

# The Predictable Disarray: Ignoring the Jury in Florida Death Penalty Cases

Michael L. Radelet  
University of Colorado – Boulder

G. Ben Cohen  
New Orleans, Louisiana

January 18, 2017

## Introduction

Both the United States Supreme Court and the Florida Supreme Court have now it made clear that the Florida death penalty statutes that have been in use over the past 45 years are blatantly unconstitutional.<sup>1</sup> How these unconstitutional statutes will affect the lives of the 393 prisoners on Florida's death row at the end of 2016 remains to be determined.<sup>2</sup>

The Florida courts are now beginning the difficult task of assessing which of these defendants sentenced to death under the unconstitutional statute are entitled to relief. It appears clear that most or all of those on death row today whose death sentence was not final at the time the Supreme Court announced *Ring v. Arizona*<sup>3</sup> (June 24, 2002) are entitled to a new sentencing hearing. An unknown number of individuals who raised appropriate claims prior to that date will likely also be granted new sentencing hearings. Any effort to draw a line to exclude a set of defendants from constitutional protection based upon the timing of judicial decisions may well be seen as arbitrary and capricious. Indeed, while state procedural rules can impose an

---

<sup>1</sup> See *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The schemes in place provided that a unanimous jury determine eligibility for capital punishment, but that the findings necessary to impose a death sentence were made by recommendation of a non-unanimous jury, and then by a judge. In neither instance, were these findings made beyond a reasonable doubt.

<sup>2</sup> See Florida Department of Corrections, Death Row Roster, located at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

<sup>3</sup> *Ring v. Arizona*, 536 U.S. 584 (2002) (holding statute which provided for judicial rather than jury determination of the existence of aggravating factors that rendered death the appropriate punishment violated the Sixth Amendment).

obligation on defense lawyers to raise objections in a timely manner, and procedural bars may be imposed when a defense lawyer misses a deadline,<sup>4</sup> it is a particular unfairness to execute a person because his or her lawyer raised the claim too early.

The courts will also have to address additional issues that arise from their recent rulings. In *Hurst v. Florida*, the Court noted that Florida’s statute failed to require “the jury to make the critical findings necessary to impose the death penalty.”<sup>5</sup> The Florida Supreme Court has addressed the deficiency arising from the lack of a unanimous verdict. But there are other problems as yet unaddressed. For example, if the finding is an essential part of a jury verdict, why wouldn’t the Due Process Clause’s *beyond a reasonable doubt* standard apply to these “findings”?<sup>6</sup> Does a defendant who decided to waive his or her penalty phase because of a perception that the unconstitutional statute would give little chance for a life sentence also get a new sentencing hearing? Will the courts address whether it is cruel and unusual punishment for a person whose conviction was final at the time of *Ring* to be executed based a statute that was later found to be unconstitutional.<sup>7</sup> These questions and a multitude of others will surely require

---

<sup>4</sup> See *Holland v. Florida*, 560 U.S. 631 (2010) (noting that in “a garden variety claim of excusable neglect,’ . . . such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.”).

<sup>5</sup> See *Hurst v. Florida*, at 622 (“Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. §921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: “It is true in Florida the jury recommends a sentence, but *it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.*”) (emphasis added).

<sup>6</sup> See *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (“What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder “beyond a reasonable doubt” of the facts necessary to establish each of those elements. . . . It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.”).

<sup>7</sup> The Delaware Supreme Court recently held a Delaware death penalty scheme that permitted non-unanimous jury verdicts, judicial override, and a sentence to be imposed based upon proof less than beyond a reasonable doubt, unconstitutional. See *Rauf v. State*, 145 A.3d 430 (Del. 2016). The Delaware Supreme Court held this retroactive to all individuals on Delaware’s death row. See *Powell v. State*, 2016 Del. Lexis 649 (December 15, 2016).

abundant time and resources of both trial and appellate courts in Florida for years to come. What is clear, however, is that where the constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires states to apply it to all defendants.<sup>8</sup>

