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Judges do it Better: Why Judges can (and Should) Decide Life or Death

Andrew R. Ford

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Judges do it Better: Why Judges can (and Should) Decide Life or Death

Andrew R. Ford*

ABSTRACT

Following its decision in *Furman v. Georgia*, the Supreme Court of the United States has attempted to standardize procedures that states use to subject offenders to the ultimate penalty. In practice, this attempt at standardization has divided capital sentencing into two distinct parts: the death eligibility decision and the death selection decision. The eligibility decision addresses whether the sentencer may impose the death penalty, while the selection decision determines who among that limited subset of eligible offenders is sentenced to death. In *Ring v. Arizona*, the Court held for the first time that the Sixth Amendment right to a jury trial requires a jury to decide each fact necessary to justify a death sentence. The Court re-affirmed *Ring* in *Hurst v. Florida*. The Court, however, has never explicitly clarified the proper role of judges in capital sentencing beyond death eligibility.

This Comment takes the position that the Court's decisions in *Ring* and *Hurst* are narrow and only implicate the eligibility decision. This Comment examines the history of the Court's modern capital punishment jurisprudence relating to jury sentencing and relevant non-capital cases that implicate the Sixth Amendment right to a jury trial. Further, this Comment argues that judicial sentencing creates a capital sentencing structure that is fairer, more uniform, and more harmonious with the public policy rationales for capital punishment than sentencing by a jury. Finally, this Comment argues that, because juries play a valuable role in democratizing the law, there should still be a role for juries beyond the constitutional minimum requirement of a jury finding aggravating circumstances or convicting a defendant of a capital felony.

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2020. I would like to thank my parents and family for their unyielding support—even when it wasn't warranted; Griffin Schoenbaum, Nader Amer and Malcolm McDermond for their blunt and helpful feedback while writing this Comment; Dietrich Mateschitz; and the great State of Nebraska.

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*Now the jury brought in a guilty verdict
And the judge he sentenced me to death*¹

I. INTRODUCTION

Capital punishment is undoubtedly controversial.² In the contemporary debate regarding capital punishment, much of the surrounding controversy involves wrongful convictions,³ cost,⁴ perceived racial bias,⁵ inadequate assistance of counsel,⁶ and con-

1. BRUCE SPRINGSTEEN, *Nebraska*, on *NEBRASKA* (Columbia Records 1982).

2. See *Glossip v. Gross*, 135 S. Ct. 2726, 2749–50 (2015) (Scalia, J., concurring) (“Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia.”).

3. See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO CTR., <https://bit.ly/JksIrR> [<https://perma.cc/L45F-5ADX>] (last visited Oct. 16, 2019) (listing those who have been freed from death row in the United States following acquittal, a decision by a prosecutor to drop charges, or an absolute pardon from a governor based on evidence of innocence). *But see* Kent S. Scheidegger, *Fix System, but Keep Death Penalty*, ATLANTA J.-CONST. (May 7, 2015), <http://bit.ly/2BzEtHn> [<https://perma.cc/V256-BV4D>] (noting the former presence of Timothy Hennis on the list and that DNA later linked Hennis to the murders he was “exonerated” of committing). See Paul G. Cassell, *Overstating America’s Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 851 (2018) (estimating that the wrongful conviction rate for violent crimes is somewhere between 0.016% and 0.062%).

4. See generally Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (2010) (arguing that, while previously ignored, the cost of imposing capital punishment has become a powerful new consideration in the resurgence of legislative efforts to abolish capital punishment).

5. See ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* 237 (2013) (arguing that the inclusion of robbery—an economic crime—as an aggravating circumstance in many jurisdictions disproportionately affects African Americans). Compare Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2086 (2004) (arguing that the death penalty is hopelessly racially compromised), with Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OH. ST. J. CRIM. L. 147, 163 (2012) (arguing that studies that have surveyed the issue of racial disparity have been imprecise).

6. See, e.g., Thomas G. Saylor, *Death Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 WIDENER L. J. 1, 22–32 (2013) (listing flagrant examples of ineffective counsel in Pennsylvania capital cases).

troveries surrounding lethal injection.⁷ Indeed, in the modern era of capital punishment in the United States,⁸ five Supreme Court justices have authored opinions either declaring or strongly intimating that capital punishment is per se unconstitutional.⁹

This Comment takes no position on capital punishment as a policy matter but rests on four basic assumptions: (1) “The Constitution allows Capital Punishment;”¹⁰ (2) current Supreme Court jurisprudence forbids mandatory death sentences;¹¹ (3) following the Supreme Court’s capital punishment decisions issued on July 2, 1976,¹² every jurisdiction in the United States that permits capital punishment requires adjudication of guilt and penalty in separate phases of the trial,¹³ where the sentencer decides the penalty based on consideration of factors that weigh in favor of death (aggravating circumstances) and circumstances that weigh against death (mitigating circumstances);¹⁴ and (4) the Sixth Amendment of the U.S. Constitution¹⁵ requires juries to find every fact necessary to sentence a defendant to death.¹⁶ It is currently unclear as to whether it

7. See, e.g., Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L. J. 1331, 1360 (2014) (describing difficulties in obtaining drugs for lethal injection); *id.* at 1357 (describing painful executions due to states’ using alternate drugs).

