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## *Hurst v. Florida's* Ha'p'orth of Tar: The Need to Revisit *Caldwell, Clemons, and Proffitt*


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## ***Hurst v. Florida's* Ha'p'orth of Tar: The Need to Revisit *Caldwell, Clemons, and Proffitt***

CRAIG TROCINO\* AND CHANCE MEYER\*\*

*In Hurst v. Florida, the Supreme Court held Florida's death penalty scheme violated the Sixth Amendment because judges, rather than juries, found sentencing facts necessary to impose death. That Sixth Amendment ruling has implications for Florida's Eighth Amendment jurisprudence.*

*Under the Eighth Amendment rule of Caldwell v. Mississippi, capital juries must appreciate their responsibility for death sentencing. Yet, Florida has instructed juries that their fact-findings merely support sentencing recommendations, while leaving the ultimate sentencing decision to a judge. Because Hurst clarifies that the Sixth Amendment requires juries to find the operative set of facts on which sentences are actually determined, Florida must revisit whether its capital juries have felt the full weight of their proper constitutional role.*

*Under the Eighth Amendment rule of Clemons v. Mississippi, appellate courts may reweigh sentencing facts and conduct harmless error analyses after finding an invalid aggravating factor was used at sentencing. Florida has permitted Clemons review on judge-found facts. After Hurst, Florida must revisit whether such review required sentencing*

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*facts found by juries.*

*Florida's pre-Hurst death penalty scheme was held to satisfy the Eighth Amendment in Proffitt v. Florida. That holding relied on the involvement of juries in finding sentencing facts and automatic review by the Florida Supreme Court. Hurst makes clear that Florida juries had no involvement in finding sentencing facts, and appellate review was based on facts improperly found by judges. Hurst, therefore, requires that Florida revisit Proffitt.*

*Repairs to Florida's Eighth Amendment jurisprudence should be made in the immediate aftermath of Hurst, while the finality of pre-Hurst death sentences already must be disturbed to satisfy the Sixth. In other words, Florida can repair today at little expense Eighth Amendment problems that may prove catastrophic tomorrow. And Florida, full as it is of able sailors, should know not to spoil the ship for a halfpennyworth of tar.*

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## INTRODUCTION

Florida knows how to weather a storm. And so too does Florida's death penalty. In the summer of 1972, the United States Su-

preme Court struck down capital sentencing regimes across the nation because they violated the Eighth Amendment by “so wantonly and so freakishly” failing to “respect human dignity.”<sup>1</sup> Before the year was out, Florida called a special legislative session and became the first state to adopt a new death penalty statute.<sup>2</sup>

When the time came for the first execution under the new statute, prison officials were worried that Old Sparky<sup>3</sup> might not work properly.<sup>4</sup> The electric chair had not been used in fifteen years, and there was no execution protocol to follow.<sup>5</sup> So they resolved to give John Arthur Spenklink<sup>6</sup> two shots of whiskey<sup>7</sup>

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<sup>1</sup> In *Furman v. Georgia*, the United States Supreme Court found that the manner in which states were imposing the death penalty was cruel and unusual, in violation of the Eighth Amendment. See 408 U.S. 238, 239–40 (1972). As Justice Stewart put it, the Eighth Amendment could not tolerate death to be “so wantonly and so freakishly imposed.” See *id.* at 310 (Stewart, J., concurring). Justice Brennan’s central concern was that “the State does not respect human dignity.” See *id.* at 274 (Brennan, J., concurring).

<sup>2</sup> See MICHAEL MELLO, *DEATHWORK: DEFENDING THE CONDEMNED* 33 (2002) (“Only five months after the *Furman* decision, the Florida Legislature met in special session to consider a new capital punishment statute.”); *State v. Dixon*, 283 So. 2d 1, 2 (Fla. 1973) (noting Florida Statute § 921.141 became effective December 8, 1972).

<sup>3</sup> “Florida’s electric chair was . . . nicknamed ‘Old Sparky.’” *Jones v. State*, 701 So. 2d 76, 82 (Fla. 1997) (Shaw, J., dissenting). In his dissent, Justice Shaw stated, “[L]egend has it that the chair . . . was a home-made affair, fashioned by inmates on-site from a single oak tree.” *Id.* (Shaw, J., dissenting) (footnotes omitted).

<sup>4</sup> David Brierton, superintendent of Florida State Prison at the time of John Arthur Spenklink’s execution and later the Secretary of the Florida Department of Corrections, “had two fears - the chair wouldn’t work or the governor would call five minutes after it was over and say there was a stay.” Associated Press, *Execution to Mark Death Penalty Anniversary*, GAINESVILLE SUN, (May 23, 2004, 6:01 AM) <http://www.gainesville.com/article/20040523/LOCAL/205230307>.

<sup>5</sup> “Florida did not have an executioner. It had not used the electric chair in 15 years. It had no written procedures on how to conduct an execution.” *Id.*

<sup>6</sup> “The first to die when executions resumed in Florida was John Spenklink. . .” Sydney P. Freedberg, *The Story of Old Sparky*, ST. PETERSBURG TIMES (Sept. 25, 1999), [http://www.sptimes.com/92599/news\\_pf/State/The\\_story\\_of\\_Old\\_Spar.shtml](http://www.sptimes.com/92599/news_pf/State/The_story_of_Old_Spar.shtml).

<sup>7</sup> “On a spring morning . . . John Spenklink had two swigs of Jack Daniels whiskey before being executed in Florida’s electric chair. The whiskey was a sedative and ‘last meal’ for Spenklink, 30.” Zaimarie De Guzman, *David Gore’s Execution Will Reflect Modern Changes in Florida’s Death Row*

before strapping him in—small mercies.<sup>8</sup> Spenkelink lived through the first two surges of 2,250 volts before the third finally killed him.<sup>9</sup> And it was thus that—to the sound of frying bacon, broadcast by a Jacksonville radio station near death row to celebrate the return of the Chair<sup>10</sup>—Florida's capital justice system got back underway. The days of wanton disrespect for human dignity were past.

Another tempestuous time came in the 1990s, when Florida's electric chair protocol caused a series of horrifically botched executions. Witnesses looked on as flames, sparks, and, in one instance, blood erupted from the heads of Jesse Tafero, Pedro Medina, and Allen Lee Davis.<sup>11</sup> The repeated spectacles might have been enough for the public to lose its taste for capital punishment entirely,<sup>12</sup> or a court to hold the electric chair unconstitutionally

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*Since its Inception*, TCPALM (April 11, 2012), <http://www.tcpalm.com/news/david-gores-execution-will-reflect-modern-changes-in-floridas-death-row-since-its-inception-ep-38278-343311752.html>.

<sup>8</sup> *Id.* (“Spenkelink was seated and strapped into the three-legged electric oak chair, known as ‘Old Sparky. . . . His head was shaved and covered in electrically- conductive gel, his mouth covered by a black gag.”).

<sup>9</sup> See Freedberg, *supra* note 6 (“It took three jolts to kill him.”); see also De Guzman, *supra* note 7 (“Three surges of 2,250-volt shocks killed him.”).

<sup>10</sup> “The day Spenkelink was put to death, a popular Jacksonville disc jockey aired a recording of sizzling bacon and dedicated it to the doomed killer.” STEPHEN G. MICHAUD & HUGH AYNESWORTH, *THE ONLY LIVING WITNESS: THE TRUE STORY OF SERIAL SEX KILLER TED BUNDY* (1999).

<sup>11</sup> “[S]moke and flames [shot] from [the] head” of Jesse Tafero in 1990. *Lightbourne v. McCollum*, 969 So. 2d 326, 339 (Fla. 2007). “[A] former maker of electric chairs said the chair’s aging electrodes caused Tafero to be burned alive.” Freedberg, *supra* note 6. “[F]lames and smoke again erupted” near the head of Pedro Medina in 1997. *Lightbourne*, 969 So. 2d at 340. “During Davis’ execution on July 8, some witnesses gasped as blood flowed from under his death mask and soaked his white shirt.” Freedberg, *supra* note 6.

<sup>12</sup> “If executions get gross, the public, otherwise solidly for them, might begin to get turned off. Even ashamed of them.” Mary Jo Melone, *A Switch is Thrown, and God Speaks*, ST. PETERSBURG TIMES (July 13, 1999) [http://www.sptimes.com/News/71399/news\\_pf/TampaBay/A\\_switch\\_is-thrown](http://www.sptimes.com/News/71399/news_pf/TampaBay/A_switch_is-thrown). Two public polls conducted in 1997 suggested that “Floridians were ready to banish Old Sparky.” Freedberg, *supra* note 6. However, there was also plenty of evidence to suggest Florida’s appetite for “its time-honored death rituals” was endless. *Id.* It had always been a huge plus politically. “During his campaign for governor in 1986, for example, Tampa Mayor Bob Martinez vowed that if he was elected, ‘Florida’s electric bill [would] go up.’” *Id.* And, even after the gruesome botch of Medina’s execution, Florida Attorney General Bob Butterworth saw Florida’s horror-show executions as a matter to be publically bragged about, not

cruel and unusual.<sup>13</sup> But neither happened. The Florida Legislature called another special session and adopted a lethal injection protocol.<sup>14</sup> With Old Sparky retired, constitutional challenges were mooted.<sup>15</sup> And so Florida's death penalty endured once again, bowed yet not broken.

But the Sunshine State is never long without a storm.

In 2015, the United States Supreme Court accepted certiorari in *Hurst v. Florida* to consider whether Florida's death penalty scheme—still roughly the same scheme that Florida hastily re-

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humbled by, commenting that “[p]eople who wish to commit murder, they’d better not do it in the state of Florida because we may have a problem with the electric chair.” Associated Press, *Condemned Man’s Mask Bursts Into Flame During Execution*, N.Y. TIMES (Mar. 26, 1997), <http://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html>. And he was right to believe that support continued. After Medina, the Legislature voted 36-0 in the Senate and 103-6 in the House to retain the Chair. Freedberg, *supra* note 6. The following year, State Senator Ginny Brown-Waite, who volunteered to watch the Davis execution, said the stain formed the shape of a cross, which she considered to be a message from God, indicating that he gave his blessing to Florida’s use of Old Sparky. *See* Melone, *supra* note 12.

<sup>13</sup> The Florida Supreme Court reviewed the constitutionality of the Chair on several occasions. Justice Shaw of the Florida Supreme Court, joined by Chief Justice Kogan and Justice Anstead, concluded that “[b]ecause of the spate of malfunctions in this jerry-built and now-dated chair, I find that execution by electrocution as currently practiced in this state no longer serves a humane purpose and in fact violates the prohibition against ‘cruel or unusual’ punishment contained in the Florida Constitution.” *Jones v. State*, 701 So. 2d 76, 82–83 (Fla. 1997) (Shaw, J., dissenting) (footnotes omitted). But the court ultimately held 4-7 that “Florida’s electric chair is not cruel or unusual punishment,” partly based on the inexplicable reasoning that “[t]he record also contains evidence that the electric chair is and has been functioning properly and that the electrical circuitry is being maintained.” *Provenzano v. Moore*, 744 So. 2d 413, 415 (Fla. 1999). Justice Shaw took the extraordinary step of inserting color photographs of Davis sitting blood-soaked in the Chair after the execution, with a purple contorted face. *Id.* at 444. But the United States Supreme Court, for the first time, granted certiorari to determine whether the electric chair was unconstitutional. Deborah W. Denno, *Adieu to Electrocution*, 26 OHIO N.U. L. REV. 665, 665 (2000).

<sup>14</sup> “In 2000, the Florida Legislature provided for a new method of execution: lethal injection.” *Lightbourne*, 969 So. 2d at 341.

<sup>15</sup> “The Court ultimately dismissed its certiorari grant in light of the Florida legislature’s decision to switch to lethal injection.” Denno, *supra* note 13 at 665.

fashioned in 1972 in an attempt to comply with the Eighth Amendment—violated the Sixth Amendment by allowing judges, rather than juries, to make the critical factual findings which render a defendant eligible for the death penalty.<sup>16</sup> The State, seeing dark clouds forming on the horizon, made ready to once again head for the shelter of anti-retroactivity law,<sup>17</sup> harmless error law,<sup>18</sup> and other procedural safe harbors<sup>19</sup> which, in the past, had protected Florida's death penalty from being swept away in the winds of changing law and policy.

But when the decision in *Hurst* made landfall on January 12, 2016, it seemed, at first glance, more in the way of a passing gale than a hurricanic constitutional event. Despite the Roberts Court's notorious loquaciousness<sup>20</sup>—the opinions of its 2009 term

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<sup>16</sup> See Petition for Writ of Certiorari to the Supreme Court of Florida at i, *Hurst v. Florida*, Case No. 14-7505 (Dec. 3, 2014). While Eighth Amendment implications were part of the issue presented in *Hurst* and were on the table for the Court's consideration, the Court did not expressly address the Eighth Amendment in its ruling.

<sup>17</sup> Florida's retroactivity standard was established in *Witt v. State*, which limits the retroactive effect of new constitutional rules only to significant "jurisprudential upheavals." 387 So. 2d 922, 929 (Fla. 1980). For instance, when *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), announced Eighth Amendment requirements for preserving juries' appreciation for the gravity of their role in capital sentencing, the Florida Supreme Court found "*Caldwell* did not represent a change in the law upon which to justify a collateral attack," *Foster v. State*, 518 So. 2d 901, 901 (Fla. 1987), so defendants whose cases were already final could not get the benefit of *Caldwell*.

<sup>18</sup> Even where multiple constitutional infirmities are found in Florida cases, the Florida Supreme Court will affirm where it concludes the errors are harmless. See *Gonzalez v. State*, 136 So. 3d 1125, 1166 (Fla. 2014) ("The cumulative effect of multiple harmless errors does not amount to fundamental error . . .").

<sup>19</sup> There are procedural hurdles to relief in addition to anti-retroactivity and harmless error analysis. For instance, in federal courts, unconstitutional state death sentences cannot be overturned if the rule making them unconstitutional was not "clearly established federal law" at the time the Florida Supreme Court affirmed them. 28 U.S.C. § 2254(d). "The phrase 'clearly established federal law' refers only to 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.'" *Bates v. Sec'y, Florida Dep't of Corrs.*, 768 F.3d 1278, 1288 (11th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (alteration in original).

<sup>20</sup> Regarding the opinions of the Roberts Court, "[s]ome critics say today's lengthy opinions aren't necessarily models of clarity." Debra Cassens Weiss, *U.S. Supreme Court Sets Record for Longest Opinions Ever*, ABA

setting a record high median word count at 4,751<sup>21</sup>—the opinion in *Hurst* was a little wee. *Hurst* breezed in at approximately a light 2,882 words.<sup>22</sup> Where was the grand exposition of a *Furman v. Georgia*, which reached back into antiquity to examine the English “progenitors” of American constitutional rules?<sup>23</sup> Where was the guidance and instruction of a *Gregg v. Georgia*, which described for states trying to comply with *Furman* the structure and methodology of a bifurcated sentencing proceeding that would do so.<sup>24</sup> For that matter, where was the poetry, like Justice Blackmun’s world-weary lament in *Callins v. Collins* that after each round of freshest death penalty atrocities “[t]he wheels of justice will churn again”?<sup>25</sup> These usual storm conditions were missing.