The problems with the Florida statute, however, are both procedural and substantive. Substituting a judge for a jury determination has been described as a procedural problem; whereas reducing the burden of proof is a substantive flaw. As the Delaware Supreme Court explained, the decision in *Hurst v. Florida*, held “as it had in *Apprendi*, that the Sixth Amendment, in conjunction with the Due Process Clause, “requires that each element of a crime be proved to a jury beyond a reasonable doubt.”<sup>9</sup> The Florida statutory scheme, that did not require proof beyond a reasonable doubt, includes a substantive flaw more significant than the procedural problems in the Arizona statute identified in *Ring*. While the United States Supreme Court, in *Schriro v. Summerlin*,<sup>10</sup> held that the *Ring* claim was procedural – and as such -- only applicable to defendants whose cases were not final on the day *Ring* was decided (June 24, 2002), the Delaware Supreme Court recognized that “the *Summerlin* Court took special notice in its first footnote that *Ring* did not address the substantive question of the burden of proof.”<sup>11</sup>

The deficiencies in Florida do not originate solely in *Ring v. Arizona*, but rather emanate from cases decided more than forty years ago.<sup>12</sup> Indeed, the deficiencies in the Florida death penalty statute were predicted even before the statute was enacted in 1972. Going back decades,

---

<sup>8</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016).

<sup>9</sup> *Powell v. State*, 2016 De. Lexis 649, 9 (Del. Dec. 15, 2016) quoting *Hurst v. Florida*, 136 S. Ct. at 619.

<sup>10</sup> *Schriro v. Summerlin*, 542 U.S. 348 (2004).

<sup>11</sup> *Powell*, *supra*, at 8.

<sup>12</sup> See *In Re Winship*, 397 U.S. 358 (1970) (holding burden of proof in a criminal case must be beyond a reasonable doubt); *Ivan V. v. New York*, 407 U.S. 203 (1972) (finding burden of proof requirement retroactive); *Cage v. Louisiana*, 498 U.S. 39 (1990) (invalidating conviction where instruction diminished burden of proof); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (holding Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict interrelated); *Apprendi v. New Jersey*, 530 U.S. 466, 476-477 (2000) (applying *Sullivan* and *Winship* together to sentencing factors).

the lack of unanimity, the provision for judicial override, the odd requirement that judges rather than juries, make formal findings of aggravation and mitigation, and the standard-less determination prescribing when death was the appropriate punishment were all foreseen by numerous experts as fundamental flaws in the Florida death penalty statute, although these warnings regularly fell on deaf ears in the Florida legislature and executive branch. The consequence, however, is the same: every defendant on death row in Florida has a legitimate challenge to the validity of his or her sentence and the State of Florida will either accept that a life sentence is sufficiently severe for each of these defendants, or be forced to expend the costs for new sentencing proceedings immediately for half of those on death row, in addition to the costs for litigating these claims for anyone initially denied relief. Given the near certitude that litigation will result in some additional number of individuals receiving relief, the prospect for finality is bleak.

#### ***A. Historical Background of Florida's Death Penalty***

In 1972, the Supreme Court (in effect) invalidated all existing death penalty statutes in the U.S.<sup>13</sup> In Florida, death sentences for ninety-eight individuals were rendered invalid.<sup>14</sup> Most observers read *Furman* as requiring exceptionally strong due process guarantees in capital cases, especially because of the unique severity and finality of the death penalty. The *Furman* Court left open at least the theoretical possibility of a valid capital punishment statute, but gave no clear blueprint of an improved system which could administer capital punishment with an acceptable degree of reliability.

---

<sup>13</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>14</sup> *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972); Michael Mello, 'In the Years when Murder Wore the Mask of Law': *Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583 (2000).