8. The period following *Furman v. Georgia*, 408 U.S. 238 (1972). Steiker & Steiker, *supra* note 4, at 157.

9. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (BREYER, J. & GINSBURG, J., dissenting); *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari); *Furman*, 408 U.S. at 257–306 (Brennan, J., concurring); *id.* at 314–71 (Marshall, J., concurring).

10. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (citations omitted).

11. See *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (invalidating statutes providing for mandatory death sentences for certain murders); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (same).

12. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). One commentator referred to these cases as the “July 2 Cases” based on the date that the Court decided them. See James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 28 (2007).

13. See Lauren Morehouse, Note, *Demanding the Last Word: Why Defendants Deserve the Final Closing Argument During the Sentencing Phase of Capital Cases*, 55 AM. CRIM. L. REV. 841, 841 (2018) (noting that every jurisdiction with capital punishment requires a bifurcated trial).

14. The Supreme Court forbids limiting the presentation of relevant mitigating evidence. See *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

15. U.S. CONST. amend. VI. The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury. . . .”

16. See *Hurst v. Florida*, 136 S. Ct. 616, 621–22 (2016) (applying *Ring v. Arizona* to Florida’s Statute); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (applying *Apprendi v. New Jersey* to capital sentencing); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (citations omitted) (holding that the Sixth Amendment requires a

is constitutional for a judge to make that ultimate sentencing decision based on a jury's findings of fact or whether the Constitution requires that the jury itself impose a capital sentence.¹⁷

Among the jurisdictions that permit capital punishment,¹⁸ the sentencing schemes fall into three rough categories: (1) jurisdictions where the jury has the sole responsibility for sentencing a person convicted of a capital crime to death;¹⁹ (2) jurisdictions where a jury's sentence of death, life imprisonment, or a term of imprisonment binds the judge, unless the jury is not unanimous;²⁰ and (3) jurisdictions where the jury is discharged after finding that an aggravating circumstance exists and then a judge or panel of judges weighs aggravation against mitigation to determine the offender's sentence.²¹ This Comment is concerned with the constitutionality of the sentencing schemes of the five states that fall into the second and third categories.

Part II of this Comment provides background as to the beginning of capital punishment's modern era in the United States. Part II also outlines the evolution of the Supreme Court's interpretation of the jury requirement in capital sentencing. Part III demonstrates that, based on the Supreme Court's jurisprudence, the Sixth Amendment does not require anything from a jury in capital cases beyond finding an aggravating circumstance exists or convicting the defendant of an underlying capital felony. Part III also provides a model for ensuring that capital sentencing is more uniform and less like "being struck by lightning"²²

jury to find every fact necessary to increase a criminal sentence beyond its statutory maximum).

17. *Compare Ring*, 536 U.S. at 614 (BREYER, J., concurring in judgment) (asserting that jury sentencing is constitutionally required), *with id.* at 612–13 (Scalia, J., concurring) (disputing JUSTICE BREYER's suggestion).

18. Twenty-nine states, the Federal Government, and the U.S. Military allow capital punishment. *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (last visited Sept. 26, 2019), <https://bit.ly/2pUfzfl> [<https://perma.cc/6AK6-EZ7V>].

19. *See Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, DEATH PENALTY INFO. CTR. (last updated Jan. 17, 2018), <https://bit.ly/2SaEDM9> [<https://perma.cc/PE7N-39SA>].

20. *See* ALA. CODE § 13A-5-46(f) (2017); IND. CODE § 35-50-2-9(f) (2017); MO. REV. STAT. § 565.030.4 (2013).

21. *See* MONT. CODE ANN. § 46-18-305 (2017) (providing for a sentencing hearing conducted by "the court"); NEB. REV. STAT. §§ 29-2520–21 (Cum. Supp. 2018) (providing for a sentencing hearing conducted by three-judge panel).

22. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

II. BACKGROUND

A. *The Supreme Court and the Jury Requirement: 1972–2002*

1. *Furman Giveth, Gregg Taketh Away*

The Supreme Court's ruling in *Furman v. Georgia*²³ must inform any understanding of capital sentencing in the United States. At the time the Court decided *Furman*, juries essentially had “un-guided discretion” in capital sentencing.²⁴ The Court's one-paragraph per curiam opinion in *Furman* provides little guidance as to what is necessary for capital punishment to be constitutional.²⁵ Each of the five justices in the *Furman* majority wrote separate concurring opinions expressing varying rationales for their decisions.²⁶ Justice Douglas focused heavily on what he viewed to be the racially discriminatory aspect of the death penalty's application in the United States.²⁷ Justice Stewart and Justice White each highlighted the arbitrariness of the system at the time.²⁸ Justice Brennan declared that the death penalty was unconstitutional as a punishment because it was “fatally offensive to human dignity.”²⁹ Justice Marshall similarly expressed his belief that capital punishment was cruel and unusual, famously stating that, if “the average citizen” knew more about capital punishment, he “would, in my opinion, find it shocking to his conscience and sense of justice.”³⁰

Following the Court's decision in *Furman*—with the death penalty's future in doubt—states passed new statutes to remedy the defects in the statutes that the Court invalidated. Some statutes provided a mandatory death penalty for certain crimes.³¹ In others,

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

24. Maria T. Kolar, “*Finding*” a Way to Complete the Ring of Capital Jury Sentencing, 95 DENV. L. REV. 671, 677 (2018).

25. *Furman*, 408 U.S. at 239–40 (1972) (per curiam). Following a brief recitation of the identities of the petitioners, the majority stated:

The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

Id.