But, light on reasoning though it might have been, the opinion’s holding was a sharp crack of thunder. After briefly describing Florida’s death penalty scheme, the Court wrote pointedly, and without qualification, “We hold this sentencing scheme unconstitutional.”<sup>26</sup> The reasoning in support of that holding was little more than a basic syllogism: “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of

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J. (Nov. 19, 2010, 11:30 AM), [http://www.abajournal.com/mobile/article/u.s.\\_supreme\\_court\\_sets\\_record\\_for\\_longest\\_opinions\\_ever](http://www.abajournal.com/mobile/article/u.s._supreme_court_sets_record_for_longest_opinions_ever).

<sup>21</sup> Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), [http://www.nytimes.com/2010/11/18/us/18rulings.html?\\_r=0](http://www.nytimes.com/2010/11/18/us/18rulings.html?_r=0) (“The Roberts court set a record last term, issuing majority opinions with a median length of 4,751 words, according to data collected by two political scientists, James F. Spriggs II of Washington University in St. Louis and Ryan C. Black of Michigan State.”)

<sup>22</sup> *Hurst v. Florida*, No. 14-7505 (U.S. Jan. 12, 2016).

<sup>23</sup> See *Furman v. Georgia*, 408 U.S. 238, 317 (1972).

<sup>24</sup> See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

<sup>25</sup> *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting). Justice Sotomayor’s restraint might have had to do with the far-reaching effects the decision would have. In *Furman*, Justice Marshall had recognized the need to be “precise” and “exacting” in drafting a decision “free from any possibility of error,” where a case involves not only the life of the petitioner but also “other condemned men and women in this country currently awaiting execution.” *Furman*, 408 U.S. at 316 (Marshall, J., concurring).

<sup>26</sup> *Hurst*, slip op. at 1.



death,”<sup>27</sup> Florida let judges do that,<sup>28</sup> so Florida’s death penalty scheme was unconstitutional.<sup>29</sup>

It became clear in the weeks after *Hurst* that Justice Sotomayor’s succinctness in drafting the opinion would do nothing to limit its impact. The winds began to pick up. The Florida Supreme Court asked for supplemental briefing to address *Hurst* in a great many capital cases.<sup>30</sup> Amici flocked to the lead case of *Lambrix v. State*, in which Mr. Lambrix faced a death warrant setting his execution

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* “Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty” after the jury had recommended a sentence of death based on its own determination as to aggravating circumstances. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, *Lowe v. State*, No. SC12-263 (Fla. Jan. 14, 2016) (order granting appellant’s “Motion for Supplemental Briefing in Light of the Decision in *Hurst v. Florida*”); *Knight v. State*, No. SC14-1775 (Fla. Jan. 19, 2016) (order directing parties to file supplemental briefs addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *State v. Bright*, No. SC14-1701 (Fla. Jan. 19, 2016) (order directing parties to file supplemental briefs addressing *Hurst v. State*, No. 14-7505 2016 WL 112683 (U.S. Jan. 12, 2016)); *State v. Dougan*, No. SC13-1826 (Fla. Jan. 19, 2016) (order directing parties to file supplemental briefs addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *Johnson v. State*, No. SC14-1175 (Fla. Jan. 29, 2016) (order granting appellant’s motion requesting to file a supplemental brief addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *King v. State*, No. SC14-1949 (Fla. Jan. 19, 2016) (order directing parties to file supplemental briefs addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *Morris v. State*, No. SC14-1317 (Fla. filed Jan 19, 2016) (order granting appellant’s motion requesting to file a supplemental brief addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *Simmons v. State*, No. SC14-2314 (Fla. filed Jan. 19, 2016) (order granting appellant’s motion requesting to file a supplemental brief addressing *Hurst v. State*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016)); *Wright v. State*, No. SC13-1213 (Fla. filed Jan. 29, 2016) (order directing parties to file supplemental briefs addressing *Hurst v. State*, No. 14-7505 2016 WL 112683 (U.S. Jan. 12, 2016)); *Jackson v. State*, No. SC13-1232 (Fla. filed Jan. 29, 2016); *Mullens v. State*, No. SC13-1824 (Fla. filed Feb. 1, 2016) (granting appellant’s “Motion for Leave to File Supplemental Brief Addressing *Hurst v. Florida*”); *Williams v. State*, No. SC14-814 (Fla. filed Jan. 29, 2016) (granting Appellant’s “Motion for Leave to File Supplemental Briefs in Light of *Hurst v. Florida*”).

for February 11, 2016, and had raised a *Hurst* claim before the decision had come down.<sup>31</sup> Trial proceedings were stayed and continued, one trial judge stating that “[w]hen human life hangs in the balance—a rush to judgment is unwise” and would “result in the trivialization of the value of human life.”<sup>32</sup> The Florida Legislature got about the business of rebuilding, as committees began debating proposed bills to rewrite Florida’s death statute,<sup>33</sup> later culminating in the Governor signing a new death penalty scheme into law on March 7, 2016.<sup>34</sup> Coverage ramped up among the news media.<sup>35</sup> And *Lambrix* was given a stay of execution, so the Florida

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<sup>31</sup> Cary Michael Lambrix filed a petition for writ of habeas corpus in the Florida Supreme Court the day before *Hurst* issued, arguing the court should stay the proceedings pending the decision in *Hurst*. See Petition for Writ of Habeas Corpus at 5, 20, *Lambrix v. Jones*, Case No. SC16-56 (Fla. filed Jan. 11, 2016). Amici included the Capital Habeas Unit of the Office of the Federal Defender for the Northern District of Florida. See Brief of Amicus Curiae, *Lambrix v. Jones*, No. SC16-56 (Fla. filed Jan. 15, 2016); Amicus Curiae Brief of the Am. Civil Liberties Union Foundation & Am. Civil Liberties of Fla. in Support of Petitioner Cary Michael Lambrix, *Lambrix v. Jones*, No. SC16-56 (Fla. filed Jan. 21, 2016); Brief of Amicus Curiae, Fla. Ass’n of Crim. Def. Lawyers on behalf of Petitioner Lambrix, *Lambrix v. Jones*, No. SC16-56 (Jan. 22, 2016).

<sup>32</sup> Order Granting State’s Motion to Continue at 3, *State v. Toledo*, Case No. 2013 102888 CFDL (Fla. Cir. Ct. filed Jan. 15, 2016).

<sup>33</sup> See Steve Bousquet, *Dozens of Florida’s Death Row Inmates Expected to Challenge Sentences*, MIAMI HERALD (Feb. 4, 2016, 6:47 PM), <http://www.miamiherald.com/news/politics-government/state-politics/article58519953.html> (“The *Hurst* case is expected to unleash a flood of new appeals and is forcing a conservative, pro-death penalty Legislature to hurriedly rewrite the law so that executions can resume.”); Lizette Alvarez, *Supreme Court Ruling Has Florida Scrambling to Fix Death Penalty Law*, N.Y. TIMES (Feb. 2, 2016) [http://www.nytimes.com/2016/02/03/us/supreme-court-ruling-has-florida-scrambling-to-fix-death-penalty-law.html?\\_r=0](http://www.nytimes.com/2016/02/03/us/supreme-court-ruling-has-florida-scrambling-to-fix-death-penalty-law.html?_r=0) (“In the State Capitol, the Republican-controlled Legislature is debating how best to change Florida’s unorthodox law, with some pushing for a thorough overhaul to blunt future legal challenges and others vying for an easy fix that would simply address the court’s narrow ruling.”).

<sup>34</sup> See Bousquet, *supra* note 33.

<sup>35</sup> See, e.g., Nina Totenberg, *Supreme Court Strikes Down Florida’s Death Penalty System*, NPR (Jan. 12, 2016, 4:25 PM) <http://www.npr.org/2016/01/12/462821735/supreme-court-strikes-down-floridas-death-penalty-system>; Raoul Cantero & Mark Schlakman, *Lawmakers Must Reform Florida’s Death Penalty*, ORLANDO SENTINEL (Jan. 21, 2016, 5:57 PM) <http://www.orlandosentinel.com/opinion/os-ed-death-penalty-florida-reform-012216-20160121-story.html>; Noreen Marcus, *Death Row Case May Reveal Life*

Supreme Court could consider *Hurst*.<sup>36</sup> All that was missing was the usual television images of palm trees laid over in heavy winds.

During the first oral arguments on *Hurst* in the Florida Supreme Court, the defense's position boiled down to a simple point: "To execute people in Florida on the basis of a statute that has been declared unconstitutional is just wrong."<sup>37</sup> The State believed that even if it was unfair for future defendants to get the benefit of *Hurst* while others, like Mr. Lambrix, were executed under the unconstitutional statute, "[f]inality sometimes has to trump fairness."<sup>38</sup> The justices' candid comments reflected a sense for *Hurst's* magnitude. Justice Lewis said of the court's prior treatment of the *Hurst* issue, "[w]e can be wrong" and "[w]e have to be big enough to admit it."<sup>39</sup> Justice Pariente was also outspoken, stating that "[w]e've got substantial inequality in Florida" and characterizing Florida's death penalty as "an outlier, which is a significant problem."<sup>40</sup>

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*After Hurst*, DAILY BUS. REV. (February 2, 2016) <http://www.dailybusinessreview.com/id=1202748481563/Death-Row-Case-May-Reveal-Life-After-Hurst#ixzz40GF2E8f> ("And conservative legislators must be seeking divine intervention to write a death penalty statute that's legal yet keeps the execution machinery going.")

<sup>36</sup> See Order Granting Stay, *Lambrix v. Jones*, Case No. SC16-56 (Fla. filed Feb. 2, 2016).

<sup>37</sup> Steve Bousquet, *Florida Supreme Court Blocks Execution of Death Row Inmate Michael Lambrix*, TAMPA BAY TIMES (Feb. 2, 2016, 4:15 PM) <http://www.tampabay.com/news/politics/stateroundup/florida-supreme-court-considers-stay-for-death-row-inmate-cary-michael/2263646> [hereinafter *Florida Supreme Court Blocks Execution*] (quoting defense attorney MartinMcClain).

<sup>38</sup> See Bousquet, *supra* note 33 (quoting Assistant Attorney General Carol Dittmar).

As to the fact that Florida is an outlier state in allowing judges to override jury recommendations for life sentences, Florida's Solicitor General argued that judges "do not contravene the jury's recommendations very often." S.M., *Supreme Skepticism About Florida's Death Penalty*, THE ECONOMIST (Oct. 14, 2015). <http://www.economist.com/blogs/democracyinamerica/2015/10/executions-sunshine-state>. In other words, this aberrational feature of Florida's death penalty was not a real concern, because even Florida judges did not care for it enough to use it.

<sup>39</sup> *Florida Supreme Court Blocks Execution*, *supra* note 37 (quoting Justice Lewis).

<sup>40</sup> Rene Stutzman, *Execution Delayed by State Justices*, ORLANDO SENTINEL (Feb. 3, 2016, 9:51 AM),

In the following weeks, this whirlwind of action continued. As we write this article, it still does. It is still uncertain how Florida will ultimately resolve the many Sixth Amendment questions posed by *Hurst*.<sup>41</sup> We write from the heart of that storm, and even after it dissipates there will remain the possibility of courts reconsidering or expanding the decisions reached. Nevertheless, we take a moment to look past the Sixth, and ahead to the horizon, where still another storm front approaches from the Eighth. While *Hurst* is, by its terms, a Sixth Amendment case describing a Sixth Amendment error, it has profound implications on the applicability in Florida of several Eighth Amendment precedents.

In *Caldwell v. Mississippi*, the U.S. Supreme Court recognized an Eighth Amendment violation where a jury's "sense of responsibility for determining the appropriateness of death"<sup>42</sup> is diminished by the State. Three years later in *Combs v. State*, the Florida Supreme Court found *Caldwell* did not make Florida's death penalty scheme unconstitutional for instructing jurors that their fact-findings as to sentencing factors only went to support an advisory, non-binding sentencing recommendation to the court.<sup>43</sup> *Hurst* now instructs that Florida failed to appreciate "[a] jury's mere recommendation is not enough"<sup>44</sup> to satisfy the Sixth Amendment requirement that juries, not judges, must find "each fact necessary to impose a

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<http://www.orlandosentinel.com/news/breaking-news/os-florida-death-penalty-arguments-20160202-story.html> (quoting Justice Pariente).

<sup>41</sup> As described by one Florida circuit court,

Unfortunately, the *Hurst* opinion left a number of issues undetermined. For example, the opinion failed to address any requirements of unanimity of votes in the finding of aggravators, standards to be used in making a determination of mitigators, and the requirement (or lack thereof) of unanimity of votes in sentencing and the finding of aggravators. More importantly, the opinion failed to inculcate Florida on the issue of retroactive application of this law.

... [T]here is no mechanism in place now to "death qualify" a jury. So even at the earliest of these proceedings, this court (and the lawyers) would be forced to extrapolate and speculate on the meanings of *Hurst* and how it can (or cannot) be incorporated into the existing or new statutes. To compound matters, there is a strong likelihood now that the Florida Legislature and/or the Florida Supreme Court will be weighing in on this matter while this case would be underway.

Order Granting State's Motion to Continue at 2–3, *State v. Toledo*, Case No. 2013 102888 CFDL (Fla. Cir. Ct. filed Jan. 15, 2016).

<sup>42</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985).

<sup>43</sup> *See Combs v. State*, 525 So. 2d 853, 854 (Fla. 1988).

<sup>44</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

sentence of death.”<sup>45</sup> In light of that finding, the Florida Supreme Court should reconsider whether under the Eighth Amendment Florida juries were misinformed as to the requisite importance of their role in capital sentencing proceedings. Florida juries should have been made to feel the weight of the huge responsibility that would come with their fact-findings serving as the critical and operative set of facts on which courts would determine life or death. *Hurst* requires that Florida revisit the *Caldwell* problem.

In *Clemons v. Mississippi*, the U.S. Supreme Court found it appropriate for an appellate court to reweigh sentencing factors and conduct harmless error analyses to cure the trial-level constitutional violation of a death sentence having been based on an invalid aggravating circumstance.<sup>46</sup> The Court relied on its prior holdings in *Hildwin v. Florida*,<sup>47</sup> that “the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment,” and *Spaziano v. Florida*,<sup>48</sup> that “neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence.”<sup>49</sup> *Hurst* explicitly overruled those precedents, stating that “[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.”<sup>50</sup> Given the holding in *Hurst* that juries must make the fact-findings necessary for death to be imposed, Florida must revisit whether appellate courts could constitutionally have reweighed sentencing factors and engage in harmless error analyses based on judge-found facts, without the requisite jury findings.