In the aftermath of *Furman*, the Governor's Committee to Study Capital Punishment received significant specific recommendations.<sup>15</sup> The Senate and the House both rejected the Governor's "proposal [that] required that all sentencing findings be in accordance with strict statutory guidelines and based upon the record of a separate sentencing proceedings,"<sup>16</sup> but took different approaches to crafting a new statute. The House Bill provided for sentencing by a three judge panel; the Senate's version included jury recommendations, which the judge was required to follow if the jury voted for life, but which required additional findings if the jury recommended death. The hybrid statute that emerged from a conference committee allowed for a judge to override a jury recommendation, and provided both for non-unanimous jury recommendations and judicial findings. It was a "Senate-House conference committee [that] met during the final night of the legislative session to draft a compromise bill."<sup>17</sup> As one of the present authors previously recounted:

The Florida Senate interpreted *Furman* as requiring jury consideration of statutorily enumerated aggravating and mitigating circumstances, followed by jury rendition of an advisory opinion reached by majority vote. Under the Senate's scheme, a verdict for life imprisonment would be binding, but a vote for death would be subject to the judge's override. However, the Governor, the Attorney General, and the Florida House of Representatives interpreted *Furman* differently. According to the House bill, the jury would be entirely excluded from the penalty phase.

Faced with such opposing views, a conference committee formulated a compromise. This final version, which eventually became the law, included aggravating and mitigating circumstances and the jury's rendition of an

---

<sup>15</sup> Charles W. Ehrhardt, Phillip A. Hubbart, L. Harold Levinson, William McKinley Smiley Jr., & Thomas A. Wills, *The Future of Capital Punishment in Florida, Analysis and Recommendations*, 64 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 3 (1973) (noting that "An acceptable system would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decision in capital cases, not only in the jury function, but at all stages of the process where substantial discretion now exists."); see also Michael Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409 (1984-1985) (describing in detail history).

<sup>16</sup> See Charles W. Ehrhardt and L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 10, 13 (1973).

<sup>17</sup> See *Florida's Legislative Response to Furman: An Exercise in Futility?*, supra, at 21.

advisory sentence that the judge could override in favor of either life or death.<sup>18</sup>

The process was described this way by some observers:

Many of the deficiencies in the statute might well have been remedied at that time if the conference committee had the benefit of adequate reports containing information about experience in other jurisdictions, surveys of professional and scholarly literature, testimony from experts and alternative solutions. . . . The capital punishment statute seems to have been an expedient response to election-time politics rather than a sound response to the constitutional and penological needs of the state.<sup>19</sup>

Thus, the rush to pass a new statute led to Florida's unique system.<sup>20</sup>

After the post-*Furman* statute was enacted, both the Florida Supreme Court and the U. S. Supreme Court rejected challenges to its constitutionality.<sup>21</sup> But the Florida sentencing structure did not go without criticism. *The Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, in 1991, made a series of constructive suggestions to improve the administration of justice, which included amending the capital sentencing statute to reduce or prevent the constitutional deficiencies that are clear today.

---

<sup>18</sup> Michael Radelet & Michael Mello, *Death to Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U.L. REV. 196, 199 (1992).

<sup>19</sup> See *Florida's Legislative Response to Furman: An Exercise in Futility?*, supra, at 21.

<sup>20</sup> For a long time, number of observers suggested that Florida's death penalty scheme would benefit from, inter alia, unanimous jury determinations. See e.g. The America Bar Association's Florida Death Penalty Assessment, Problems and Recommendations, 2006, available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/factsheet.authcheckdam.pdf>

<sup>21</sup> See *Spaziano v. Florida*, 468 U.S. 477, 569 (1984); *Evans v. State*, 808 So. 2d 92, 110 (Fla. 2001) ("In *Evans*' remaining points on appeal, he asserts that the trial court erred in imposing the death penalty because the jury made no unanimous findings of fact as to death eligibility. We have previously rejected that argument in *Mills v. Moore*, 786 So. 2d 532, 536-37 (Fla. 2001), cert. denied, 532 U.S. 1015, 121 S. Ct. 1752, 149 L. Ed. 2d 673 (2001)."); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001) ("We hold the following claims are without merit: (1) in light of the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the trial court erred in denying *Card*'s motion to require a unanimous jury verdict for the death penalty."). See also Johnny Hutchinson, *The Gideons and the Gallows: Against the 'Typical Juror' Standard in Capital Cases*, 57 CASE W. RES. L. REV. 955, 1006 (2007) ("The Florida Supreme Court refuses to entertain challenges to Florida's death penalty statutes, which do not require a unanimous recommendation of death for death to be impose.").