26. See *id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

27. See *id.* at 256–57 (Douglas, J., concurring).

28. See *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

29. *Id.* at 305 (Brennan, J., concurring).

30. *Id.* at 369 (Marshall, J., concurring)

31. *E.g.*, Act of Apr. 8, 1974, ch. 1201, § 1, 1974 N.C. Sess. Laws 323, 323, *invalidated by* *Woodson v. North Carolina*, 428 U.S. 280 (1976).

defendants became eligible for death when they were convicted of an underlying capital felony during the guilt stage³² or when “aggravating circumstances” were proven during a second phase of the trial³³—usually referred to as the “penalty phase.”³⁴ In schemes with a penalty phase, the trier considers aggravating circumstances or underlying capital offenses against mitigating factors, and it sentences the offender based on that consideration.³⁵

On January 22, 1976, the Supreme Court granted certiorari in five cases challenging the constitutionality of the death penalty generally and the state statutes of Georgia, Florida, Texas, North Carolina, and Louisiana specifically.³⁶ On July 2, 1976, the Supreme Court issued its decisions in each of the five cases.³⁷ Bare majorities struck down Louisiana’s and North Carolina’s mandatory death penalty statutes,³⁸ but in the other three cases the Court upheld death penalty laws, including in *Gregg*, in which the judgment ended a period of national uncertainty and affirmed the constitutionality of capital punishment as a general matter.³⁹ The *Gregg* plurality, consisting of Justice Stewart, Justice Powell, and Justice Stevens, recognized that death penalty statutes must provide a limiting function that takes into account both the terrible nature of the crime and factors that call for mercy.⁴⁰ The plurality also stated

32. See, e.g., Act of June 14, 1973, ch. 426 art. 1-3, 1973 Tex. Gen. Laws 1122, 1125 (current version at TEX. CODE CRIM. PROC. art. 37.071(2019)).

33. See, e.g., Act of Dec. 8, 1972, ch. 72-724, § 9, 1973 Fla. Laws 15, 20–22, *invalidated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

34. *Accord* *State v. Flowers*, 266 So. 3d 772, 776 n.1 (Ala. Crim. App. 2017).

35. See, e.g., 42 PA. CON. STAT. § 9711(c)(1)(iv) (2018).

36. See *Roberts v. Louisiana*, 423 U.S. 1082–83 (1976) (Order Granting Petition for Certiorari); *Gregg v. Georgia*, 423 U.S. 1082 (1976) (Order Granting Petition for Certiorari); *Jurek v. Texas*, 423 U.S. 1082 (1976) (Order Granting Petition for Certiorari); *Woodson v. North Carolina*, 423 U.S. 1082 (1976) (Order Granting Petition for Certiorari); *Proffitt v. Florida*, 423 U.S. 1082 (1976) (Order Granting Petition for Certiorari).

37. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

38. See *Roberts*, 428 U.S. at 338 (Opinion of Stewart, Powell, & Stevens, JJ.); *Woodson*, 428 U.S. at 301 (opinion of Stewart, Powell, & Stevens, JJ.).

39. *Gregg*, 428 U.S. at 176 (opinion of Stewart, Powell, & Stevens, JJ.) (“We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.”). See also *id.* at 207 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring) (“The issue in this case is whether the death penalty imposed for murder on petitioner *Gregg* under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.”).

40. See *id.* at 189 (opinion of Stewart, Powell, & Stevens, JJ.) (citations omitted).

that the Court “presumes the validity” of a procedure that a democratically elected legislature adopts.⁴¹ Relevant to this Comment, the plurality identified one advantage inherent in a system such as Georgia’s, in which the jury acts as sentencer—that it reflects the community’s values.⁴² While *Gregg* is the canon case and the most identified of the July 2 Cases,⁴³ the Court’s judgment in *Proffitt v. Florida*,⁴⁴ which upheld the ability of judges to exercise sole sentencing discretion, is the most relevant case for this Comment.

2. *Proffitt Validates Judicial Sentencing in Death Penalty Cases*

Florida’s post-*Furman* law reserved a role for juries in capital sentencing.⁴⁵ Unlike the Georgia statute, however, the jury’s verdict was merely advisory, and the trial judge possessed discretion to override it.⁴⁶ Under the Florida statute, the trial court—in writing—made factual findings necessary to render a death sentence and served as the sole sentencing authority.⁴⁷

Having ruled in favor of the Georgia in *Gregg*, the Supreme Court shifted its focus to Florida in *Proffitt*. As in *Gregg*, there was no majority opinion in *Proffitt*, and the same trio who had written the plurality opinion and judgment of the Court in *Gregg* wrote a joint opinion representing the judgment of the Court.⁴⁸ While the Florida law lacked Georgia’s statutory proportionality review requirement, the plurality nonetheless found that, when conducting appellate review, the Florida Supreme Court performed the same limiting function as Georgia’s mandatory proportionality review.⁴⁹

As to whether the judge can make the ultimate sentencing determination instead of the jury, the *Proffitt* plurality rejected the

41. *Id.* at 175.