In *Proffitt v. Florida*, the Court considered whether Florida’s statute adopted in response to *Furman* succeeded in curing Florida’s Eighth Amendment problems.<sup>51</sup> The Court’s analysis relied heavily on the involvement of juries in finding aggravating and mitigating circumstances and the Florida Supreme Court’s automatic review being effectively facilitated by the requirement that

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<sup>45</sup> *Id.*

<sup>46</sup> See *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990).

<sup>47</sup> *Hildwin v. Florida*, 490 U.S. 638 (1989).

<sup>48</sup> *Spaziano v. Florida*, 468 U.S. 447 (2016).

<sup>49</sup> *Clemons*, 494 U.S. at 746.

<sup>50</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 9.

<sup>51</sup> See *Proffitt v. Florida*, 428 U.S. 242, 244 (1976).

sentencing judges write orders embodying the critical fact-findings on which that review would take place.<sup>52</sup> *Hurst* revealed that jury findings were irrelevant to Florida sentencing and appellate review, because the only findings of record were those of Florida judges. *Hurst* requires that Florida revisit *Proffitt* under *Furman*.

We urge Florida courts to take it upon themselves to address these Eighth Amendment issues in the immediate aftermath of *Hurst*. Waiting to see what they might amount to years or decades from now will spoil the ship for a ha'p'orth of tar.<sup>53</sup> Given the extensive Sixth Amendment repairs that must be made after *Hurst*, it would cost the State less in the way of additional re-sentencings, post-conviction litigation, disturbing the finality of capital cases, and judicial resources to patch up around the Eighth today, while already about the work of restoration. Florida can and should extend its repairs to *Caldwell*, *Clemons*, and *Proffitt*.<sup>54</sup> Avoiding difficult Eighth Amendment questions and letting violations pile up in case after case over the coming years will only result in greater damage to the administration of capital cases if and when the United States Supreme Court eventually steps in to remedy the situation. Like the *Hurst* of the Sixth seems to have sunk the entire ship, tomorrow's *Hurst* of the Eighth might do the same.

We take this lesson from Florida history. After *Ring v. Arizona* held in 2002 that the fact-findings giving rise to death eligibility under Arizona's capital sentencing statute must be found by juries rather than judges,<sup>55</sup> Florida failed to correct the constitutional infirmity in its own death penalty scheme by extrapolating how the underlying constitutional rule of *Ring* would apply in Florida. The Florida Supreme Court instead looked at the situation as having

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<sup>52</sup> See *id.* at 251.

<sup>53</sup> The proverb "don't spoil the ship for a ha'p'orth of tar" means that one should not risk a large failure in order to save a small amount of cost in the short term. It takes only a ha'p'orth—that is, a halfpennyworth—of tar to repair a small crack in the hull of a ship. But if that minor expense is not undertaken and that minor repair made, the problem may worsen, and the entire ship may sink tomorrow.

<sup>54</sup> We do not intend to represent that this list of issues exhausts the greater implications of *Hurst*. There are many other questions, such as the possible need for jury findings of intellectual disability to allow for death eligibility under *Atkins v. Virginia*, 536 U.S. 304 (2002), after the ruling in *Hurst. Proffitt*, *Clemons*, and *Caldwell* are simply the subjects we have chosen for review.

<sup>55</sup> *Ring v. Arizona*, 536 U.S. 584, 585 (2002).

created a “Need for Legislative Action,” and requested that the Florida Legislature “revisit the statute to require some unanimity in the jury’s recommendations.”<sup>56</sup> The Legislature, for its part, declined to act, did not revise the statute, and, in effect, left it to the Florida Supreme Court to take responsibility for ensuring the constitutionality of Florida’s death penalty. During the stalemate, people were being sentenced and put to death<sup>57</sup>. It was not until fourteen years later that the U.S. Supreme Court stepped in and, in *Hurst*, demanded that Florida do what it had failed to.

After *Lockett v. Ohio* instructed in 1978 that mitigating circumstances could not be limited to a statutory list,<sup>58</sup> the Florida Supreme Court held that, as long as capital defendants had an opportunity to present anything in mitigation, Florida juries did not need to be instructed that they could consider mitigating circumstances beyond those listed.<sup>59</sup> Nine years later, the U.S. Supreme Court again had to step in to clarify that juries had to be made aware that they could consider any mitigating evidence if *Lockett’s* mandate was to mean anything.<sup>60</sup> In the meantime, people had been sentenced and put to death.

After *Atkins v. Virginia* created a categorical prohibition on the execution of the intellectually disabled in 2002,<sup>61</sup> Florida created a legal fiction to define intellectual disability in a way that was more exclusive than the clinical reality of the condition.<sup>62</sup> This time, it took twelve years for the U.S. Supreme Court to step in and re-

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<sup>56</sup> *Steele v. State*, 921 So. 2d 538, 548-50 (Fla. 2005).

<sup>57</sup> From the time that the Florida Supreme Court called for Legislative action in the February 2, 2006, revised opinion in *State v. Steele, id.*, to the time that *Hurst* invalidated Florida’s death penalty in 2016, there were 32 executions, according to the Florida Department of Corrections. See Execution List: 1976 – present, Florida Department of Corrections, <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

<sup>58</sup> See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>59</sup> See *Downs v. Dugger*, 514 So. 2d 1069, 1071 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987).

<sup>60</sup> See *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

<sup>61</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>62</sup> See *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) (finding that under Florida’s statute, an IQ score over 70 could not establish intellectual disability despite a standard error of measurement accepted and applied by the psychological community in clinical diagnosis).

quire Florida courts to consider the psychological community's definition of intellectual disability rather than a contradictory statutory fiction.<sup>63</sup> In the meantime, people were sentenced and put to death.<sup>64</sup>

In each of these instances, Florida would have been better off making the tough decisions early and keeping decades-worth of unconstitutional death sentences from accumulating. The same is true now.

Florida should not relaunch its death penalty after its Sixth Amendment restorations, and continue with executions based on pre-*Hurst* capital sentencings, without also having made necessary repairs to its Eighth Amendment jurisprudence. When the squall around the Sixth calms, Florida will wake to a red morning sky and know that the storm is not yet over.<sup>65</sup> History teaches that will be no time for defiance or daring. As the U.S. Supreme Court has wisely cautioned mariners since the Nineteenth Century, one should never, in poor weather, "hazard an extraordinary press of sail."<sup>66</sup>

#### I. REVISITING *CALDWELL V. MISSISSIPPI*: THE TROUBLE WITH TELLING CAPITAL JURIES THEIR FACTFINDINGS DON'T MATTER

One year shy of a century ago, in July of 1917,<sup>67</sup> a Florida prosecutor stood before a capital sentencing jury in a sweltering Okaloosa County<sup>68</sup> courtroom and said the following: "If there is any error committed in this case, the Supreme Court, over in the capital of our state, is there to correct it, if any error should be done."<sup>69</sup> In a sense, the prosecutor was right. The Florida Supreme

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<sup>63</sup> See *Hall v. Florida*, 134 S. Ct. 1986 (2014).

<sup>64</sup> From the June 20, 2002, decision in *Atkins* to the May 27, 2014, decision in *Hall*, there were 35 executions. See Execution List: 1976 – present, Florida Department of Corrections, <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

<sup>65</sup> "Red sky in morning, sailor take warning" is an ancient nautical proverb for weather forecasting. JOHN ROUSMANIERE, MARK SMITH, ANAPOLIS BOOK OF SEAMANSHIP 135 (4th ed. 2014).

<sup>66</sup> The "Colorado", 91 U.S. 692, 702 (1875) (emphasis removed).

<sup>67</sup> See *Blackwell v. State*, 79 So. 731, 732 (1918) ("on July 2, 1917, the defendants were placed on trial").

<sup>68</sup> See *id.*

<sup>69</sup> *Id.* at 735 (quoting prosecutors remarks in closing argument).



Court found there was an error, and the Court corrected it.<sup>70</sup> But in a greater sense, the prosecutor was badly mistaken. His statement *was* the error.<sup>71</sup>

The Florida Supreme Court found in *Blackwell v. State* that “[t]he purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberation.”<sup>72</sup> The Court went so far as to hold that when a jury is “told that in some measure they could disregard their own responsibility,”<sup>73</sup> it “can hardly be treated as harmless,” and thus must be reversed on appeal no matter how the State might try to explain the problem away.<sup>74</sup>

Some forty years later in another capital case, *Pait v. State*, the Florida Supreme Court made a similar finding as to the following remarks of the prosecutor:

The State of Florida also provides this defendant with the only right of appeal. The People of the State have no right to appeal. This is the last time the People of this State will try this case in this court. Because whatever you do, the People have no right of appeal. They are done. This is their day. But he may have another day; he has an appeal. So those are the rights that the State of Florida gives to him, that intangible object.<sup>75</sup>

The Florida Supreme Court reversed, stating that while “a trial judge should be given an opportunity to correct such highly prejudicial although sometimes impulsive remarks of prosecuting officials,” some remarks too “deeply implant seeds of prejudice or confusion that even in the absence of a timely objection at the trial level it becomes the responsibility of this court to point out the

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<sup>70</sup> See *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959) (describing the error in *Blackwell*).

<sup>71</sup> See *id.*

<sup>72</sup> *Blackwell*, 79 So. at 735–36.

<sup>73</sup> *Pait*, 112 So. 2d at 384 (discussing *Blackwell*, 79 So. at 735).

<sup>74</sup> *Id.* (discussing *Blackwell*, 79 So. at 735).

<sup>75</sup> *Id.* at 383.

error and if necessary reverse the conviction.”<sup>76</sup> And so even unreserved errors of this nature required reversal.

Given these longstanding precedents, one would think it came as no surprise to Florida when the U.S. Supreme Court recognized in the 1985 case of *Caldwell v. Mississippi* an Eighth Amendment violation when the State diminishes a jury’s “sense of responsibility for determining the appropriateness of death.”<sup>77</sup> Had this not already been the Florida Supreme Court’s jurisprudence?

In our view, *Blackwell* and *Pait* were *Caldwell* before *Caldwell* was *Caldwell*.<sup>78</sup> Just like in *Blackwell* and *Pait*, the prosecutor in *Caldwell* “urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court.”<sup>79</sup> And, like the Florida Supreme Court, the U.S. Supreme Court concluded that it is “impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>80</sup>

But the guiding lights of *Blackwell* and *Pait* did not prevent the Eleventh Circuit and the Florida Supreme Court from doing a bit of meandering through some rough waters, and getting knocked off course, on their way to reaching a unified interpretation of *Caldwell*’s applicability to Florida’s death penalty scheme.

The Florida Supreme Court found the wind first. In *Pope v. Wainwright*, the court denied a *Caldwell* challenge to a Florida jury being instructed that its role was merely advisory because, unlike with the Mississippi death penalty scheme at issue in *Caldwell*, “in Florida it is the trial judge who is the ultimate ‘sentencer,’” and the jury, “although an integral part of Florida’s capital sentencing

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<sup>76</sup> *Id.* at 384.

<sup>77</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985).

<sup>78</sup> Indeed, Justice Marshall, writing for the majority, cited *Blackwell* and *Pait* as examples of cases where “even before *Furman* the sort of argument offered by the prosecutor here was viewed as clearly improper by most state courts.” *Id.* at 334 n.5.

<sup>79</sup> *Id.* at 323.

<sup>80</sup> *Id.* at 328–29.

scheme, is merely advisory.”<sup>81</sup> The Florida Supreme Court found “nothing erroneous about informing the jury of the limits of its sentencing responsibility” in order to “relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial.”<sup>82</sup> The notion of trying to help capital jurors not be too fretful about their task seemed rather at odds with the underlying sentiments of *Caldwell*—that sentencing jurors must “recognize[] the gravity of [their] task,”<sup>83</sup> “view their task as [a] serious one,” and “treat their power to determine the appropriateness of death as an ‘awesome responsibility.’”<sup>84</sup> One would think that with awesome responsibility comes anxiety. But the Florida Supreme Court found that Florida’s death penalty scheme was *Caldwell*-compliant “as long as the significance of [the jury’s] recommendation is adequately stressed,” which could be accomplished by simply instructing the jury as to its advisory role under the law.<sup>85</sup>

A month later, the Eleventh Circuit got underway with Florida’s *Caldwell* issue in *Adams v. Wainwright*, where the judge had instructed the jury

[t]he Court is not bound by your recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It’s on my shoulders. You are merely an advisory group to me in Phase Two . . . . So that this conscience part of it as to whether or not you’re going to put the man to death or not, that is not your decision to make. That’s only my decision to make and it has to be on my conscience. It cannot be on yours.<sup>86</sup>

Given this especially enthusiastic judicial effort at anxiety-relief, the Eleventh Circuit reversed under *Caldwell* because the jury

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<sup>81</sup> *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986). The Florida Supreme Court also cited *Proffitt v. Florida*, 428 U.S. 242 (1976), in defense of the constitutionality of Florida’s system. *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985).

<sup>84</sup> *Id.* at 329–30.

<sup>85</sup> *Pope*, 496 So. 2d at 805.

<sup>86</sup> *Adams v. Wainwright*, 804 F.2d 1526, 1528 (11th Cir. 1986).

was “misled as to the importance of its role.”<sup>87</sup> The court seemed to be on rather a different tack than the Florida Supreme Court, finding that “the jury’s role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence” was unconstitutional.<sup>88</sup> Unlike the Florida Supreme Court’s endorsement of judges calming the nerves of capital jurors, the Eleventh Circuit felt that *Caldwell* prohibited “attempts to shield the jury from the full weight of its advisory responsibility.”<sup>89</sup>

Later, in the companion *en banc* rehearing cases of *Mann v. Dugger*<sup>90</sup> and *Harich v. Dugger*,<sup>91</sup> the Eleventh Circuit seemed to all but stall out entirely on its journey to reconciling Florida’s death penalty scheme with *Caldwell*. In *Harich*, the court found that “the seriousness of the jury’s advisory role was adequately communicated by the court and prosecutor,” even though the Florida jury had been instructed that “[t]he penalty is for the court to decide” and “[y]ou are not responsible for the penalty in any way because of your verdict.”<sup>92</sup> This was at odds with *Adams*.<sup>93</sup> And *Mann* made things still more chaotic, because the Eleventh Circuit found a violation of *Caldwell* in the Florida jury instruction as to the jury’s advisory role, which had been found constitutional by the Florida Supreme Court in *Pope*:

In this case, the comments by the prosecutor were such that they would mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law. It bears emphasizing that the prosecutor in *Caldwell* stated only that the jury’s verdict would be “automatically reviewable.” Technically, this statement was an accurate statement of Mississippi law—death sentences are automatically reviewed by the Supreme Court of Mississippi under

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<sup>87</sup> *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988) (describing *Adams*).

<sup>88</sup> *Adams*, 804 F.2d at 1530.

<sup>89</sup> *Harich*, 844 F.2d at 1473 (describing *Adams*).

<sup>90</sup> 844 F.2d 1446 (11th Cir. 1988).