When the Supreme Court issued its opinion in *Ring v. Arizona* on June 24, 2002,<sup>22</sup> the Court suggested *Ring*'s claim was "tightly delineated" by focusing on whether the Sixth Amendment required jury findings on the aggravating circumstances – specifically, *Ring* held that the Sixth Amendment applied to any findings that a state's statute said were necessary to impose death. The majority opinion noted "Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty."<sup>23</sup>

But the writing was clearly on the wall. As one commentator noted, "inherent in the Sixth Amendment right to a trial by an impartial jury is the Framers' intent that the jury would have the complete and sole authority to decide facts, render a verdict, and select a sentence—without judicial or official intervention."<sup>24</sup>

The *Ring* opinion located the rationale for the opinion in fidelity to the Court's decision in *Apprendi v. New Jersey*, issued in 2000. In *Apprendi*, the Supreme Court had held in the non-capital context that factual determinations that serve to increase a defendant's punishment – even if they were called sentencing findings – were subject to Sixth Amendment requirements, meaning they "should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours" "beyond a reasonable doubt."<sup>25</sup> "As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury."<sup>26</sup> Though

---

<sup>22</sup> 536 U.S. 584 (2002).

<sup>23</sup> *Id.* at n. 4 citing *Proffitt v. Florida*, 428 U.S. 242, 252, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976) (plurality opinion) ("It has never [been] suggested that jury sentencing is constitutionally required.").

<sup>24</sup> Benjamin Diamond, *The Sixth Amendment: Where Did the Jury Go? Florida's Flawed Sentencing in Death Penalty Cases*, 55 FLA. L. REV. 905, 911 (2003).

<sup>25</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>26</sup> *Ring v. Arizona*, 536 U.S. 584, 604-605 (2002).

the opinion focused on non-capital sentencing, both the concurrence of Justice Thomas and Scalia<sup>27</sup> and the dissent of Justice O'Connor, Breyer and Kennedy,<sup>28</sup> acknowledged that it foretold constitutional deficiencies in the capital sentencing schemes in Arizona and Florida. Defendants sentenced to death in Florida, both before and after *Apprendi*, raised Sixth Amendment challenges to the death penalty statute. As Justice Scalia explained:

On the other hand, as I wrote in my dissent in *Almendarez-Torres v. United States*..., and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.<sup>29</sup>

As Justice Scalia explained, *Ring v. Arizona* made clear that the decision in *Apprendi v. New Jersey* applied to death penalty cases.

As Florida Supreme Court Chief Justice Anstead added these words shortly after *Ring* was decided:

The question is where do we go from here. Prior to its decision in *Ring*, the Supreme Court had rejected numerous constitutional attacks on Florida's death penalty scheme, including a Sixth Amendment challenge in *Hildwin v. Florida*, ... The plurality opinion has chosen to retreat to the "safe harbor" of these prior U.S. Supreme Court decisions upholding Florida's death penalty scheme, as well as the Supreme Court's failure to confront those decisions in *Ring*. While I join in the denial of relief to *Bottoson*, I must also acknowledge that, after *Ring*, that harbor may not be so safe. The safety of that harbor may be particularly at risk if Justice Scalia's Sixth Amendment analysis in *Ring* is accepted as correct. . . .

---

<sup>27</sup> See *Apprendi*, at 522 (Scalia J., Thomas, J., concurring) ("I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona*... [which] approve[d] a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. ... We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.").

<sup>28</sup> See *Apprendi* at 544 (O'Connor, J., Kennedy, J., Breyer, J., dissenting) ("it is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton*.").

<sup>29</sup> *Ring*, at 612 (Scalia J., concurring).



As noted above, *Apprendi* and *Ring* also stand for the proposition that under the Sixth Amendment, a determination of the existence of aggravating sentencing factors, just like elements of a crime, must be found by a unanimous jury vote. As the Supreme Court expressly noted in *Ring*, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."