42. *Id.* at 190 (citations omitted).

43. See *Liebman*, *supra* note 12, at 28.

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

45. FLA. STAT. § 921.141(2) (1973). The Florida statute also did not require a jury to make explicit findings as to the existence of an aggravating circumstance necessary for the imposition of a death sentence, which the Court later determined to be a fatal flaw to the constitutionality of an amended version of the law. See *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

46. *Proffitt*, 428 U.S. at 249 (opinion of Stewart, Powell, & Stevens, JJ.). Such a phenomenon has been known as the “jury override.” Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1405 (1996).

47. FLA. STAT. § 921.141(3)–(3)(a) (1973).

48. *Proffitt*, 428 U.S. at 244 (opinion of Stewart, Powell, & Stevens, JJ.).

49. See *id.* at 258–59. In short, proportionality review is a system where a court “compare[s] the sentence in the case before it with the penalties imposed in similar cases” *Pulley v. Harris*, 465 U.S. 37, 44 (1984).

notion that the Constitution requires juries to serve as the sentencing authority, stating as follows:

This Court . . . has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.⁵⁰

Along with the plurality, four justices concluded that judicial sentencing passed constitutional scrutiny,⁵¹ but this did not settle the matter. Over the next four decades, litigation ensued as to what extent the Constitution permits trial courts to act as sentencing authorities.

3. *Stare Decisis as a Platitude: Post-Proffitt Developments Regarding Judicial Sentencing in Capital Cases*

a. *Spaziano, Hildwin, and Walton: No Constitutional Right to Jury Factfinding*

Exactly eight years after its decision in *Proffitt*, the Court again addressed the constitutionality of the Florida death penalty statute in *Spaziano v. Florida*.⁵² After a jury convicted Joseph Robert Spaziano of murder, a majority of the jury, in its advisory role under the Florida statute, recommended a sentence of life in prison.⁵³ Despite that recommendation, the trial judge overrode the jury's advisory verdict and sentenced Spaziano to death.⁵⁴ On certiorari, Spaziano raised two sentencing-related claims. Spaziano's first sentencing-related claim attacked the constitutionality of allowing judges to sentence defendants to death when a jury recommends life imprisonment, while the second challenged the Florida Supreme Court's standard for reviewing an override of the jury's sentencing recommendation.⁵⁵

50. *Proffitt*, 428 U.S. at 252 (citations omitted).

51. *See id.* at 261 (Blackmun, J., concurring); *id.* at 260–61 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring).

52. *Spaziano v. Florida*, 468 U.S. 447 (1984).

53. *Id.* at 451.

54. *Id.* at 451–52. The Florida Supreme Court overturned Spaziano's initial death sentence because the trial judge impermissibly looked at a confidential portion of a presentencing report, which neither party was given a copy of. *Id.* at 452 (citing *Spaziano v. State*, 393 So. 2d 1119 (Fla. 1981)). On remand, the trial court again sentenced Spaziano to death. *Id.* at 453.

55. *Id.* at 449.

Spaziano's challenge to his death sentence had three parts. First, Spaziano claimed that the rarity of judicial sentencing as compared to jury sentencing violates the Eighth and Fourteenth Amendments.⁵⁶ Next, he argued that, because a jury made a recommendation of life, the judge's override of the decision exposed him to double jeopardy, thus violating the Fifth Amendment.⁵⁷ Finally, he argued that, based on the Court's "recognition of the value of the jury's role, particularly in a capital proceeding, . . . the practice violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment."⁵⁸

The Court, in an opinion by Justice Blackmun, concluded that allowing a judge to override a jury's recommendation of death is constitutional.⁵⁹ Addressing Spaziano's lead argument—that most states with capital punishment vested sentencing discretion with juries—the Court stated that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."⁶⁰ The Court then addressed Spaziano's Sixth Amendment argument and rejected it, holding that "neither the nature of, nor the purpose behind, the death penalty requires jury sentencing"⁶¹

What is most notable about *Spaziano* is Justice Stevens's concurring and dissenting opinion, in which Justice Stevens concluded—contrary to the *Proffitt* plurality he joined—that the Constitution is only satisfied when "the decision to impose the death penalty is made by a jury rather than by a single government official."⁶²

In 1989, the Court again addressed the Florida death penalty statute in *Hildwin v. Florida*.⁶³ A judge sentenced Paul Hildwin to death following a jury's unanimous sentence recommendation.⁶⁴ Unlike Spaziano, who waged his primary attack on his death sentence using the Eighth Amendment,⁶⁵ Hildwin argued that the Florida statute violated the Sixth Amendment because it "per-

56. *See id.* at 461.

57. *Id.* at 457–58.

58. *Id.* at 458.

59. *See id.* at 465.

60. *Id.* at 464.

61. *Id.*

62. *Compare Spaziano*, 468 U.S. at 469 (Stevens, J., concurring in part and dissenting in part), *with Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

63. *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam).

64. *Id.* at 639.