<sup>91</sup> 844 F.2d 1464 (11th Cir. 1988).

<sup>92</sup> *Harich v. Wainwright*, 813 F.2d 1082, 1101 (11th Cir. 1987).

<sup>93</sup> *Adams*, 804 F.2d at 1526.

Miss. Code Ann. § 99-19-105. The mischief was that the statement, unexplained, would have likely been misunderstood by the jurors as meaning that their judgment call on the appropriateness of a death sentence did not really matter. We are faced with a similar situation here. The prosecutor repeatedly told the jury that its task was to render an “advisory” recommendation. As with “automatically reviewable” in *Caldwell*, this characterization is technically accurate, at least in the sense that the Florida death penalty statute contains the term “advisory.” However, the danger exists that the jurors, because they were unaware of the body of law that requires the trial judge to give weight to the jury recommendation, were misinformed as to the importance of their judgment call.<sup>94</sup>

With the contradictory outcomes in *Pope* and *Mann*, it seemed Florida’s *Caldwell* jurisprudence was hopelessly unmoored. The underlying reasoning in *Mann* was simply impossible to square with the underlying reasoning in *Pope*. The Florida Supreme Court had taken the view that juries were incidental enough to sentencing that they need not be made too anxious about their involvement. But the *Mann* Court believed that, while the Florida Legislature’s

use of the term ‘advisory,’ considered in a vacuum, could be viewed as evincing a legislative intent that the sentencing jury play a role which, in the final analysis, is in fact largely meaningless . . . [W]e must look to how the Supreme Court of Florida, the final interpreter of the death penalty statute, has characterized that role.<sup>95</sup>

And after surveying various affirmations of the importance of capital juries at sentencing from the Florida Supreme Court,<sup>96</sup> the Eleventh Circuit concluded in *Mann* that “the Florida case law evinces an interpretation of the death penalty statute that requires

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<sup>94</sup> *Mann*, 844 F.2d at 1457.

<sup>95</sup> *Id.* at 1450.

<sup>96</sup> *See id.* at 1452–53.

a trial judge to give great weight to a jury's sentencing recommendation,"<sup>97</sup> and "reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge."<sup>98</sup> Thus, the Eleventh Circuit held that "the concerns voiced in *Caldwell* are triggered when a Florida sentencing jury is misled into believing that its role is unimportant,"<sup>99</sup> regardless of what the Florida Supreme Court may have said after *Caldwell* about the role of Florida juries in death sentencing.

This led to *Combs v. State*, where the Florida Supreme Court remarked that it was "deeply disturbed about the interpretation of Florida's death penalty process and the application of *Caldwell* by the United States Court of Appeals for the Eleventh Circuit in its decisions in *Mann v. Dugger* . . . ."<sup>100</sup> The Florida Supreme Court reasserted its view from *Pope*, stating that "the Florida procedure is clearly distinguishable from the Mississippi procedure" in that "[t]he Florida procedure does not empower the jury with the final sentencing decision."<sup>101</sup>

Ultimately, the tempest subsided when, in *Romano v. Oklahoma*, the U.S. Supreme Court decided that "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."<sup>102</sup> In the reconciliatory case of *Davis v. Singletary*, the Eleventh Circuit overruled *Mann* and *Harich*, because the view that "a prosecutorial or judicial comment or instruction could constitute *Caldwell* error even if it was a technically accurate description under state law of the jury's actual role in capital sentencing . . . cannot survive [*Romano*]."<sup>103</sup> In the end, Florida law was what it was. Juries were so insignificant to capital sentencing that their duty simply could not be deemphasized too much. So the Florida Supreme Court and the Eleventh Circuit finally got on the same course. *Caldwell* was not a problem in Florida.

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<sup>97</sup> *Id.* at 1453.

<sup>98</sup> *Id.* at 1454.

<sup>99</sup> *Id.*

<sup>100</sup> *Combs v. State*, 525 So. 2d 853, 855 (Fla. 1988).

<sup>101</sup> *Id.* at 856.

<sup>102</sup> *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

<sup>103</sup> *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997).

But now, so many years later, *Hurst* has exposed a different sort of *Caldwell* problem in Florida's death penalty scheme. Under Florida's pre-*Hurst* death penalty statute, a jury made a non-binding sentencing recommendation of death to a trial court based on findings "[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" but did not specify what aggravating circumstances it had found.<sup>104</sup> Because *Hurst* found that Florida failed to appreciate "[a] jury's mere recommendation is not enough"<sup>105</sup> to satisfy the Sixth Amendment right to a jury trial, the fact that Florida juries were instructed that their fact-findings would only go to support a non-binding recommendation—rather than creating the critical and operative set of facts on which the court would determine the punishment—indicates Florida juries have been misinformed as to their constitutionally required role in capital sentencing proceedings.<sup>106</sup>

This problem especially implicates the reasons the *Caldwell* Court provided to support the *Caldwell* rule, of which there are four. Those reasons were described in relation to the prosecutor in *Caldwell* having encouraged the jury to think of *appellate* judges as ultimately responsible, but they apply with striking parallel to the *Hurst* problem of juries being encouraged to think of *trial* judges as ultimately responsible for finding the facts on which death would be imposed.

First, the *Caldwell* Court believed that diminishing the responsibility of a trial-level sentencer by encouraging her to rely on a future appellate court review effectively deprived the defendant of the right to a fair sentencing, because "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance."<sup>107</sup> If a proper sentencing did not happen in the first instance, it would not happen at all.<sup>108</sup> The *Caldwell* Court felt that appellate courts cannot fill-in for sentencers that fail to appreciate the gravity of their task, due to several

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<sup>104</sup> See FLA. STAT. § 921.141(3)(a-b) (effective March 7, 2016).

<sup>105</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>106</sup> *See id.*

<sup>107</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

<sup>108</sup> *See id.*

limitations at the appellate stage.<sup>109</sup> Some limitations were practical: “Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record,” and, even if they could, “most appellate courts review sentencing determinations with a presumption of correctness.”<sup>110</sup> Appellate judges were simply not in the room to see for themselves, and even if they had imagination enough to put themselves there, they had to defer to lower court fact-findings in any event. But other limitations were less practical, more subtle, and put in place by pre-existing Eighth Amendment precedents:

This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed “[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.” When we held that a defendant has a constitutional right to the consideration of such factors, *Eddings, supra*; *Lockett, supra*, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.<sup>111</sup>

So the *Caldwell* Court found that appellate-level sentencing failed to live up to the requirement of individualized and humanized sentencing inherent in the Eighth Amendment. The *human connection* cannot be achieved from the higher bench on review of a cold record. Appellate review is just not the same as sitting in those sweltering Florida courtrooms with the Blackwells and the Paitis, seeing the face of each witness, and developing over time an intuition and sense for the truth *behind* the evidence. Appellate courts are just too far removed from that essential American sentencing experience.

This *Caldwell* concern implicates the *Hurst* problem directly. Just as jurors are better-suited than appellate judges to determine sentence, jurors are better-suited than trial judges to find the operative, binding facts on which sentencing will occur. Fact-finding is

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<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at 330–31.

<sup>111</sup> *Id.* (citing *Woodson et al. v. North Carolina*, 428 U.S. 280, 304 (1976)).



entrusted by the Sixth Amendment to jurors, not trial judges, for the same reason that *Caldwell* sought to entrust sentencing to jurors, and not appellate judges: jurors are more likely to take a humanistic view of the defendant and see him as a *person* like themselves.<sup>112</sup> Justice Story has explained that the Sixth Amendment right to jury fact-findings “was designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’”<sup>113</sup> Legal officials, those given the power of the State to sit in judgment of other citizens in case after case, are simply more likely to lose touch with the common man. As explained by a federal district court about federal sentencing:

A court that mechanically doles out precalculated sentences on a wholesale basis to categories of faceless defendants fails to do justice. A court that succumbs to apathy, bred by repetition, will cease to see defendants as individuals, with pasts and potentials, with humanity and promise. “It is a terrible business to mark a man out for the vengeance of men,” and “the terrible thing about legal officials . . . is simply that they have gotten used to it.” Gilbert Keith Chesterton, *Tremendous Trifles* 54–55 (BiblioBazar, LLC 2006) (1909). “[T]he more a man looks at a thing, the less he can see it,” so that “they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.” *Id.* at 55.<sup>114</sup>

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<sup>112</sup> *See id.*

<sup>113</sup> *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION (4th ed. 1873)).

<sup>114</sup> *United States v. Coughlin*, No. 06-020005, 2008 WL 313099 at \*7–8 (W.D. Ark. Feb. 1, 2008).

This is what *Hurst* is all about: having a lay juror and member of the community, rather than a legal official, find facts on which death will be imposed.

The second reason given for the *Caldwell* rule is that a jury's desire to sentence harshly in order to "send a message," rather than to sentence in proportion to the crime at hand, "might make a jury very receptive to a prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'"<sup>115</sup> Here again, the *Hurst* problem is front and center. Florida juries that felt their anxiety about finding sentencing facts relieved by an instruction that the judge would be ultimately responsible for finding her own facts, and sentencing based on those, would take less care in ensuring they did not make a critical error.

The third *Caldwell* concern is that a juror might get the impression that only a death sentence will trigger an appeal and then understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence."<sup>116</sup> This may lead a jury to impose a death sentence "out of a desire to avoid responsibility for its decision."<sup>117</sup> In the *Hurst* context, this concern is profound. A jury that is advised that its fact-finding would only go to support a non-binding sentencing recommendation might be more inclined to recommend death. This is so because a death recommendation would call upon the judge to exercise her sentencing discretion by finding and weighing sentencing factors. On the other hand, a life recommendation—suggesting a lack of facts to support a death recommendation—might lead a judge to accept the insufficiency of the facts needed to open the door to death in the first place, and thus not even reach the weighing, the moral judgment, that would take responsibility for the sentence of the jury. In other words, a jury could conclude that finding facts to support a death recommendation was the only way to truly put the ball in the judge's court.

The fourth *Caldwell* concern was that

the uncorrected suggestion that the responsibility for  
any ultimate determination of death will rest with

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<sup>115</sup> *Caldwell*, 472 U.S. at 331.

<sup>116</sup> *Id.* at 332.

<sup>117</sup> *Id.*

others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.<sup>118</sup>

Indeed, in the *Hurst* context, a juror might be likely to encourage another to go along with the finding of a particular aggravator and a recommendation of death, because the judge was going to supplant the fact-finding and supersede the sentencing decision anyway.

*Hurst* makes clear that by encouraging jurors to place responsibility for the finding and consideration of sentencing facts on legal officials rather than themselves, encouraging jurors to be less concerned about making an error because any error would be corrected, encouraging jurors to find facts to support a death recommendation in order to transfer responsibility for the sentence to the trial judge, and encouraging jurors to pressure each other into going along with finding facts in favor of death because the finding would not go to support any death sentence ultimately imposed anyway, Florida violated *Caldwell*.<sup>119</sup>

## II. REVISITING *CLEMONS V. MISSISSIPPI*: APPELLATE COURTS CAN'T REVIEW FACTFINDINGS THAT DON'T EXIST

When a sentencer weighs an invalid aggravating circumstance in arriving at a death sentence, the Eighth Amendment is violated.<sup>120</sup> The Eighth abhors randomness, and “[e]mploying an invalid aggravating factor in the weighing process ‘creates the possibility . . . of randomness.’”<sup>121</sup> Invalid aggravating circumstances wrongly “plac[e] a ‘thumb on death’s side of the scale.’”<sup>122</sup> The sentencer is led to believe the defendant is more deserving of death

<sup>118</sup> *Id.* at 333.

<sup>119</sup> *See* *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>120</sup> *Sochor v. Florida*, 504 U.S. 527, 532 (1992).

<sup>121</sup> *Id.* (quoting *Stringer v. Black*, 503 U.S. 222, 232, 236 (1992)).

<sup>122</sup> *Id.* (brackets omitted) (alteration added).

than he really is,<sup>123</sup> which seems as wrong a thing as the justice system could possibly do.

But, ever since *Chapman v. California*, not all constitutional errors in a criminal trial require reversal.<sup>124</sup> And *Clemons v. Mississippi* allows the use of invalid aggravating circumstances in support of death sentences to be cured during appellate court review.<sup>125</sup>

In *Clemons*, the Mississippi Supreme Court had upheld a death sentence despite finding one of the aggravating circumstances unconstitutional under *Maynard v. Cartwright*.<sup>126</sup> The U.S. Supreme Court held that “the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless error review.”<sup>127</sup> Thus, for the last quarter-century, the Florida Supreme Court has had two avenues to affirm death sentences despite the sentencer’s consideration of invalid aggravating factors: reweighing sentencing factors<sup>128</sup> and harmless error analysis.<sup>129</sup>

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<sup>123</sup> See *id.*

<sup>124</sup> *Chapman v. California*, 386 U.S. 18, 22 (1967).

<sup>125</sup> See *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990).

<sup>126</sup> See *id.* at 741 (citing *Matnard v. Cartwright*, 486 U.S. 356 (1988), as requiring that the aggravating circumstance of “especially heinous, atrocious, or cruel” not be too vaguely defined).

<sup>127</sup> *Clemons*, 494 U.S. at 741. This holding extended to so-called weighing states the holding of *Zant v. Stephens*, 462 U.S. 862 (1983), that, in states where aggravating circumstances serve to create death eligibility without weighing against mitigation, “the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury.” *Id.* at 744–45.

<sup>128</sup> The Court in *Clemons* acknowledged that it had telegraphed this ruling earlier, when in *Barclay v. Florida*, seven years prior, it had “opined,” *id.* at 752, that “[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance.” *Barclay v. Florida*, 463 U.S. 939, 958 (1983).

<sup>129</sup> The United States Court of Appeals for the Eleventh Circuit characterized the ruling in *Clemons* as being that “state appellate courts in weighing states may independently weigh aggravating and mitigating circumstances and thereby cure certain errors that might have occurred at the sentencing phase of a trial; they may act as sentencers.” *Bolender v. Singletary*, 16 F.3d 1547, 1568 (11th Cir. 1994) (quotation omitted) (quoting *Booker v. Dugger*, 922 F.2d 633, 642 (11th Cir. 1991) (Tjoflat, C.J., specially concurring)).

But, in light of *Hurst*, the ruling in *Clemons* no longer applies to appellate review of pre-*Hurst* Florida death sentences. The Florida Supreme Court should revisit the question of whether it is proper for appellate courts to have reweighed aggravating and mitigating circumstances and conducted harmless error analyses when reviewing Florida death sentences under *Clemons*.