. . . However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.<sup>30</sup>

In rejecting the claims of *Bottoson* and *King*, Justice Wells concurred, explaining:

The State has sentenced individuals to death, confined individuals in a severe and special state of confinement with limited privileges, and executed fifty-three individuals in reliance on the constitutionality of Florida's capital sentencing statute as determined by the decisions of the United States Supreme Court. I cannot agree with the concurring opinions in this case and *King*<sup>31</sup> which contend that the Court's ruling in *Ring* suddenly undermines the twenty-six years of judicial precedent which has been applied to these cases.

At the time this opinion is released, Florida has 369 individuals confined in special confinement on death row. Over one hundred of these individuals have been so confined for in excess of fifteen years. A list of those confined on death row begins with an individual who was received on death row on April 11, 1974. *King* committed the murder for which he has been sentenced to death in 1977, and *Bottoson* committed the murder for which he has been sentenced to death in 1979. *King* has been held on Florida's death row for more than twenty-four years and *Bottoson* for more than twenty. During that time, *King* and *Bottoson*'s death sentences have been upheld based upon and in reliance on the decisions of both the United States Supreme Court and this Court upholding the constitutionality of Florida's capital sentencing statute.

---

<sup>30</sup> *Bottoson v. Moore*, 833 So. 2d 693, 703-704 (Fla. 2002) (citations omitted); see also *id.*, at 711 (Shaw, J., concurring) ("I believe that this State's highest Court has an obligation to evaluate the validity of Florida's capital sentencing statute in light of *Ring*."); *id.*, at 719 (Pariente, J., concurring) ("[B]ased on the reasoning of the majority of the United States Supreme Court in *Ring* and Justice Scalia's separate concurrence in *Ring*, I agree with Chief Justice Anstead that *Ring* does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme.").

<sup>31</sup> Linroy Bottoson was executed on December 9, 2002, and Amos King was executed in 2003. *Death Penalty Information Center, Searchable Execution Database, available at* <http://www.deathpenaltyinfo.org/views-executions>

The extreme length of time that Florida inmates have been kept on death row has been due in substantial part to shifting constitutional analysis of death penalty statutes in the 1980s, and in substantial part to issues related to the competent representation of defendants in trials and the representation of defendants in postconviction proceedings....<sup>32</sup>

Justice Wells argued -- not that the logic of *Ring* did not apply to Florida's statutory scheme -- but that applying *Ring* to Florida's capital sentencing statute "would have a catastrophic effect on the administration of justice in Florida and would seriously undermine our citizens' faith in Florida's judicial system." He recognized that "if Florida's capital sentencing statute is held unconstitutional based upon a change in the law applicable to these cases, all of the individuals on Florida's death row will have a new basis for challenging the validity of their sentences on issues which have previously been examined and ruled upon." Amos King and Linroy Bottoson, along with thirty-nine other individuals, were then executed before the end of 2016 despite the plain recognition that the statute under which they were sentenced was likely unconstitutional.<sup>33</sup> The chaos warned of then is the future now where these challenges will "result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings."<sup>34</sup>

### ***B. Census of Florida's Current Death Penalty***

Since 1976, according to the Death Penalty Information Center, there have been 961 death sentences imposed in Florida.<sup>35</sup> By the end of 2016, Florida had executed ninety-two (92)

---

<sup>32</sup> *Bottoson v. Moore*, 833 So. 2d 693, 698-699 (Wells, J., concurring/explaining).

<sup>33</sup> See Death Penalty Information Center, Execution Database, Executions in Florida, 2002-2017. Available at <http://www.deathpenaltyinfo.org/views-executions>.

<sup>34</sup> *Bottoson*, *supra* at 699.

