (per curiam).

²³⁰ See *Asay v. State*, 210 So. 3d 1, 22, 29 (Fla. 2016) (per curiam).

a sentence of death before the trial judge, who, upon individual considerations and findings, could sentence a defendant to death.²³¹ Only seven jurors had to recommend death before the trial judge could sentence the defendant to death.²³² In fact, in some cases, the trial court sentenced the defendant to death with even less.²³³

Following the Supreme Court's decision in *Hurst v. Florida*, before the Florida Supreme Court decided *Hurst v. State* on remand, the Florida Legislature revised Florida's capital sentencing scheme to require a 10 to 2 jury vote in favor of recommending death before the trial judge could impose a sentence of death.²³⁴ However, in *Hurst v. State*, the Florida Supreme Court determined that the Sixth Amendment and article I, section 22, of the Florida Constitution and the Eighth Amendment of the U.S. Constitution require that "the penalty phase jury must be unanimous in making the . . . recommendation . . . necessary before a sentence of death may be considered by the judge or imposed."²³⁵ Thus, the Florida Supreme Court invalidated that interim statute.²³⁶

Further, the Florida Supreme Court determined that *Hurst* errors are "capable of harmless error review," and, in this context, "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find

²³¹ FLA. STAT. §§ 775.082, 921.141 (2015).

²³² See § 921.141(3).

²³³ See, e.g., *18 Years After Enacting DNA Law, Florida Death-Row Prisoners Are Still Being Denied Testing*, DEATH PENALTY INFO. CTR. (Dec. 21, 2018), <https://deathpenaltyinfo.org/news/18-years-after-enacting-dna-law-florida-death-row-prisoners-are-still-being-denied-testing>. Although a Florida jury recommended that Tommy Ziegler receive a life sentence for his quadruple-murder conviction, the trial judge overrode that recommendation to sentence Ziegler to death. *Id.*

²³⁴ H.B. 7101, 2016 Leg., Reg. Sess. (Fla. 2016), *invalidated by* *Perry v. State*, 210 So. 3d 630, 632–34, 640–41 (Fla. 2016) (per curiam), *overruled by* No. SC18-150, 2019 WL 419702, at *872 (Fla. Sept. 5, 2019) (per curiam). *But cf.* *Evans v. State*, 213 So. 3d 856, 859 (Fla. 2017) (per curiam) (holding that the provisions of H.B. 7101 "identified as problematic in *Perry* . . . can only be constitutionally applied under our decisions in *Hurst* and *Perry* to pending prosecutions for a jury recommendation of death if twelve jurors unanimously determine that a defendant should be sentenced to death.").

²³⁵ *Hurst v. State*, 202 So. 3d 40, 44, 59 (Fla. 2016) (per curiam) *receded from by* *State v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020) (per curiam).

²³⁶ *Perry*, 210 So. 3d at 632–34, 640–41; *see also Evans*, 213 So. 3d at 859.

all the facts necessary for imposition of the death penalty did not contribute to [the defendant's] death sentence."²³⁷ Later, in *Davis v. State*, the Florida Supreme Court explained that "[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances."²³⁸

The jury's recommendation for death in Hurst's trial was 7 to 5.²³⁹ Applying this new post-*Hurst* harmless error standard, the Court determined that "the error in Hurst's sentencing [was] not shown to be harmless beyond a reasonable doubt."²⁴⁰

[W]e cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was "sufficiently substantial" to call for a life sentence. Nor can we say beyond a reasonable doubt there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence. We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review.²⁴¹

However, in *Davis*, the Florida Supreme Court determined that a jury's pre-*Hurst v. Florida* unanimous recommendation for death allowed the Court "to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors."²⁴² Regarding *Davis*'s case, the Florida Supreme Court explained that the pre-*Hurst v. Florida* jury's unanimous recommendation for death allowed the Court to "conclude that the State [could] sustain its burden

²³⁷ *Hurst v. State*, 202 So. 3d at 68.

²³⁸ *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016) (per curiam).

²³⁹ *Hurst v. State*, 202 So. 3d at 47, 52, 68.

²⁴⁰ *Id.* at 69.