The reason *Clemons* held that appellate courts can cure consideration of invalid aggravating circumstances was simple: there was no reason they should not. The Court said, “[w]e . . . see nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence.”<sup>130</sup> To reach this conclusion, the Court relied on its prior holdings in *Hildwin v. Florida*<sup>131</sup> and *Spaziano v. Florida*.<sup>132</sup>

In *Hildwin*, the Court had reviewed the question of “whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida.”<sup>133</sup> Under Florida’s death penalty statute, a jury would recommend a death sentence based on findings “[t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,”<sup>134</sup> but the jury would not specify which aggravating circumstances it had found to support those findings. The jury would merely make a non-binding sentencing recommendation to the court based on non-disclosed findings of fact.<sup>135</sup> The *Hildwin* Court held that “the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment.”<sup>136</sup> And thus for decades it was thought in Florida that juries made proper findings of individual aggravators somewhere along the way to the finding of sufficiency, but exactly where was of no concern to the Sixth

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<sup>130</sup> *Clemons*, 494 U.S. at 750.

<sup>131</sup> 490 U.S. 638 (1989); see *Clemons*, 494 U.S. at 746 (citing *Hildwin v. Florida*, 490 U.S. 638 (1989)).

<sup>132</sup> 468 U.S. 447 (1984); see *Clemons*, 494 U.S. at 746 (citing *Spaziano v. Florida*, 468 U.S. 447 (1984)).

<sup>133</sup> *Hildwin*, 490 U.S. at 638.

<sup>134</sup> See FLA. STAT. § 921.141(3)(a-b) (effective March 7, 2016).

<sup>135</sup> See *Combs*, 525 So. 2d at 858.

<sup>136</sup> *Hildwin*, 490 U.S. at 640–41.

Amendment. In fact, juries were later prohibited from specifying which aggravators they had found. In *State v. Steele*, the Florida Supreme Court ruled that “[i]ndividual jury findings on aggravating factors would contradict th[e] settled practice” that “the trial court alone must make detailed findings about the existence and weight of aggravating circumstances.”<sup>137</sup>

In *Spaziano*, the U.S. Supreme Court reviewed the same death penalty scheme under the Eighth Amendment.<sup>138</sup> *Spaziano* held that “neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence.”<sup>139</sup> The jury recommendation of death that *Hurst* would later find “is not enough”<sup>140</sup> to satisfy the Sixth Amendment requirement for jury fact-finding, *was* enough in *Spaziano* to satisfy the Eighth Amendment requirement that states provide sentencers with sufficient guidance to “rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.”<sup>141</sup>

So the *Clemons* Court decided that, because *Hildwin* made it unnecessary for juries to find aggravators and *Spaziano* made it unnecessary for juries to weigh aggravating and mitigating circumstances to determine sentences, there was no necessary jury finding standing in the way of appellate courts reconsidering sentences after striking one or more aggravators.<sup>142</sup> After all, there was no oppositional preexisting constitutional principle. Juries were not really needed.<sup>143</sup>

But that all changed with *Hurst v. Florida*. In *Hurst*, the U.S. Supreme Court explicitly overruled *Spaziano* and *Hildwin*, stating that “[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.”<sup>144</sup> This conclusion was inescapable, given the ruling in *Hurst* that “[t]he Sixth Amendment requires a jury, not

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<sup>137</sup> *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005).

<sup>138</sup> *Spaziano v. Florida*, 468 U.S. 447, 449 (2016).

<sup>139</sup> *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (discussing *Spaziano*, 468 U.S. at 449).

<sup>140</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>141</sup> *Spaziano*, 468 U.S. at 460.

<sup>142</sup> *See Clemons*, 494 U.S. at 745–46.

<sup>143</sup> *Compare Clemons*, 494 U.S. at 746, *with Spaziano*, 468 U.S. at 449.

<sup>144</sup> *Hurst*, slip op. at 9.

a judge, to find each fact necessary to impose a sentence of death.”<sup>145</sup> *Hildwin* had been wrong. *Spaziano* had been wrong. And knowing this, the Florida Supreme Court must now ask whether by reweighing of sentencing factors or by harmless error analysis an appellate court may have constitutionally upheld a Florida death sentence pursuant to *Clemons* without jury fact-finding. The court must ask whether, in Florida, *Clemons* still stands.

After all, it was the *Clemons* Court that wrote “when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes.”<sup>146</sup> This concept should apply with even more force when the Sixth Amendment creates that interest.

The *Clemons* Court also cautioned that “[n]othing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding.”<sup>147</sup> Just because “such procedures are constitutionally permissible,”<sup>148</sup> does not mean they are appropriate in every instance. “In some situations, a state appellate court may conclude that peculiarities . . . make appellate reweighing or harmless-error analysis extremely speculative or impossible.”<sup>149</sup> Florida’s unique death penalty scheme—which conflates the Sixth Amendment fact-finding with the Eighth Amendment weighing of sentencing factors and combines them into one step<sup>150</sup>—is the sort of peculiarity that makes appellate review too speculative. Florida chose to protect death sentences by subsuming jury findings into sentencing recommendations and thus hiding them from appellate review. And the

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<sup>145</sup> *Hurst*, slip op. at 1.

<sup>146</sup> *Clemons*, 494 U.S. at 746 (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)).

<sup>147</sup> *Id.* at 754.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *Jennings v. McDonough*, 490 F.3d 1230, 1249 n.14 (11th Cir. 2007) (referring to Florida’s death penalty scheme as “one in which the legislative narrowing of death-eligible defendants and the individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors”).

price of that is not being able to uncover and review those findings when doing so would serve the same purpose.

1. APPELLATE REWEIGHING OF SENTENCING FACTORS AFTER  
*HURST*

When *Clemons* permitted appellate courts to reweigh sentencing factors after striking an aggravator, the Florida Supreme Court demurred. “On several occasions, the Florida Supreme Court has stated that it does not reweigh evidence when reviewing a death sentence.”<sup>151</sup> In *Hudson v. State*, the same year as *Hildwin*, the court pronounced that “[i]t is not within this Court’s province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances.”<sup>152</sup>

This pronouncement has been relied on by the Eleventh Circuit on federal habeas review to deny challenges to the Florida Supreme Court’s alleged reweighing of sentencing factors:

We do not read the court’s opinion as undertaking a reweighing of the aggravating and mitigating circumstances . . . . [T]he Florida Supreme Court has itself said that it does not reweigh evidence when reviewing a death sentence . . . . Thus, [the defendant]’s arguments regarding the court’s alleged errors in assigning insufficient weight to the proffered mitigating evidence or for failing to view the evidence cumulatively are beside the point. The court need only have answered the question of whether the aggravator would have been found with a proper instruction beyond a reasonable doubt. Consequently, we find no grounds for viewing the Florida Supreme Court’s harmless error analysis as contrary to or an unreasonable application of clearly established federal law.<sup>153</sup>

In other words, a defendant cannot maintain a habeas challenge to a Florida Supreme Court analysis that seems an awful

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<sup>151</sup> *Bolender v. Singletary*, 16 F.3d 1547 (11th Cir. 1994) (citing *Hudson v. State*, 538 So. 2d 829, 831 (Fla. 1989)).

<sup>152</sup> *Hudson*, 538 So. 2d at 831.

<sup>153</sup> *Jennings v. McDonough*, 490 F.3d 1230, 1250–51 (11th Cir. 2007).



lot like a reweighing of sentencing factors, because the Florida Supreme Court says it does not conduct reweighing.<sup>154</sup> Likewise, the U.S. Supreme Court has taken the Florida Supreme Court at its word on this point: “We noted in *Parker* that the Supreme Court of Florida will generally not reweigh evidence independently, and the parties agree that, to this extent at least, our perception of Florida law was correct.”<sup>155</sup> There again, the quality and constitutionality of the Florida Supreme Court’s reweighing of sentencing factors escapes federal review.

This would seem to leave harmless error analysis as the only *Clemons* option for the Florida Supreme Court to affirm a death sentence after striking an invalid aggravating circumstance. But Florida’s death penalty law is no slave to consistency.

While the Eleventh Circuit has declined to scrutinize the Florida Supreme Court’s reweighing because the Florida Supreme Court has stated that it does not reweigh, the Eleventh Circuit has *also* found that the Florida Supreme Court *does* conduct reweighing. For example, in order to uphold a death sentence in *Bolender v. Singletary*, where the Florida Supreme Court failed to conduct a harmless error analysis, reweighing was the only alternative to reversal:

In this case, the Florida Supreme Court conducted the type of reweighing called for in *Clemons* . . . after striking the two aggravating circumstances . . . [T]he Florida Supreme Court did not state that it had reviewed [the defendant]’s case for harmless error. But the opinion . . . does indicate that the Florida Supreme Court reweighed the aggravating and mitigating circumstances in the manner contemplated by *Clemons*. First, the court determined that “[t]he disparity between [the defendant]’s death sentences and Macker’s twelve concurrent life sentences is supported by the facts.” Having evaluated the only aspect of the case that was argued as mitigation, the court then found that, “[b]ased on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person

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<sup>154</sup> *See id.*

<sup>155</sup> *Sochor v. Florida*, 504 U.S. 527,539–40(1992) (citations omitted).

could differ on the sentence.” Finally, the court concluded by comparing the aggravating and mitigating circumstances proved and finding that, on the record before the court, “[i]n the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence.” Accordingly, the Florida Supreme Court conducted the proper form of review after it invalidated the use of two aggravating circumstances and concluded that the balance of the aggravating and mitigating factors clearly justified the imposition of the death penalty; it did not err in declining to remand the case for resentencing.<sup>156</sup>

How can it be that the Florida Supreme Court is found not to conduct reweighing when doing so would expose its decision to reversal but found indeed to conduct reweighing when *not* doing so would require reversal? The Eleventh Circuit offered an explanation in *Bolender*:

On several occasions, the Florida Supreme Court has stated that it does not reweigh evidence when reviewing a death sentence . . . . The Florida Supreme Court does, however, conduct a proportionality review of the sentence, which “involves comparing the balance between aggravating and mitigating circumstances in the case at hand with the balance in other cases (not considered by the jury in recommending, or the trial judge in fashioning, the sentence to be given) in which the death penalty has been imposed.” To the United States Supreme Court, and *despite the Florida Supreme Court’s protestations to the contrary*, this form of analysis may constitute exactly the type of “reweighing” referred to in *Clemons*. To cure a constitutional violation in the trial court under *Clemons*, therefore, an appellate court in a weighing state need only reconsider the balance of aggravating and mitigating circumstances

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<sup>156</sup> *Bolender*, 16 F.3d at 1568–69 (citations omitted).

to determine whether the evidence still justifies the death penalty.<sup>157</sup>

And there you have it. Because it does not matter what the Florida Supreme Court thinks it is doing, a federal habeas court need not be consistent in what it thinks the Florida Supreme Court is doing from case to case.<sup>158</sup> In this way, the Florida Supreme Court's self-imposed limitation is easily sidestepped when inconvenient to a desired result.

Thus, reweighing becomes one of the *Clemons* options of appellate curing of constitutional violations that we must reconsider after *Hurst*, both for purposes of Florida Supreme Court analyses and federal habeas review.

The requisite reweighing is held to a very high standard of quality. As Judge Kravitch of the Eleventh Circuit once explained, "*Clemons* does not allow reviewing courts to give cursory attention to a defendant's sentence after an aggravating factor has been invalidated."<sup>159</sup> Rather, the Eighth Amendment requires "a thorough analysis of the role an invalid aggravating factor played in the sentencing process."<sup>160</sup> There must be "close appellate scrutiny of the import and effect of invalid aggravating factors."<sup>161</sup>

The trouble is, the U.S. Supreme Court has already found this sort of close appellate scrutiny to be impossible when it comes to jury findings supporting Florida death sentences. In *Sochor v. Florida*, the defendant argued that Eighth Amendment error occurred when "the sentencer" weighed the aggravating circumstance of cold, calculated, and premeditated, because the evidence did not support that aggravator.<sup>162</sup> The U.S. Supreme Court found Sochor's argument to require three steps:

[T]he first step in his argument being that the coldness factor was "invalid" . . . ; the second step, that the jury in the instant case "weighed" the coldness

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<sup>157</sup> *Id.* at 1568 (citations omitted) (emphasis added).

<sup>158</sup> *See id.*

<sup>159</sup> *White v. Singletary*, 972 F.2d 1218, 1229 (11th Cir. 1992) (Kravitch, C.J., concurring in part and dissenting in part).

<sup>160</sup> *Id.* (quoting *Stringer v. Black*, 503 U.S. 222, 223 (1992)).

<sup>161</sup> *Id.* (quoting *Stringer*, 503 U.S. at 230) (quotations omitted).

<sup>162</sup> *Sochor v. Florida*, 504 U.S. 527, 538 (1992).

factor; and the third and last step, that in Florida the jury is at least a constituent part of “the sentencer” for *Clemons* purposes.”<sup>163</sup>

The Court found that second step—that the jury weighed the problematic aggravating factor—“fatally flawed.”<sup>164</sup> Why? “Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on the coldness factor. If it did not, there was no Eighth Amendment violation.”<sup>165</sup> So, prior to *Hurst* and ever since *Sochor*, Florida capital defendants could not challenge a jury’s improper weighing of invalid aggravating factors because that weighing was done in secret. It was insulated from review because it was not of record.

How elegant, that the very analysis that has enabled the Florida Supreme Court to supposedly cure unconstitutional death sentences based on invalid aggravating factors since *Sochor* in 1992 must now, after *Hurst*, prohibit the Florida Supreme Court from doing the same. *Sochor* acknowledged that an appellate court cannot know on what aggravators a jury relied. Since *Hurst* recognized those aggravators as underlying the operative, Sixth Amendment-compliant fact-finding on which Florida death sentences must be imposed, an appellate court could not and cannot act as a fill-in sentencer and reweigh aggravating circumstances to uphold a pre-*Hurst* Florida death sentence. The only underlying facts available on which to rely were found by a judge. Cases in which Florida death sentences were affirmed based on appellate reweighing of sentencing factors—and the Florida Supreme Court’s proportionality analyses treated by the Eleventh Circuit as *Clemons* reweighing—are irreparably unconstitutional and do not survive *Hurst*.

## 2. HARMLESS ERROR ANALYSIS AFTER *HURST*

In addition to reweighing, *Clemons* “approved of the use by state courts of ‘harmless error’ analysis to cure a trial court’s erroneous application of aggravating factors in death penalty cases.”<sup>166</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *White*, 972 F.2d at 1226–27.

There are two permissible types of harmless error review.<sup>167</sup> First, appellate courts can determine that the sentence would have been the same had an invalid aggravating circumstance *not been instructed* in the first place.<sup>168</sup> Second, appellate courts can determine that the sentence would have been the same had an invalid aggravating circumstance *been properly instructed*.<sup>169</sup> However, the problem with Florida's aggravating circumstances after *Hurst* is not merely that the jury was instructed to find an improper one, or improperly instructed to find a proper one; the problem is that the jury was instructed not to make any record findings as to individual aggravating circumstances at all.<sup>170</sup>

This means that pre-*Hurst* harmless error analyses conducted by the Florida Supreme Court after striking an aggravator<sup>171</sup> suffer from an Eighth Amendment problem in addition to the Sixth Amendment problem identified in *Hurst*: the Florida Supreme Court could not step in as the sentencer under the Eighth Amendment without having the requisite fact-findings on which to rely under the Sixth Amendment.