<sup>35</sup> See Death Penalty Information Center, Death Sentences in the United States from 1977 by State and Year, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present/> While exact numbers of the numbers of death sentences between 1972 and 1977 are not readily available, in *Proffitt v. Florida*, the Court noted that the Florida Supreme Court had -- by 1976 -- vacated 8 of the 21 death sentences that it had reviewed. See *Proffitt v. Florida*, 428 U.S. 252, 253 (1976).

individuals, including forty-one (41) since *Ring* was decided on June 24, 2002. The National Registry of Exonerations lists eight (8) exonerations from death row in Florida since 1989.<sup>36</sup> The Death Penalty Information Center also identifies twenty-six (26) exonerations since 1973; twenty-two (22) of those exonerations were the result of death sentences imposed under the current statutory scheme. As the TAMPA BAY TIMES recently reported, “Of the 20 people who have been exonerated and for whom sentencing information is available, 15 were sent to death row by a divided jury. Three others were cases in which judges imposed the death penalty over a jury’s recommendation of life in prison.”<sup>37</sup>

At the end of 2016, the Florida Department of Corrections listed a total of 384 individuals sentenced to death in Florida, including 220 white males, 148 African-American men, 12 “other males,” one white female, two African-American females and one “other female.”<sup>38</sup>

The United States Supreme Court issued its opinion in *Ring v. Arizona*, on June 24, 2002. Almost 14 years later, in *Hurst v. Florida* (January 12, 2016),<sup>39</sup> the Court held that the Florida capital sentencing scheme violated the Sixth Amendment in light of *Ring*.<sup>40</sup>

Then, in December 2016, the Florida Supreme Court issued a series of opinions addressing the question of who would be entitled to relief under *Hurst* and *Ring*. It held that *Hurst* relief unquestionably applied to those individuals whose case was not final before *Ring* was decided.<sup>41</sup>

---

<sup>36</sup> <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

<sup>37</sup> Anna M. Phillips, *How the Nation’s Lowest Bar for the Death Penalty Has Shaped Death Row*, Tampa Bay Times, January 31, 2016.

<sup>38</sup> Florida Department of Corrections, Corrections Offender Network, Death Row Roster, *available at* <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

<sup>39</sup> 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

<sup>40</sup> 136 S.Ct. at 620 (“We granted certiorari to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*, 575 U.S. \_\_\_, 135 S. Ct. 1531, 191 L. Ed. 2d 558 (2015). We hold that it does, and reverse.”).

<sup>41</sup> *See, e.g., Mosley v. State*, 2016 Fla. LEXIS 2721 (Fla. Dec. 22, 2016) (“For fourteen years after *Ring*, until the United States Supreme Court decided *Hurst v. Florida*, Florida’s capital defendants attempted to seek relief based on

At the very least, convictions of 201 defendants on Florida's death row at the end of 2016 were not final on June 24, 2002. Our data allow us to determine the jury's sentence recommendation in 190 of these cases.<sup>42</sup> As best we can determine, of these 190, the jury vote was less than unanimous in at least 134 cases.<sup>43</sup>

---

*Ring*, both in this Court and the United States Supreme Court. . . . interests of finality must yield to fundamental fairness.”); *Asay v. State*, 2016 Fla. LEXIS 2729 (Fla. Dec. 22, 2016) (“[W]e conclude that *Hurst* should not be applied retroactively to *Asay*'s case, in which the death sentence became final before the issuance of *Ring*.”).

<sup>42</sup> Since the late 1970s, every time a person was sentenced to death in Florida, Prof. Radelet has sent a questionnaire to the defense attorney and obtained a copy of the judge's sentencing order, which specifies the aggravating and mitigating circumstances that the judge found in the case. The case is then followed until the inmate is removed from death row, either through resentencing by the trial court, action by appellate courts, death by natural causes or execution, clemency, etc.

<sup>43</sup> Even the death sentences imposed by unanimous jury votes are thrown into question by the recent rulings. It is possible, for example, that a jury's initial vote for death was 10-2, but the two voting for life went with the majority because they thought or realized that that their vote for life was essentially meaningless. *Hurst* has now given those life votes new weight. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985); Michael L. Schultz, *Eighth Amendment: References to Appellate Review of Capital Sentencing Determinations*, 76 J. OF CRIM. L. & CRIMINOLOGY 1051 (1985).