²⁴¹ *Id.*

²⁴² *Davis*, 207 So. 3d at 174.

of demonstrating that any [*Hurst*] error was harmless beyond a reasonable doubt.”²⁴³ Thus, Davis was not entitled to *Hurst* relief.²⁴⁴ Accordingly, the differentiating factor between a harmful error and harmless *Hurst* error appears to be a unanimous and non-unanimous jury recommendation for death.

Of the approximately 390 defendants who were awaiting execution on Florida’s death row when the Supreme Court decided *Hurst v. Florida*,²⁴⁵ 6.2% of the jury votes to recommend death are unknown, and 5.4% waived their right to a penalty phase jury.²⁴⁶ Of the remaining defendants, two (Marshall²⁴⁷ and Ziegler²⁴⁸) were sentenced to death after the trial judge overrode the jury’s recommendation for a sentence of life; 19.9% were sentenced to death after a unanimous jury recommended a sentence of death; and 79.5% were sentenced to death after a non-unanimous jury recommended a sentence of death.²⁴⁹

Table 13 and Figure 3 below show the distribution of jury votes to recommend a sentence of death across Florida’s death row at the time *Hurst v. Florida* was decided.²⁵⁰ Note that this information includes all pending death sentences in Florida when *Hurst v. Florida* was decided—both pre- and post-*Ring*.

²⁴³ *Id.* at 175.

²⁴⁴ *Id.*

²⁴⁵ See ANNUAL REPORT 2014–2015, *supra* note 68, at 37.

²⁴⁶ See *Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst> (last updated Jan. 23, 2020).

²⁴⁷ *Id.*

²⁴⁸ See *18 Years After Enacting DNA Law, Florida Death-Row Prisoners Are Still Being Denied Testing*, *supra* note 233.

²⁴⁹ See *Florida Death-Penalty Appeals Decided in Light of Hurst*, *supra* note 246; see also *Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6790> (last visited Mar. 30, 2020).

²⁵⁰ See *Florida Death-Penalty Appeals Decided in Light of Hurst*, *supra* note 246.

Jury Vote to Recommend Death	Percentage of Total
12-0	17.5%
11-1	14.2%
10-2	16.8%
9-3	16.8%
8-4	12.4%
7-5	10.1%
Life	0.5%
Unknown	6.2%
Waiver	5.4%
Total	99.9%

Table 13: Distribution of Jury Votes on Florida's Death Row

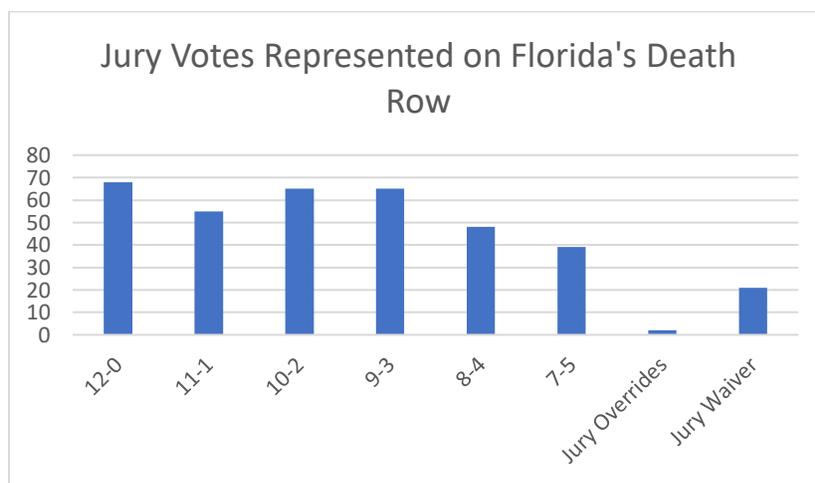


Figure 3: Distribution of Jury Votes on Florida's Death Row

Based on this information, we can estimate—assuming that the jury votes were evenly distributed between pre- and post-*Ring* sentences—that, under the *Davis* framework, the *Hurst* error was harmless beyond a reasonable doubt in approximately 17.5% of the cases to which *Hurst* applied. However, this number is probably higher, considering that there were likely 12-0 recommendations in at least some of the twenty-four unknown jury votes.