This goes back to *Steele*, one of the cases that served as the Florida Supreme Court's post-*Ring* gut check as to whether it would stay committed to its death penalty scheme despite the doubt

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<sup>167</sup> *Jennings v. McDonough*, 490 F.3d 1230, 1249 (11th Cir. 2007).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> There are numerous examples of such cases. In *Reaves v. State*, 639 So. 2d 1, 6 (Fla. 1994), the Florida Supreme Court struck the aggravator of "heinous, atrocious, or cruel," but found the error was harmless "in view of the two other strong aggravating factors found and relatively weak mitigation." In *Anderson v. State*, 841 So. 2d 390, 407 (Fla. 2003), the Florida Supreme Court struck the "avoid arrest and committed in the course of a felony aggravators," but found the error was harmless because, given "Anderson would still have three remaining aggravators: CCP, HAC, and prior violent felony," there was "no reasonable possibility that Anderson would have received a life sentence." In *Oats v. State*, 446 So. 2d 90, 95-96 (Fla. 1984), the Florida Supreme Court decided it was impossible to "know if the result would have been different" where "the judge weighed three impermissible aggravating factors, in addition to the three permissible ones," but remanded for a judge resentencing, rather than requiring findings by a new jury. In *Demps v. Dugger*, 714 So. 2d 365, 367 (Fla. 1998), the Florida Supreme Court found "the trial court's ruling would have been the same beyond a reasonable doubt in the absence of the invalid factors."

cast over it by *Ring*.<sup>172</sup> In *Steele*, the Florida Supreme Court did not just hold that Florida juries *need not* specify what aggravators they found pursuant to *Ring*, it held that juries *could not* specify under Florida law.<sup>173</sup> Florida juries were *prohibited* from making the operative fact-findings on which sentencing judges would rely.<sup>174</sup> And even in cases like *Steele*, where a Florida trial court took the hint from *Ring v. Arizona* and resolved to have juries specify their findings of aggravators whether the Florida Supreme Court had yet required it or not,<sup>175</sup> trial judges were nevertheless still directed by Florida's death penalty statute to make their own findings of aggravating circumstances, and then to rely on those judge-found facts to weigh mitigation and arrive at a sentence.<sup>176</sup> So the jury's underlying findings were inoperative, or supplanted, even when not kept secret.

This led to the rather dumbfounding conclusion that utter fractionalization and disagreement on Florida juries could serve as legally sound fact-finding as to individual aggravators:

the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on *which* aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, *see* § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, *see* § 921.141(5)(f), because

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<sup>172</sup> *Steele v. State*, 921 So. 2d 538, 546 (Fla. 2005).

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 541 (noting that the trial court ruled that it "would submit to the jury a penalty-phase interrogatory verdict form that would require jurors to specify each aggravator found and the vote for that aggravator").

<sup>176</sup> *See* FLA. STAT. § 921.141(3).

seven jurors believe that at least one aggravator applies.<sup>177</sup>

Even an aggravator rejected by eleven jurors could end up partially supporting a death sentence if one juror who voted for death believed that aggravator was established.<sup>178</sup> And perhaps this is the best way to know there were no jury fact-findings as to individual aggravators in Florida to support harmless error review pre-*Hurst*: Florida treated a jury's disagreement as to a fact—which is the opposite of a finding of fact—as a finding of fact. But still, the only fact-findings *of record* were those the judge found and described in her sentencing order. And *Hurst* revealed those to be constitutionally infirm and unusable to appellate courts.

This means that regardless of the extent to which the Sixth Amendment rule in *Hurst* is extended to Florida defendants whose cases were final before *Hurst*, and regardless of the manner in which the Florida Supreme Court might attempt to conduct harmless error analyses to cure the Sixth Amendment violation found in *Hurst*, there is an additional Eighth Amendment problem in pre-*Hurst* cases in which the Florida Supreme Court affirmed death sentences through harmless error review pursuant to *Clemons*, after striking an invalid aggravator, in reliance on the remaining judge-found aggravators. This distinction—between harmless error review of the *Hurst* problem and pre-*Hurst* harmless error review under *Clemons*—matters, because the Eighth Amendment violation has different implications than the Sixth Amendment violation.<sup>179</sup> The

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<sup>177</sup> *Steele*, 921 So. 2d at 545–46.

<sup>178</sup> *See id.*

<sup>179</sup> *Hurst* was not silent on harmless error, but it also did not offer much guidance. The Court stated “we do not reach the State’s assertion that any error was harmless,” because “[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *Hurst v. Florida*, No. 14-7505, slip op. at 10 (U.S. Jan. 12, 2016). The Court did cite *Neder v. United States*, 527 U.S. 1, 19 (1999), for “holding that the failure to submit an uncontested element of an offense to a jury may be harmless,” *Id.* at 10, but did nothing to change its admonishment from *Clemons* that “nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis. . . .” *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990). However, whatever bearing the Court’s comments as to harmless error might be said to have on Florida Supreme Court harmless error review of the *Hurst* Sixth Amendment

first is about the likelihood of a different outcome had the jury made the critical death-eligibility fact-findings under the Florida statute, which *Hurst* identified as being the findings of sufficient aggravators not outweighed by mitigators contained in Florida Statutes § 921.141(3).<sup>180</sup> The second is about the likelihood of a different outcome had the jury made fact-findings as to *individual* aggravators.

Jury death recommendations pre-*Hurst* embodied the general finding of sufficient aggravators under Florida Statutes § 921.141(2), but not the particular aggravators found. Thus, the Eighth Amendment problem with the Florida Supreme Court's pre-*Hurst* harmless error analyses under *Clemons* is that an appellate court cannot achieve the level of reason and soundness required of a *Clemons* harmless error analysis while only being able to speculate about what operative aggravators were actually found. The standard of scrutiny required of *Clemons* harmless error analyses is too high.<sup>181</sup>

An appellate court can only find an error harmless beyond a reasonable doubt.<sup>182</sup> In *Sochor*, the U.S. Supreme Court made clear that a high level of clarity and certainty was required of harmless error analyses when it declined to give the Florida Supreme Court the benefit of the doubt and "accept an implied harmless error analysis" in the absence of an explicit rationale.<sup>183</sup> The Florida Supreme Court had found insufficient evidence to support the aggravating circumstance that the crime was cold, calculated, and premeditated, but affirmed on the following analysis:

Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three

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violation, the *Hurst* Court certainly did not comment on the decision's bearing on pre-*Hurst* harmless error analyses under *Clemons*.

<sup>180</sup> See *Hurst*, slip op. at 5–6 ("Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3).")

<sup>181</sup> *White v. Singletary*, 972 F.2d 1218, 1229 (11th Cir. 1992) (Kravitch, C.J., concurring in part and dissenting in part).

<sup>182</sup> *Jennings v. McDonough*, 490 F.3d 1230, 1249 (11th Cir. 2007).

<sup>183</sup> *White v. Singletary*, 972 F.2d 1218, 1226–27 (11th Cir. 1992) (discussing *Sochor v. State*, 580 So. 2d 595 (Fla. 1991)).



aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.<sup>184</sup>

The U.S. Supreme Court found this analysis to be an inadequate assessment of whether the error was harmless, “[s]ince the Supreme Court of Florida did not explain or even ‘declare a belief that’ this error ‘was harmless beyond a reasonable doubt[.]’”<sup>185</sup> But the Court was clear that it did not intend “to require a particular formulaic indication by state courts before their review for harmless federal error will pass federal scrutiny.”<sup>186</sup> Rather, it was the lack of a good, sound explanation that was the central problem. So *Clemons* harmless error review came into focus in *Sochor* as being fundamentally about *reason*, not magic words.<sup>187</sup> Justice O'Connor reaffirmed this in her concurrence, emphasizing that “[a]n appellate court's bald assertion that an error of constitutional dimensions was ‘harmless’ cannot substitute for a principled explanation of how the court reached that conclusion.”<sup>188</sup>

Thus, *Clemons* harmless error review cannot be accomplished by lip service. And it cannot be accomplished implicitly. *Clemons* harmless error review requires a well-reasoned, well-articulated examination of how a constitutional error played into a sentencing.<sup>189</sup> It has to be practically couched in the reality of the trial, not

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<sup>184</sup> *Sochor*, 580 So. 2d at 604 (Fla. 1991) (citations omitted).

<sup>185</sup> *Sochor v. Florida*, 504 U.S. 527, 540–41 (1992). Another example of federal review of a Florida Supreme Court harmless error analysis can be found in *Hill v. State*, where “the federal district court found that th[e Florida Supreme] Court may have erred in its harmless error analysis, in violation of *Clemons* . . . ,” and remanded, but also stated that the language used by the Florida Supreme Court “was possibly sufficient under *Clemons*.” 643 So. 2d 1071, 1073 (Fla. 1994) (citations omitted).

<sup>186</sup> *Sochor*, 504 U.S. at 540.

<sup>187</sup> *See id.*

<sup>188</sup> *Id.* at 541 (O'Connor, J., concurring).

<sup>189</sup> Note the more that invalid aggravators are relied on by the prosecution, the more stringent the harmless error review must be. “When the prosecution has stressed . . . the invalid factor during the sentencing hearing, a reviewing court

whimsical or speculative. And as a result, the ability of an appellate court to meaningfully reason out a harmless error analysis is at the heart of whether a harmless error analysis can rightly be undertaken at all.

Indeed, while the U.S. Supreme Court has found many constitutional errors amenable to harmless error analysis (such as jury instructions containing an erroneous conclusive presumption, or misstating an element of the offense, or containing an erroneous rebuttable presumption, or neglecting the presumption of innocence, or—as in *Clemons*—vaguely defining an aggravating circumstance),<sup>190</sup> the Court has found that some are not (such as total deprivation of the right to counsel, trial by a biased judge, and violation of the right to self-representation).<sup>191</sup> So-called *structural errors*—those “contain[ing] a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself’”—cannot be cured through harmless error review,<sup>192</sup> because they “infect the entire trial process.”<sup>193</sup> Recall that in *Blackwell*, the Florida Supreme Court found that when a jury is “told that in some measure they could disregard their own responsibility”<sup>194</sup> it “can hardly be treated as harmless.”<sup>195</sup> Such are errors that infect the entire trial.<sup>196</sup>

In *Sullivan v. Louisiana*, the U.S. Supreme Court reviewed a deficient reasonable-doubt instruction to ask in “which category the present error belong[ed].”<sup>197</sup> There, a dividing line between the two categories was drawn:

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must justify its finding of harmless error with a ‘detailed explanation based on the record.’” *White*, 972 F.2d at 1229 (Kravitch, C.J., concurring in part and dissenting in part) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990)).

<sup>190</sup> See *Arizona v. Fulminante*, 499 U.S. 279, 306–07 (1991) (surveying constitutional errors amenable to harmless error analysis).

<sup>191</sup> See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (surveying errors that invalidate the result of a criminal trial and cannot be harmless); *Neder v. United States*, 527 U.S. 1, 8 (1999) (doing the same).

<sup>192</sup> *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310).

<sup>193</sup> *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993)).

<sup>194</sup> *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959).

<sup>195</sup> *Id.*

<sup>196</sup> *Brecht*, 507 U.S. at 630–31.

<sup>197</sup> *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The question . . . is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which “the jury *actually rested* its verdict.” The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.<sup>198</sup>

Because *Hurst* makes clear that a “jury’s mere recommendation” of sentence, implicitly embodying aggravation findings, “is not enough” to satisfy the Sixth Amendment requirement that juries make the findings that open the door to death,<sup>199</sup> we know now that there are no aggravation findings in pre-*Hurst* Florida death penalty cases to be reviewed by appellate courts so that they can satisfy the Eighth Amendment requirement of reliability and non-arbitrariness when pinch-hitting for trial judges as sentencer. Under *Sullivan*, it is the actual finding made by the actual jury in each case that must be analyzed,<sup>200</sup> not the finding that an appellate court might speculate a jury might have made. “The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action.”<sup>201</sup> The Florida Supreme Court could not, under the Eighth Amendment, hypothesize what aggravating circumstances a jury

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<sup>198</sup> *Id.* (emphasis in original) (citations omitted).

<sup>199</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>200</sup> This is supported by Justice Blackmun’s separate opinion in *Clemons*, which criticizes the majority’s reliance on the conclusion from *Spaziano* “that evidence relevant to the capital sentencing decision can be adequately assessed by a trial judge who has witnessed the testimony,” because appellate courts, reviewing under *Clemons* do so “on the basis of a cold record,” without viewing the evidence first hand. *Clemons v. Mississippi*, 494 U.S. 738, 765 (1990) (Blackmun, J., joined by Brennan, Marshall, Stevens, J.J., concurring in part and dissenting in part).

<sup>201</sup> *Sullivan*, 508 U.S. at 280.

might have found in order to ask if those circumstances would still have been found had Florida's statute complied with the Sixth Amendment.

And the Florida Supreme Court was wrong in its pre-*Hurst Clemons* jurisprudence to hold that its harmless error analysis had to be "based on what the sentencer actually found."<sup>202</sup> It was never about the judge's findings as the sentencer. It was, or should have been, about the jury's findings all along. And thus, as in *Sullivan*, "the question whether the *same* verdict . . . would have been rendered absent the constitutional error is utterly meaningless," because "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate."<sup>203</sup>

It might be argued that the constitutional error reviewed in *Sullivan* is distinguishable from that of *Hurst* because *Sullivan* involved a guilty verdict, which is the province of the jury, rather than a sentencing verdict.<sup>204</sup> But the basis for the holding in *Hurst* is that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury."<sup>205</sup> Fact-findings relating to aggravators supporting a sentencing verdict are constitutionally indistinguishable from fact-findings of elements supporting a guilty verdict. That's the whole point of *Hurst*. So, just as in *Sullivan*, in pre-*Hurst* Florida death cases "there has been no jury verdict within the meaning of the Sixth Amendment."<sup>206</sup> And, according to *Sullivan*, "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable."<sup>207</sup> "The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"<sup>208</sup>

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<sup>202</sup> *Hill v. State*, 643 So. 2d 1071, 1073 (Fla. 1994).

<sup>203</sup> *Sullivan*, 508 U.S. at 280 (emphasis in original).

<sup>204</sup> *See id.* at 281 (explaining that when an appellate court speculates what a jury might have found the "wrong entity" determines guilt).

<sup>205</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 5 (U.S. Jan. 12, 2016) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

<sup>206</sup> *Sullivan*, 508 U.S. at 280.

<sup>207</sup> *Id.* at 281 (citing *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

<sup>208</sup> *Id.* at 281–82.