65. *See Spaziano*, 447 U.S. at 457.

mit[ted] the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment.”⁶⁶

In a brief per curiam opinion, the Court approvingly cited to *Spaziano* and rejected Hildwin’s claim, stating,

If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment . . . it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.⁶⁷

In rejecting the argument that mandated a different result, the Court reasoned that aggravating circumstances did not serve as elements of the crime but as “a sentencing factor that comes into play only after the defendant has been found guilty.”⁶⁸ Unlike in *Spaziano*, there was no dissent beyond Justice Brennan’s and Justice Marshall’s.⁶⁹

In 1990, the Court decided *Walton v. Arizona*,⁷⁰ which involved a challenge to the Arizona death penalty statute then in effect. In Arizona, unlike in Florida, the jury did not have a role in sentencing once it decided guilt in a capital crime.⁷¹ The jury convicted Walton of first-degree murder, and the trial judge conducted a separate sentencing hearing as Arizona law required.⁷² Finding two aggravating circumstances and no mitigating circumstances “sufficiently substantial” for leniency, the trial court sentenced Walton to death.⁷³ The Arizona Supreme Court affirmed Walton’s conviction and death sentence.⁷⁴ In 1988—the year prior to the Arizona Supreme Court’s decision in Walton’s direct appeal—the Ninth Cir-

66. *Hildwin*, 490 U.S. at 639.

67. *Id.* at 639–40 (citing *Spaziano*, 447 U.S. at 459).

68. *Id.* at 640 (internal quotation marks omitted) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)).

69. *See id.* at 641 (Brennan, J., dissenting); *id.* (Marshall, J., dissenting). Justice Brennan and Justice Marshall dissented from every post-*Furman* death penalty case that ruled against the defendant—1,841 cases in total. Matt Ford, *How a Victory for the Death Penalty May Hasten Its End*, THE ATLANTIC (July 23, 2015), <https://bit.ly/2MQad0c> [<https://perma.cc/5VT2-Q9MJ>]. For a more in-depth discussion, see *id.*

70. *Walton v. Arizona*, 497 U.S. 639 (1990).

71. ARIZ. REV. STAT. ANN. § 13-703(b) (1989), *invalidated by* *Ring v. Arizona*, 536 U.S. 584 (2002).

72. *Walton*, 497 U.S. at 645.

73. *Id.* (citations omitted).

74. *Id.* (citing *State v. Walton*, 769 P.2d 1017 (1989)).

cuit ruled Arizona's death penalty statute unconstitutional.⁷⁵ The U.S. Supreme Court granted certiorari "to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty."⁷⁶

In his petition for certiorari, Walton presented three questions for the Court's review, one of which implicated the Sixth Amendment right to jury sentencing.⁷⁷ The basis for Walton's Sixth Amendment argument was that a jury, rather than a judge, must find every fact necessary to sentence a defendant to death.⁷⁸ In so arguing, Walton attempted to distinguish between the Florida statute the Court had repeatedly upheld and the Arizona statute by arguing that Florida involves the jury in capital sentencing, while Arizona does not.⁷⁹ Walton additionally argued that, "in Florida, aggravating factors are only sentencing 'considerations' while in Arizona they are 'elements of the offense.'"⁸⁰

Justice White's opinion announcing the Court's judgment received majority support on only one issue⁸¹—Walton's Sixth Amendment claim. In Part III of Justice White's opinion, a majority of the Court rejected Walton's claim that the Arizona statute violated his Sixth Amendment right to a jury trial.⁸² The Court rejected the distinction that Walton tried to draw between the Florida and Arizona statutes by noting that, while a Florida jury did recommend a sentence under that statute, it did not "make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding . . ."⁸³ As to Walton's "sentencing 'considerations'" argument, the Court noted

75. *Id.* at 647 (citing *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc)).

76. *Id.*

77. Brief for Petitioner at i, *Walton v. Arizona*, 497 U.S. 639 (1990) (No. 88-7351). Walton's other issues challenged the mandatory nature of a death sentence if he failed to prove the existence of a mitigating circumstance, placing the burden on the defendant to prove mitigating circumstances, and whether one of the aggravating circumstances proven against him was unconstitutional. *See id.* at 30, 39.

78. *See Walton*, 497 U.S. at 647.

79. *See id.* at 648

80. *Id.*

81. Justice Scalia concurred in full in Part III and concurred in the judgment, reserving objections to the parts of the opinion that discussed the Eighth Amendment and registering his objections to the *Lockett* line of cases, thus denying the Court a majority. *See id.* at 656 (Scalia, J., concurring in part and concurring in judgment) (opining that the Court's cases since *Furman* were antithetical to the underpinnings of *Furman*). Thus, Justice White's opinion only represents a plurality of the Court insofar as it relates to the Eighth Amendment.

82. *See id.* at 649 (majority opinion). The plurality also rejected Walton's Eighth Amendment claims. *See id.* at 655-56 (plurality opinion).