Census of Individuals on Death Row by  
County and Jury Vote as of 12/31/2016<sup>44</sup>

County	Census of Individuals On Death Row	Post- <i>Ring</i> Defendants on Death row	Known Non- Unanimous Cases Post- <i>Ring</i>
Duval	58	31	26
Miami-Dade	26	12	11
Broward	21	12	8
Hillsborough	25	11	6
Seminole	12	11	7
Brevard	13	10	5
Volusia	17	10	6
Orange	19	8	6
Pinellas	23	8	4
Polk	14	8	4
Lake	10	6	4
Clay	7	5	3
Santa Rosa	7	5	4
Charlotte	6	4	2
Bay	10	4	3
Escambia	8	4	3
Marion	8	4	4
St. Johns	5	4	2
St. Lucie	5	4	3
Walton	6	4	2
Okeechobee	3	3	1
Putnam	6	3	3
Sarasota	6	3	1
Lee	6	2	1
Flagler	3	2	2
Gadsden	2	2	2
Martin	3	2	0
Okaloosa	5	2	0
Pasco	6	2	2
Wakulla	2	2	2

---

<sup>44</sup> There are no individuals currently on death row from the following sixteen counties: Baker, Calhoun, DeSoto, Dixie, Franklin, Gilchrist, Gulf, Hardee, Hendry, Jefferson, Lafayette, Levi, Liberty, Madison, Nassau, and Suwannee.

Bradford	1	1	1
Citrus	1	1	1
Columbia	1	1	1
Highlands	2	1	1
Indian River	4	1	1
Leon	4	1	0
Manatee	3	1	0
Monroe	2	1	0
Osceola	3	1	1
Palm Beach	7	1	1
Sumter	1	1	0
Union	1	1	0
Washington	1	1	0
Alachua	2	0	0
Collier	2	0	0
Hamilton	2	0	0
Hernando	2	0	0
Glades	1	0	0
Jackson	1	0	0
Taylor	1	0	0
Total	384	201	134

Ten counties are responsible for filling more than half of death row. Duval, Miami-Dade, Hillsborough, Pinellas, Broward, Orange Volusia, Polk, Brevard and Seminole are responsible for 228 of the 384 individuals on death row, 121 of the 201 individuals on death row sentenced since *Ring*, and 83 of the 134 individuals known to have been sentenced by non-unanimous verdicts. In Duval County, 18 of the 26 defendants (69 percent) sentenced to death post-*Ring* by non-unanimous juries are African-American (including a time between July 2008, and July 2015, during which fourteen out of the fifteen individuals sentenced to death – 93 percent -- were African-American men).

In sum, 384 people remained under a sentence of death in Florida as of the end of 2016, despite the fact that their death sentences were imposed under a constitutionally invalid statute. Our count of 201 post-*Ring* cases in this group who will be given new sentencing hearings is not

an exhaustive count, the legal definition of “final” may be nuanced with case-specific factors which render additional individuals not counted in the among the 201 as not “final” at the time of *Ring*. Moreover, the 134 non-unanimous verdicts post-*Ring* are not the only cases that may require resentencing, as defendants may have different claims arising from other constitutional deficiencies in the Florida statute (such as including the failure to make factual findings “beyond a reasonable doubt”), and two instances of men still on death row where a trial court overrode a jury recommendation for life with a death sentence.<sup>45</sup> The significant cost of resentencing all of these individuals under a constitutional scheme was very predictable at the time of *Ring* in 2002, and was also foreseen by at least some experts who examined the post-*Furman* statute that was enacted in 1972.

In the aftermath of *Furman*, the Governor proposed legislation that “required that all sentencing findings be in accordance with strict statutory guidelines.” Experts agreed that a statute must be narrowly focused. In 2017, the Florida legislature will need to make changes in the Florida death penalty statute that were predictable when the statute was first passed in 1972, and inevitable when the U.S. Supreme Court released *Ring v. Arizona* in 2002. Finally, they will need to acknowledge that *Ring* has rung.

---

<sup>45</sup> One of the authors of this piece documented, inter alia, the one hundred and sixty six defendants sentenced to death after a jury recommended life in Florida. See Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV 793 (2011). The last case where a person was sentenced to death in Florida after a jury recommendation of life occurred in 1999. Yet, two men with jury recommendations of life remained on death row at the end of 2016 (Matt Marshall and Tommy Zeigler).