*Neder v. United States* supports this conclusion.<sup>209</sup> There, the U.S. Supreme Court found that a federal district court's failure to submit the tax-fraud element of materiality to the jury was curable by harmless error analysis,<sup>210</sup> or, put another way, was not so "intrinsicly harmful as to require automatic reversal."<sup>211</sup> Why? The omission of an element—failing to submit one of several elements to the jury—was found merely to prevent a finding on one element rather than, as in *Sullivan*, "vitiat[ing] all the jury's findings."<sup>212</sup> The *Neder* Court drew a distinction between "the absence of a complete verdict on every element of the offense" and there being no verdict at all.<sup>213</sup> In the case of pre-*Hurst* harmless error analyses, there was no verdict at all from the jury on individual aggravators. While leaving out one element may not render a trial fundamentally unfair, leaving out all of them surely must.

### 3. Secondhand sentencing after *Hurst*

The inability of appellate courts to act as sentencers without available jury fact-finding circles back to the *Caldwell* concern that "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death,"<sup>214</sup> because of their "inability to confront and examine the individuality of the defendant"<sup>215</sup> fails to live up to the humanized sentencing envisioned in *Woodson v. North Carolina*,<sup>216</sup> *Lockett v. Ohio*,<sup>217</sup> and *Eddings v. Oklahoma*.<sup>218</sup> Sentencers just need to be in the room in order to judge the defendant as a human being. There is no Eighth Amendment-compliant sentencing on a cold record barren of fact-findings. Because there are no constitutionally sound fact-findings of aggravating circumstances on which to conduct *Clemons* review, either by reweighing or by harmless error analysis, the Florida Supreme Court should—at the very least in considering the Eighth

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<sup>209</sup> 527 U.S. 1 (1999).

<sup>210</sup> See *Neder*, 527 U.S. at 4.

<sup>211</sup> See *id.* at 7.

<sup>212</sup> *Id.* at 10–11 (citing *Sullivan*, 508 U.S. at 281).

<sup>213</sup> *Id.* at 12 (quotations omitted).

<sup>214</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

<sup>215</sup> *Id.*

<sup>216</sup> *Woodson et al. v. North Carolina*, 428 U.S. 280, 304 (1976).

<sup>217</sup> *Lockett v. Ohio*, 438 U.S. 586, 603–04 (1978).

<sup>218</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

Amendment implications of *Hurst*—revisit cases where it affirmed a death sentence after striking one or more aggravating circumstances.

III. REVISITING *PROFFITT V. FLORIDA*: THE ARBITRARINESS OF FLORIDA DEATH SENTENCES IMPOSED WITHOUT JURY FACTFINDINGS

In response to the Supreme Court's decision in *Furman v. Georgia*, Florida embarked on a journey in search of a death penalty scheme that would somehow "respect human dignity" in the pursuit of taking human life, and thus no longer violate the Eighth Amendment.<sup>219</sup> Florida first set its course by adopting a new death penalty statute under which

the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." . . . The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge . . . .

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances."<sup>220</sup>

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<sup>219</sup> *Furman v. Georgia*, 408 U.S. 238, 274 (Brennan, J., concurring).

<sup>220</sup> *Proffitt v. Florida*, 428 U.S. 242, 248–50 (1976) (quoting FLA. STAT. § 921.141(2), (3)) (citations and footnotes omitted).

With this sentencing scheme, Florida put its trust in the sentencing judgment of lone trial judges, and limited jury involvement to making—by a simple majority vote and without specifying specific findings as to aggravators or mitigators—a non-binding sentencing recommendation of life or death.<sup>221</sup>

A few years later, the U.S. Supreme Court considered *Proffitt v. Florida* to determine whether Florida had successfully navigated around the Eighth Amendment barriers erected by *Furman*.<sup>222</sup> The *Proffitt* Court declared that “[o]n its face the Florida system [] satisfies the constitutional deficiencies identified in *Furman*,” and thus held that the Eighth Amendment was satisfied where a trial judge makes a capital sentencing determination on sentencing facts she found herself, without ever knowing what facts the jury found.<sup>223</sup>

The *Proffitt* Court held Florida’s judicial fact-finding constitutional, notwithstanding its view that “jury sentencing in a capital case can perform an important societal function.”<sup>224</sup> The Court cited to *Witherspoon v. Illinois*, where it had earlier described that function: “a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”<sup>225</sup> In other words, the jury box is where a society, not the bench, chooses death. Death being a societal choice is consistent with the Court’s prior view of the Eighth Amendment that “[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>226</sup> Civilized standards are both defined and met when a jury expresses a society’s conscience. Yet, the Court observed in *Proffitt* that “it has never suggested that jury sentencing is constitutionally required.”<sup>227</sup>

This is due to the Court’s view, expressed in *Proffitt*, that “judicial sentencing should lead. . .to even greater consistency in the im-

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<sup>221</sup> *Id.*; see also FLA. STAT. § 921.141(2) (1976).

<sup>222</sup> *Proffitt*, 428 U.S. 242 (1976).

<sup>223</sup> *Id.* at 253.

<sup>224</sup> *Id.* at 252 (citing *Witherspoon v. Illinois et al.*, 391 U.S. 510, 519 (1968)).

<sup>225</sup> *Witherspoon*, 391 U.S. at 519.

<sup>226</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>227</sup> *Proffitt*, 428 U.S. at 252.

position . . . of capital punishment, since a trial judge is more experienced in sentencing than a jury.”<sup>228</sup> The *Proffitt* Court cited approvingly the Florida Supreme Court’s similar view, expressed a year after *Furman* in *State v. Dixon*: “a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants.”<sup>229</sup> When the *Proffitt* Court found that the greater experience and knowledge of trial judges would “assure that the death penalty [would] not be imposed in an arbitrary or capricious manner,”<sup>230</sup> consistency won out over society’s conscience. Thus, before getting to the constitutional implications of *Proffitt* that result from *Hurst* finding that juries had been insufficiently relied on in Florida’s death penalty scheme,<sup>231</sup> it is worth taking a moment to consider the *Proffitt* Court’s conception of what the jury’s role and impact would be under that scheme. Justices of the Supreme Court endorsing the experiential sagacity of trial judges over the common man in finding and weighing sentencing factors may seem antithetical to the jury’s role of effectuating social conscience in sentencing, particularly in light of Justice Story’s nineteenth century observation, which we noted above, that the Sixth Amendment right to jury fact-findings “was designed ‘to guard against a spirit of oppression and tyranny on the part of rulers.’”<sup>232</sup> In that light, it seems the law’s highest officials may be among the least preferred trustees of the conscience of a nation founded in part on a strong sense of anti-establishmentarianism. A community’s standards are best preserved not by a judge, but by a twelve-member cross-section of that community. Indeed, as Justices Breyer and Stevens have observed, “jurors possess an important comparative advantage over judges” because they more accurately reflect “the composition and experiences of the community

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 252 n.10 (citing *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973)).

<sup>230</sup> *Id.* at 253.

<sup>231</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>232</sup> *United States v. Gaudin*, 515 U.S. 506, 510–11 (citing Story, *supra* note 104, at 540–41).



as a whole.”<sup>233</sup> Much more so than judges, jurors “express the conscience of the community on the ultimate question of life or death.”<sup>234</sup>

That judges are the best helmsman of capital sentencing is at odds with scholarship reflecting that “[a] judge who is a prosperous white Anglo male . . . will have a picture of reality that differs markedly from the pictures carried around by a large proportion of the people being judged: women, poor people, or people of another race, ethnicity, or religion.”<sup>235</sup> Additionally,

the problem of judicial bias involves the risk that the judge will fall into the old pattern of treating those who are different not as people but as abstractions—as projected images of his own negative identities. The idea of sympathetic connection with the negative identity that one is trying to repress is fundamentally contradictory. Acculturated differences thus threaten the quality of judging, both in the exploration and evaluation of the facts of a case and in the application and construction of the governing legal doctrine.<sup>236</sup>

In other words, judges acculturated differently from those being judged can lead to arbitrary sentencing,<sup>237</sup> rather than judges being the hallmark of consistency that the Supreme Court contemplated in *Proffitt*.<sup>238</sup>

Research reflects that where, as in Florida, trial judges are elected based on tough-on-crime campaigns, they are more likely to override a jury’s life recommendation and less likely to preserve a defendant’s rights: “Between 1972 and early 1992, Florida trial judges, who face contested elections every six years, imposed death sentences over 134 jury recommendations of life imprisonment, but

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<sup>233</sup> *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (quoting *Spaziano*, 468 U.S. at 486 (Stevens, J., concurring in part and dissenting in part)).

<sup>234</sup> *Id.* (quoting *Witherspoon v. Illinois et al.*, 391 U.S. 510, 519).

<sup>235</sup> Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1958 (1988).

<sup>236</sup> *Id.*

<sup>237</sup> *See id.*

<sup>238</sup> *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976).

overrode only fifty-one death recommendations.”<sup>239</sup> Thus, during those years, a Florida judge was more than 2.6 times as likely to override a life recommendation than a death recommendation.<sup>240</sup> This problem was even recognized by the Florida Supreme Court when, in *In Re McMillan*, it removed a trial judge from a case in part for his campaign that promised to be more pro-prosecution than his incumbent opponent.<sup>241</sup> There are also studies concluding that judges who override life recommendations and issue death sentences are more likely to commit serious errors in trial.<sup>242</sup> Of course, this is not to say that jurors are free of potential bias.<sup>243</sup> Rather, we intend to highlight that undue reliance on judicial experience is not a constitutional panacea for Florida’s death penalty scheme.

And, to some extent, the *Proffitt* Court had to recognize this, because it relied heavily on the role of juries to constitutionalize Florida’s death penalty scheme.<sup>244</sup> Charles William Proffitt argued “that it is not possible to make a rational determination whether there are ‘sufficient’ aggravating circumstances that are not outweighed by the mitigating circumstances.”<sup>245</sup> And, in response, the *Proffitt* Court looked to the jury box:

While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a factfinder in a lawsuit. For example,

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<sup>239</sup> Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793 (1995); see also Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 196, 210–11 (1992).

<sup>240</sup> See *id.*

<sup>241</sup> See *In re Matthew W. McMillan*, 797 So. 2d 560 (Fla. 2001).

<sup>242</sup> See, e.g., JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 1, 156 (2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf>; Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants’ Rights Through Judicial Discipline*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 255, 272 (2008).

<sup>243</sup> See Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827 (2012).

<sup>244</sup> *Proffitt v. Florida*, 428 U.S. 242, 252 (1976).

<sup>245</sup> *Id.* at 257.

juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances . . .

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.<sup>246</sup>

Thus, part of the reason that the *Proffitt* Court found Florida's scheme constitutional was that juries were equipped to make the difficult determinations that were required by the statute and would serve to guide and channel the sentencing judge's discretion.<sup>247</sup> Properly instructing the jury on how to find sentencing facts was part of the process through which the jury would guide judicial discretion in sentencing.<sup>248</sup> So the Court felt justified in relying on its belief that, given proper instructions, juries are capable of making tough decisions.<sup>249</sup>

According to the *Proffitt* Court, arbitrariness would be eliminated where "the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty . . . ."<sup>250</sup> So even though judges were, in the view of the *Proffitt* Court, better at consistently applying the death penalty, juries would still serve to channel judicial discretion.<sup>251</sup>

But *Hurst* changes the entire calculus of *Proffitt*. In *Hurst*, the Court considered the same death penalty sentencing scheme that was considered in *Proffitt*. *Proffitt* held the scheme constitutional

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<sup>246</sup> *Id.* at 257–58.

<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

<sup>249</sup> *See id.*

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

“on its face”<sup>252</sup> because judges are more consistent than juries in finding and weighing sentencing facts.<sup>253</sup> *Hurst*, however, found the same scheme to be facially unconstitutional because the “Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.”<sup>254</sup> The Court flatly concluded, “[a] jury’s mere recommendation is not enough.”<sup>255</sup>

While *Hurst* was decided on Sixth Amendment grounds, its holding implicates Eighth Amendment deficiencies in Florida’s death penalty scheme. *Proffitt* relied, at least in part, on the jury fact-findings to channel and guide the discretion of sentencing judges, even though the jury would make no actual findings of fact on the record that would go to support the sentence.<sup>256</sup> By holding that only the jury can make findings necessary to impose death, *Hurst* declared that Florida juries were not making constitutionally mandated findings of fact in death penalty cases.<sup>257</sup> Since the critical factual findings have not been made, Florida juries have never appropriately channeled or guided the sentencing authority as described in *Proffitt*.<sup>258</sup>

By holding that jury-found facts, rather than judge-found facts, must anchor Florida death sentences, *Hurst* eroded one of *Proffitt*’s main pillars.<sup>259</sup> The *Proffitt* Court considered jury fact-finding to serve as a check on the sentencing court by way of the jury’s sentencing recommendation.<sup>260</sup> But *Hurst* makes clear that no such check was in place.<sup>261</sup> The jury fact-finding never made its way to the judge, the ultimate sentencer. So, in the forty years after *Proffitt*, people have been sentenced to death and executed in Florida without jury findings, in violation of the Sixth Amendment, and concomitantly without jury channeling judicial sentencing discre-

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<sup>252</sup> *Id.* at 253.

<sup>253</sup> *Id.* at 252.

<sup>254</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S. Jan. 12, 2016).

<sup>255</sup> *Id.*

<sup>256</sup> *Proffitt*, 428 U.S. at 252.

<sup>257</sup> *Hurst*, slip op. at 1.

<sup>258</sup> *See Proffitt*, 428 U.S. at 258.

<sup>259</sup> *Hurst*, slip op. at 1.

<sup>260</sup> *See Proffitt*, 428 U.S. at 252.

<sup>261</sup> *Hurst*, slip op. at 1.

tion, in violation of the Eighth. In other words, Florida death sentences for the last forty years have been—contrary to the holding in *Proffitt*—unconstitutionally arbitrary.<sup>262</sup>

And the problem was not entirely unknown. Florida Supreme Court Justice Pariente, in her dissent from the affirmance of Timothy Hurst's death sentence in 2014, acknowledged Eighth Amendment problems<sup>263</sup> that went unresolved later by the U.S. Supreme Court in *Hurst*. The *Hurst* Court specifically mentioned Justice Pariente's dissent, noting that “[s]he reiterated her view that ‘*Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury.’”<sup>264</sup> But Justice Pariente's dissent went further than the implications of *Ring*; it addressed Eighth Amendment concerns with Florida's death penalty that the *Hurst* Court declined to address:

Finally, I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases. Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance. This means that in *no other state or federal court in the country* would Hurst have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier.<sup>265</sup>

With jury fact-finding that treats aggravators as elements of the crime of capital murder comes the requirement of unanimity<sup>266</sup>. And

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<sup>262</sup> *Proffitt*, 428 U.S. at 252; *Hurst*, slip op. at 1.

<sup>263</sup> See *Hurst v. State*, 147 So. 3d 435, 452 (Fla. 2014) (Pariente, J., concurring in part and dissenting in part).

<sup>264</sup> *Hurst*, slip op. at 4 (quoting *Hurst*, 147 So. 3d at 450 (2014) (Pariente, J., concurring in part and dissenting in part)).