83. *Id.* at 648 (majority opinion).

that, in a previous case, they had held that aggravating circumstances “are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.”⁸⁴

Given later developments in Sixth Amendment capital jurisprudence,⁸⁵ Justice Stevens’s solitary dissent in *Walton* is noteworthy.⁸⁶ Departing from the broad approach he espoused in *Spaziano*,⁸⁷ Justice Stevens focused instead on a narrower issue—that, in his opinion, the aggravating circumstances the judge found in Arizona’s statute were elements of a capital crime because, “in their absence, that sentence is unavailable under §§ 13-1105 and 13-703.”⁸⁸ To support his argument, Justice Stevens asserted that the original understanding of the Sixth Amendment required juries to find the existence of an aggravating circumstance.⁸⁹ Moreover, he argued that, at the time the Court incorporated the Sixth Amendment in *Duncan v. Louisiana*,⁹⁰ Walton would have succeeded in having his death sentence overturned.⁹¹ Justice Stevens further lamented “the gradual ‘increase and spread’” of the Court’s precedents in favor of judges “to the utter disuse of juries in questions of the most momentous concern.”⁹² Despite writing a solitary dissenting opinion, Justice Stevens’s views on the jury’s role in both capital and non-capital cases would be binding precedent only 12 years later.⁹³

84. *Id.* (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)).

85. *See infra* Parts II.A.3.c & II.B.

86. *See Walton*, 497 U.S. at 708 (Stevens, J., dissenting). Additionally, Justice Brennan dissented, in an opinion joined by Justice Marshall, restating his belief that capital punishment is per se unconstitutional. *See id.* at 674–75 (Brennan, J., dissenting); *see also* Matt Ford, *supra* note 69. Justice Blackmun also dissented, joined by Justice Brennan, Justice Marshall, and Justice Stevens. *Id.* at 677 (Blackmun, J., dissenting).

87. *See Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

88. *Walton*, 497 U.S. at 709 n.1 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986); and then citing *Cabana v. Bullock*, 474 U.S. 376, 385 (1986)).

89. *See id.* at 710–11 (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10–11 (1989)).

90. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

91. *Walton*, 497 U.S. at 711 (Stevens, J., dissenting).

92. *Id.* at 714 (internal quotation marks omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343–44 (1769)).

93. *See infra* Part II.A.3.

b. *Jones and Apprendi Cast Doubt on Walton*

*Jones v. United States*⁹⁴ appeared on its face as a relatively banal case interpreting a federal carjacking statute⁹⁵ rather than the meaning of the Sixth Amendment as it relates to judges and juries. The question presented to the Court was whether the federal carjacking statute defined three different crimes that must be presented in an indictment and proved to a jury or a single crime with three different maximum penalties “exempt from the requirements of charge and jury verdict.”⁹⁶ The petitioner, Nathaniel Jones, was charged under a general indictment that did not require the jury to prove the occurrence of bodily injury, a fact that, under the statute, would have increased the maximum sentence from 15 to 25 years.⁹⁷ Jones was informed at his arraignment that he faced a maximum of 15 years in prison.⁹⁸ At trial, the jury instructions did not require the jury to find that serious bodily injury occurred, and the jury convicted Jones.⁹⁹ The court imposed a 25-year sentence because it found by a preponderance of the evidence that the victim suffered serious bodily injury.¹⁰⁰ The Ninth Circuit affirmed Jones’s sentence.¹⁰¹

In a five to four opinion authored by Justice Souter, the Court analyzed the statute’s text and legislative history and concluded that, under the fairest reading of the statute, bodily injury was an element of the crime rather than a sentencing factor.¹⁰² While acknowledging that there was merit to the sentencing factor argument, the majority refused to construe the law in such a way, instead resolving the question under the principle of constitutional avoidance, stating: “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other . . . such questions are avoided, our duty is to adopt the latter.”¹⁰³

94. *Jones v. United States*, 526 U.S. 227 (1999).

95. 18 U.S.C. § 2119 (Supp. V 1993).

96. *Jones*, 526 U.S. at 229.

97. *See id.* at 230.

98. *Id.* at 230–31.

99. *Id.* at 231.

100. *Id.*

101. *Id.* n.2 (citing *United States v. Oliver*, Nos. 96-10176, 96-10177, 96-1017, 116 F.3d 1487, 1997 WL 355922 (9th Cir. June 27, 1997) (unpublished table opinion)).

102. *See id.* at 232–39.

103. *Id.* at 239 (cleaned up) (quoting *United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). For more on constitutional avoidance, see *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing seven rules the Court uses to avoid constitutional questions).

The dissent—authored by Justice Kennedy and joined by Chief Justice Rehnquist, Justice O’Connor, and JUSTICE BREYER¹⁰⁴—chided the majority for its approach as a matter of statutory construction and argued that the majority’s approach was an “attempt to create instability[.]” which was “neither a proper use of the rule of constitutional doubt nor a persuasive reading of our precedents.”¹⁰⁵ The dissent further argued that the majority provided little guidance as to what constitutes an “element” of a crime.¹⁰⁶ The majority responded in dicta by proposing a constitutional test for determining whether something is an “element.” The majority’s test was:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.¹⁰⁷

The majority conceded that the interpretation was “suggest[ed] rather than establish[ed]” by the Court’s precedents.¹⁰⁸ The dissenters predicted the Court’s new test would disturb the Court’s precedent regarding the right to a jury trial in a capital case.¹⁰⁹ The dissent further argued that “*Walton* would appear to have been a better candidate for the Court’s new approach than is the instant case.”¹¹⁰ The majority disputed the assertion that *Jones* vitiated the Court’s recent Sixth Amendment capital jurisprudence.¹¹¹ Only one year later, however, the constitutional doubt the Court alluded to in *Jones* would become constitutional certainty.