Likewise, we can estimate that if *Hurst v. Florida* applied to all sentences that were pending when it was decided—if *Hurst* was

fully retroactive—88.4% of defendants on death row would have been entitled to *Hurst* relief. This is calculated by subtracting the 5.4% of defendants who waived their right to a penalty phase jury and the 6.2% of unknown jury votes, from the total 100%. The 0.5% of jury recommendations for life are included in the defendants who would have been entitled to *Hurst* relief under full retroactivity because those defendants were denied *Hurst* relief based on the Court's retroactivity decision in *Asay V*, not because *Hurst* relief was inappropriate for juridical overrides.²⁵¹ Rather, the Court held that “judicial override[s] d[o] not warrant an exception to the retroactivity [decision] in *Asay [V]*.”²⁵²

In light of *State v. Poole*, a jury's unanimous recommendation for death is no longer required in Florida before a defendant may be sentenced to death.²⁵³ Thus, *Poole* could affect approximately 190 defendants on death row: approximately 88.4% of defendants would have been entitled to relief under *Hurst* and adjusting for retroactivity.

Retroactivity:²⁵⁴ $390 \times (44.6\% + 10.8\%) = 216$

Entitled to relief before *Poole*: $216 \times 88.4\% = 190$

CONCLUSION

It may seem easy to discuss capital punishment in numeric terms—the difference of one vote in determining whether a *Hurst* error is harmless beyond a reasonable doubt, or the difference of one day in determining whether a defendant is entitled to retroactive application of *Hurst v. Florida*. However, each *number* is a defendant waiting for a decision between life or death, or another chance at the difference between life or death. Since reenacting capital punishment following *Furman*, Florida has remained one of the nationwide leaders in capital sentencing and executions. Florida is home to one of the country's largest death row populations—housing approximately 390 defendants awaiting execution when the Supreme Court

²⁵¹ See *Marshall v. Jones*, 226 So. 3d 211, 211 (Fla. 2017) (per curiam); see also *Zakrzewski v. Jones*, 221 So. 3d 1159, 1159 (Fla. 2017) (per curiam).

²⁵² *Zakrzewski*, 221 So. 3d at 1159; see also *Marshall*, 226 So. 3d at 211.

²⁵³ See *State v. Poole*, No. SC18-245, 2020 WL 370302, at *12–13 (Fla. Jan. 23, 2020) (per curiam).

²⁵⁴ See *supra* Table 11.

determined in January 2016 that Florida's capital sentencing scheme violated the Sixth Amendment to the U.S. Constitution. Therefore, understanding Florida's capital sentencing scheme is important in understanding the American death penalty generally.

By reviewing the demographics of Florida's death penalty, this Article has shown that, while some aspects of capital sentencing in Florida are consistent—such as the time between the defendant's crime and sentencing—other aspects are not, such as the time between sentencing and execution. Further, the racial, age, and ethnic makeup of Florida's death row and, more specifically, those who are executed in Florida is almost completely unpredictable.

Moreover, this Article reviewed the practical effect of *Hurst v. Florida* and the Florida Supreme Court's decision on remand in *Hurst v. State* and other related decisions. Specifically, this Article showed that the Court's determination that *Hurst* applies only to sentences of death that became final before June 24, 2002, essentially splitting Florida's death row in half as to who may receive *Hurst* relief and who was precluded from even claiming such relief.

Finally, this Article showed that the Court's institution of an unanimity requirement in the jury's final recommendation for death—bringing Florida in line with the rest of the country (except Alabama)—likely would have significantly decreased the number of death sentences imposed in Florida. However, the Court's 2020 decision in *State v. Poole* realigned Florida with Alabama as the only two states in the country that do not require unanimity in the jury's final recommendation for death. In other words, *Poole* made it much easier for prosecutors to obtain a sentence of death and, likewise, trial courts to sentence defendants to death. In short: *Hurst v. Florida* caused several important changes but also may have perpetuated the arbitrariness that the Supreme Court sought to distinguish in *Furman v. Georgia*.

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