<sup>265</sup> *Hurst*, 147 So. 3d at 451–52 (2014) (Pariente, J., concurring in part and dissenting in part) (emphasis supplied).

<sup>266</sup> See *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) (“In this state, the verdict of the jury must be unanimous.”).

with unanimity comes fewer death sentences and narrowing of capital murder cases down to the worst of the worst.<sup>267</sup> Thus, a lack of jury fact-finding violates not only the right to a jury trial, but also the right to a non-arbitrary capital sentencing by unconstitutionally expanding the class of defendants subject to the death penalty.

Beyond jury fact-finding, the *Proffitt* Court relied heavily on the Florida Supreme Court's review process to check the sentencing judge's discretion.<sup>268</sup> The Court noted—perhaps overenthusiastically—that “[t]he statute provides for automatic review by the Supreme Court of Florida” and thus “Florida capital-sentencing procedures [] seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.”<sup>269</sup> The *Proffitt* Court even took a moment to fawn over the Florida Supreme Court for “undertak[ing] responsibly to perform its function of death sentence review with a maximum of rationality and consistency.”<sup>270</sup>

And so, after the *Proffitt* Court concluded that trial judges are the most consistent in death sentencing, the Court placed the remainder of its faith in the justices of the Florida Supreme Court.<sup>271</sup> Any risk of a trial judge sentencing in an arbitrary and capricious manner, in the *Proffitt* Court's opinion, was “minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida ‘to determine independently whether the imposition of the ultimate penalty is warranted.’”<sup>272</sup> The *Proffitt* Court heralded the Florida Supreme Court's vacating of eight out of twenty-one death sentences it had reviewed at the time *Proffitt* was decided,<sup>273</sup> which the *Proffitt* Court took to mean that the Florida Supreme Court was ensuring

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<sup>267</sup> *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (Because the death penalty is the “most irrevocable of sanctions,” it “should be reserved for a small number of extreme cases.”); *Coddington v. State*, 254 P.3d 684, 709 (Okla. 2011) (cases subject to death penalty must be narrowed down to the ““worst of the worst murderers”“)

<sup>268</sup> *Proffitt*, 428 U.S. at 242.

<sup>269</sup> *Id.* at 250–53.

<sup>270</sup> *Id.* at 258–59.

<sup>271</sup> *Id.* at 252.

<sup>272</sup> *Id.* at 242 (quoting *Songer v. State*, 322 So. 2d 481, 484 (Fla. 1975)).

<sup>273</sup> *Id.*

that each sentence was “consistent with other sentences imposed in similar circumstances.”<sup>274</sup>

However, the *Proffitt* Court’s great reliance on Florida Supreme Court review was premised on the assumption that the review was based on proper fact-findings:

Since . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida . . . considers its function to be to “[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.” *State v. Dixon*, 283 So.2d 1, 10 (1973).<sup>275</sup>

The review was only made meaningful by the presence of written fact-findings. This is critical because the jury’s fact-findings were not of record; only the trial court’s sentencing order describing the judge’s fact-findings was the basis of review. Because *Hurst* recognized that the Sixth Amendment made jury fact-findings the only findings upon which death may be imposed, Florida Supreme Court review of Florida death sentences can only be proper and meaningful under the Eighth Amendment if it is based on those jury findings.<sup>276</sup> Thus, *Hurst* revealed that, along with constitutionally defective trial-level sentencing determinations, there have been forty years of meaningless and inadequate appellate review in the Florida Supreme Court.<sup>277</sup> None of those volumes and volumes worth of proportionality analysis from the Florida Supreme Court—no matter how earnest—could satisfy the Eighth Amendment.

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 251.

<sup>276</sup> *See Hurst v. Florida*, No. 14-7505 (U.S. Jan. 12, 2016).

<sup>277</sup> *See id.*

Beyond the lack of jury fact-findings and meaningful appellate review, in the years since *Proffitt*, the channeling of judicial discretion achieved by the statutory enumeration of a finite number of aggravating circumstances has diminished. There must be clear and objective standards to sufficiently guide and narrow sentencing discretion.<sup>278</sup> However, it has been Florida's practice over the decades following *Proffitt* to expand, rather than reduce, the factors that make the death penalty applicable.<sup>279</sup> At the time of *Proffitt*, there were a total of eight aggravating circumstances, a fact which the *Proffitt* Court cited approvingly: "[t]he sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed."<sup>280</sup> The Court quoted at length the statutory description for each aggravator.<sup>281</sup> In the years after *Proffitt*, Florida doubled the list to sixteen.<sup>282</sup>

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<sup>278</sup> See *Gregg v. Georgia*, 428 U.S. 153, 197–98 (1976).

<sup>279</sup> *Proffitt*, 428 U.S. at 251 (stating there were eight aggravating factors); FLA. STAT. § 921.141(6) (laying out sixteen factors in the years following *Proffitt*).

<sup>280</sup> *Proffitt*, 428 U.S. at 251.

<sup>281</sup> In a footnote, the Court stated:

The aggravating circumstances are:

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

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

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

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

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

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

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

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

*Proffitt*, 428 U.S. at 248 n.6 (internal citations omitted).

<sup>282</sup> FLA. STAT. § 921.141(6) lists the aggravating factors as follows:

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



Thus, for years there has been double the potential findings that can place a particular murder into that narrow category of the “worst of the worst” for which death is an appropriate punishment.<sup>283</sup> By doubling the amount of aggravating factors since *Proffitt*, Florida has ensured that seemingly all manner of homicides will

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

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

(d)The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

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

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

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

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

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

(j)The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k)The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim’s official capacity.

(l)The victim of the capital felony was a person less than 12 years of age.

(m)The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n)The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o)The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p)The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.”

<sup>283</sup> Coddington v. State, 254 P.3d 684, 709 (Okla. 2011) (“the death penalty should be reserved for the ‘worst of the worst murderers’”). The “worst of the worst” axiom has developed from *Gregg*’s reference to “the humane feeling that

be death-eligible. The reader might peruse the list of sixteen and ask herself what homicide would *not* include at least one of those characteristics.

Thus, when it came to finding aggravators in Florida, the narrowing, the channeling, and the jury involvement were added at the step where a jury found *sufficient* aggravators. *That* was the moment of narrowing. *That* was the line that only the worst of the worst murders were supposed to cross. But, according to *Hurst*, that line was never drawn pursuant to the actual, operative findings of aggravating circumstances that went to support death sentences. Worse yet, for decades there has been no jury-ensured, appellate-ensured consistency in Florida death sentencing.

The only consistency in Florida death sentencing since *Furman* has been the consistently expanding universe of defendants eligible to be executed under an unconstitutional scheme.

In reassessing the Eighth Amendment compliance of death sentences imposed under Florida's post-*Furman* death penalty scheme, it must be considered that the narrowing accomplished by having a limited list of aggravating factors has broken down along with that accomplished by jury fact-finding and appellate review. Each of the three key checks of judicial discretion relied on by the *Proffitt* Court have either been proven meaningless or greatly diminished. As a result, there is nothing left of *Proffitt*.

For forty years, Florida's death penalty has sailed smoothly enough under *Proffitt's* ensign, with trial judges as the captain. But *Hurst* is a sea of change. *Proffitt's* reliance on jury fact-finding and appellate review to narrow the discretion of sentencing judges was misplaced. Justice Pariente was correct that

... in *no other state or federal court in the country* would *Hurst* have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier. . . .

While questions of public policy regarding Florida's capital sentencing statute are left to the Legislature,

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this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

the Sixth and Eighth Amendment implications of Florida's outlier status on the lack of jury unanimity, which threaten to unravel our entire death penalty scheme, should be of serious concern.<sup>284</sup>

Expanding on Justice Pariente's dissent, it can be said that in no other state or federal court in the country would the 389 people on Florida's death row<sup>285</sup> have been sentenced to death on non-binding, bare majority, undisclosed fact-findings. And that makes Florida's post-*Furman*, pre-*Hurst* death penalty scheme look very much like a deliberate widening of death eligibility, rather than the constitutionally required narrowing.<sup>286</sup>

It may prove to be that the Eighth Amendment problem in Florida's death penalty scheme went beyond the lack of jury fact-findings in sentencing and also had to do with a lack of jury sentencing. When the *Hurst* Court overruled *Spaziano* as inconsistent with its holding that "a jury, not a judge, [must] find *each fact necessary to impose* a sentence of death,"<sup>287</sup> it indirectly found jury sentencing to be constitutionally required in Florida. This is due to the fact that the Florida Legislature, in drafting Florida's former death penalty statute, wrote the Sixth Amendment finding of aggravators and the Eighth Amendment weighing of sentencing factors into a single, indivisible step.<sup>288</sup> Under the statute, the fact-finding necessary to impose death *was* the sentencing calculus. *Hurst* identified the requisite findings of sufficient aggravators not outweighed by mitigators—which *is* the sentencing determination—as the operative Sixth Amendment fact-finding. In other words, the Sixth Amendment requirement that juries must do the operative

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<sup>284</sup> *Hurst v. State*, 147 So. 3d 435, 451–52 (2014) (Pariente concurring in part and dissenting in part).

<sup>285</sup> Greg Allen, *Florida Supreme Court to Decide Whether Executions Can Go Forward*, NPR (Feb. 2, 2016, 4:56 AM), <http://www.npr.org/2016/02/02/465188045/florida-supreme-court-to-decide-whether-executions-can-go-forward>.

<sup>286</sup> See Jeffrey L. Kirchmeier,  *Casting A Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 5–6 (2006).

<sup>287</sup> *Hurst v. Florida*, No. 14-7505, slip op. at 1 (U.S., Jan. 12, 2016) (emphasis added).

<sup>288</sup> See *Jennings v. McDonough*, 490 F.3d 1230, 1257 (11th Cir. 2007).

fact-finding ends up having the effect that juries must do the sentencing. Thus, the Florida Legislature unintentionally merged two bodies of constitutional law, by contravening both.

*Hurst* overruled *Spaziano*'s upholding of Florida's sentencing scheme under the Eighth Amendment.<sup>289</sup> In *Spaziano*, the Supreme Court noted that in the years after *Furman* it had "emphasized its pursuit of the 'twin objectives' of 'measured, consistent application and fairness to the accused.'"<sup>290</sup> The Court went on to confidently state, "nothing in those twin objectives suggests that the sentence must or should be imposed by a jury."<sup>291</sup> But now that there is a requirement in *Hurst* that the death determination be made by a jury, the entire underpinnings of a jury's constitutional role in the "twin objectives" must be reconsidered from an Eighth Amendment perspective.<sup>292</sup> "Time and subsequent cases have washed away the logic"<sup>293</sup> of *Spaziano*'s preferential view of judicial sagacity over the judgment of the common man affirming the conscience of the larger society.<sup>294</sup>

The manner in which time washed away the logic of prior precedent is reflected in Justice Breyer's evolution on the issue of whether the Eighth Amendment requires a jury determination of the death penalty. In his concurrence in *Ring*, he stated "[a]lthough I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view"<sup>295</sup> and declared "I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."<sup>296</sup> Justice

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<sup>289</sup> *Hurst*, slip op. at 1.

<sup>290</sup> *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110–11 (1982)).

<sup>291</sup> *Id.* at 460.

<sup>292</sup> *Id.*

<sup>293</sup> *Hurst*, slip op. at 9.

<sup>294</sup> *Spaziano v. Florida*, 468 U.S. 447 (1984).

<sup>295</sup> *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (citing *Gregg v. Georgia*, supra, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, J.)).

<sup>296</sup> *Id.* Summing up his evolution and enlightenment on the subject, Justice Breyer aptly quoted Justice Frankfurter's statement that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Id.* (citing *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

Breyer's position on this may yet prove to be prescient. Where *Profitt* celebrated the trial judge's experiential helmsmanship in sentencing, *Hurst* hoists the jury's expression of social conscience prominently to the masthead.<sup>297</sup> Rather than falling prey to what Emerson termed the "hobgoblin" of "foolish consistency,"<sup>298</sup> Florida's Eighth Amendment jurisprudence regarding a jury's role in death penalty sentencing would do well to move forward along the Sixth Amendment course charted by *Apprendi*, *Ring*, and *Hurst*.

Justice Breyer is not alone. Justice Blackmun wrote the majority opinion in *Spaziano* that the Court would overrule in *Hurst*.<sup>299</sup> Ten years after he wrote for the *Spaziano* majority to uphold Florida's death penalty scheme, he defied Emerson's hobgoblin, and changed course:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.<sup>300</sup>

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<sup>297</sup> *Hurst v. Florida*, No. 14-7505 (U.S. Jan. 12, 2016).

<sup>298</sup> In his essay, *Self-Reliance*, Ralph Waldo Emerson stated,

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words, and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day. — 'Ah, so you shall be sure to be misunderstood.' — Is it so bad, then, to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood.

RALPH WALDO EMERSON, *SELF-RELIANCE* 7 (1841).

<sup>299</sup> *Hurst*, slip op. at 9; *Spaziano*, 468 U.S. at 449.

<sup>300</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J. dissenting).

The logic supporting *Proffitt* and the Eighth Amendment endorsement of judge-based sentencing in the context of Florida's former death penalty scheme is being washed out in the same tide that carried *Spaziano* and *Hildwin*.

Four decades of hindsight after *Proffitt* has not borne any credence to the Supreme Court's faith of Florida's death penalty scheme. While Florida executed ninety-one people since 1979, twenty-six death-sentenced people were exonerated.<sup>301</sup> Thus, for every 3.5 executions, Florida came within a hair's breadth of executing a person wrongly convicted.<sup>302</sup> This, along with *Hurst*, indicates that *Proffitt* has broken free from its frayed moorings and should be cast away from its berth in the Eighth Amendment.

#### CONCLUSION

What we have written here certainly does not exhaust *Hurst's* Eighth Amendment consequences. As if from a crack in the hull of a ship, *Hurst's* implications spider-web outward, reaching far and undermining the integrity of Florida's Eighth Amendment jurisprudence in ways yet to be seen. We have chosen here to chase down a few of the more troubling fracture lines. We have suggested that they could be repaired for a mere ha'p'orth of tar, compared to the cost of waiting. Perhaps the courts will do so. But not until the hull is fully restored will Florida's death penalty again be seaworthy.

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<sup>301</sup> Florida has carried out 91 executions since 1979. *Death Row*, COMM. OFF., FLA. DEP'T CORRECTIONS, <http://www.dc.state.fl.us/oth/deathrow/>. Florida has had 26 exonerations from death sentences, more than any other state. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>; see also, Tonya Alanez, *Death Penalty in Florida: By the Numbers*, SUNSENTINEL (Jan. 15, 2016, 8:01 AM), <http://www.sun-sentinel.com/news/florida/fl-death-penalty-roundup-20160115-story.html>.

<sup>302</sup> *Id.* This failure rate is partially a result of forty years of adherence to the superiority of judicial sentencing in death penalty cases and the complete lack of jury fact-finding.