In *Apprendi v. New Jersey*,¹¹² the Court considered whether “the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by

104. See *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting).

105. *Id.* at 264.

106. *Id.* at 269

107. *Id.* at 243 n.6 (majority opinion).

108. *Id.*

109. See *id.* at 272 (Kennedy, J., dissenting) (“If it is constitutionally impermissible to allow a judge’s finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge’s finding may increase the maximum punishment for murder from imprisonment to death.”).

110. *Id.*

111. See *id.* at 251 (majority opinion) (“[In *Walton*], the Court described . . . aggravating circumstances . . . as ‘standards to guide the . . . choice between the alternative verdicts of death and life imprisonment.’” (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990))).

112. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

a jury on the basis of proof beyond a reasonable doubt.”¹¹³ The statute at issue in *Apprendi* was a New Jersey “hate crime” law that included enhanced penalties “if the trial judge f[ound], by a preponderance of the evidence, that ‘the defendant in committing the crime acted with a purpose to intimidate an individual or group . . . because of race’”¹¹⁴ After Charles Apprendi pleaded guilty to charges that carried a sentencing range of five to ten years, the prosecution requested that the hate crime statute apply because the offense was motivated by racial animus, and the judge agreed, thereby doubling the minimum and maximum sentences.¹¹⁵ The New Jersey Supreme Court affirmed.¹¹⁶

The majority opinion in *Apprendi*, written by Justice Stevens and joined by the four other justices from the *Jones* majority, invalidated Apprendi’s sentence.¹¹⁷ The rule the majority applied to decide *Apprendi* was similar to the rule suggested in dicta in *Jones*, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”¹¹⁸ According to the majority, that a part of a statute is labeled an element was irrelevant.¹¹⁹ Instead, “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”¹²⁰ The majority further claimed that their decision had no impact on the Court’s previous decision in *Walton*; a first degree murder conviction exposed a defendant to a death sentence.¹²¹ Therefore, the judge could not increase the maximum penalty in the sentencing hearing.¹²²

Justice O’Connor’s dissent¹²³—joined by the other *Jones* dissenters—mainly concerned itself with the Court’s creation of a new bright-line rule and departure from its previous deference to legis-

113. *Id.* at 469.

114. *Id.* at 468–69 (quoting N.J. STAT. ANN. § 2C44-3(e) (West Supp. 2000)).

115. *See id.* at 470–71.

116. *Id.* at 472 (citing *State v. Apprendi*, 731 A.2d 485 (N.J. 1999)).

117. *See id.* at 497.

118. *Apprendi*, 530 U.S. at 490.

119. *See id.* at 494

120. *Id.*

121. *Id.* at 496–97.

122. *Id.* at 497 (citation omitted).

123. *See id.* at 523 (O’Connor, J., dissenting). JUSTICE BREYER also authored a dissent, joined by Chief Justice Rehnquist, where he argued—in typically *Breyerian* fashion—that the new rule, while laudable in theory, was unworkable in practice. *See id.* at 555 (BREYER, J., dissenting).

latures.¹²⁴ Furthermore, Justice O'Connor lamented that the majority "marshalls virtually no authority to support its extraordinary rule."¹²⁵ Justice O'Connor additionally focused on the practical effects of the new rule, arguing that it could lead to the invalidation of the "[Federal] Sentencing Guidelines."¹²⁶ Justice O'Connor responded to the majority's attempt to distinguish *Walton* from *Apprendi* by noting that, without a judge's finding an aggravating circumstance, a defendant cannot receive a death sentence and, therefore, the maximum sentence a person could receive without a finding of an aggravating circumstance was life imprisonment.¹²⁷ Nearly two years later, the *Jones-Apprendi* dissenters would receive their answer as to the applicability of the new rule to capital sentencing.

c. The Supreme Court Puts a *Ring* on It

Barely 12 years after it decided *Walton* and apparently settled the issue, the Court heard *Ring v. Arizona*.¹²⁸ *Ring* concerned Timothy Ring, who was sentenced to death pursuant to a procedure substantially identical to the one that saw Jeffrey Walton sentenced to death.¹²⁹ Despite reservations as to the statute's continued applicability in light of *Apprendi*, the Arizona Supreme Court upheld Ring's conviction and death sentence because it was bound under the Supremacy Clause to apply *Walton*.¹³⁰ At the U.S. Supreme Court, Ring challenged the procedure under which he was sentenced, but he did so in a "tightly delineated" fashion.¹³¹ Instead of launching a facial attack on judicial sentencing, like the petitioners in the prior cases, Ring's claim was limited to arguing "that the

124. See *id.* at 524–25 (O'Connor, J., dissenting).

125. *Id.* at 525.

126. *Id.* at 550. JUSTICE BREYER, who joined Justice O'Connor's opinion, was a Commissioner of the United States Sentencing Commission at the time it adopted the Federal Sentencing Guidelines, and he has written extensively on the topic. See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

127. *Apprendi*, 530 U.S. at 540–41 (O'Connor, J., dissenting). JUSTICE THOMAS acknowledged Justice O'Connor was correct. *Id.* at 522 (THOMAS, J., concurring). But whether to overturn *Walton* was "a question for another day." *Id.* at 523.

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

129. Compare ARIZ. REV. STAT. ANN. § 13-703 (2001), with ARIZ. REV. STAT. ANN. § 13-703 (1989).

130. See *Ring*, 536 U.S. at 596 (citing *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)).

131. *Id.* at 597 n.4. The Court also restated the conclusion from *Proffitt* that "[i]t has never been suggested that jury sentencing is constitutionally required." *Id.* at 597–98 n.4. (brackets omitted) (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

Sixth Amendment required jury findings on the aggravating circumstances asserted against him.”¹³² Arizona’s principal argument was that under the Arizona statute, a jury conviction for first-degree murder exposed the defendant to life in prison or death,¹³³ and, therefore, Ring was sentenced “within the range of punishment authorized by the jury verdict.”¹³⁴

Predictably, the Court¹³⁵ held that “*Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both.”¹³⁶ The majority justified its deviation from the dicta in its prior cases,¹³⁷ which disputed that the rules announced in those cases rendered *Walton* obsolete by noting that the Arizona Supreme Court found that the *Apprendi* majority interpreted Arizona state law incorrectly.¹³⁸ Responding to Arizona’s argument about the jury’s verdict authorizing the sentence of death, the majority restated that “the relevant inquiry” under *Apprendi* is one of effect rather than form and that a judge’s finding of an aggravating circumstance under the Arizona statute increased the maximum sentence for first-degree murder.¹³⁹ Addressing Arizona’s secondary argument—based on *Walton*—that aggravating circumstances were sentencing factors rather than elements of the offense, the majority noted that “*Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs . . . 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.”¹⁴⁰

The true intrigue in *Ring* as to the breadth of its holding rests in the dueling concurrences by Justice Scalia¹⁴¹ (joined by JUSTICE

132. *Id.* at 597 n.4.

133. ARIZ. REV. STAT. ANN. § 13-1105(c) (2001).

134. *Ring*, 536 U.S. at 604. Arizona made a secondary argument—based on the Court’s distinction in *Walton*—that the aggravating circumstances in the Arizona statute were sentencing factors rather than elements of the offense. *Id.* at 604–05.

135. Justice Kennedy, who voted in the minority in *Apprendi* and wrote the principal dissent in *Jones*, joined the majority opinion in full while expressing his belief that *Apprendi* “was wrongly decided” *Id.* at 613 (Kennedy, J., concurring).

136. *Id.* at 609.

137. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 251 (1999).

138. See *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

139. *Id.* at 603–04 (quoting *Apprendi*, 530 U.S. at 494).

140. *Id.* at 605–06 (citing *Apprendi*, 530 U.S. at 492).

141. See *id.* at 610–13 (Scalia, J., concurring). In this opinion, Justice Scalia acknowledged that joining the majority opinion was “difficult” because Arizona’s statute was created in response to a “line of decisions[, starting with *Furman*, that] had no proper foundation in the Constitution.” *Id.* at 610 (citing *Walton v. Ari-*

THOMAS) and JUSTICE BREYER's (concurring alone and only in the judgment).¹⁴² In his opinion, JUSTICE BREYER stated both his continued disapproval of *Apprendi* and, for the first time, his belief "that jury sentencing in capital cases is mandated by the Eighth Amendment."¹⁴³ In supporting his conclusion, he cited Justice Stevens's opinion in *Spaziano*, which noted that juries are "more attuned to the community's moral sensibility" because they "reflect more accurately the composition and experiences of the community as a whole"¹⁴⁴ Justice Scalia responded to JUSTICE BREYER's assertion that the Eighth Amendment requires jury sentencing in death penalty cases by stating:

[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.¹⁴⁵

Justice Kennedy's concurrence, while continuing to register objections to *Apprendi*, accepted the reality that "no principled reading of *Apprendi* would allow *Walton* . . . to stand."¹⁴⁶ In a brief dissent, Justice O'Connor lamented that "[b]y expanding on *Apprendi*, the Court today exacerbates the harm done in that case. . . . I would overrule *Apprendi* rather than *Walton*."¹⁴⁷

zona, 497 U.S. 639, 659–60 (Scalia, J., concurring in part and concurring in judgment)).

142. *See id.* at 613–19 (BREYER, J., concurring in judgment).

143. *Id.* at 614.

144. *Id.* at 615 (internal quotation marks omitted) (quoting *Spaziano v. Florida*, 468 U.S. 447, 481, 486 (1984) (Stevens, J., concurring in part and dissenting in part)).

145. *Id.* at 612–13 (Scalia, J., concurring). Justice Scalia's response to JUSTICE BREYER's willingness to join a result dependent on *Apprendi* while reserving objections to the result of the opinion was vintage Scalia. *See id.* at 313 ("There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, JUSTICE BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.").

146. *Id.* (Kennedy, J., concurring). Justice Kennedy further cautioned the court against "extend[ing]" *Apprendi* "without caution, for the States' settled expectations deserve our respect." *Id.*

147. *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting)

B. Ring's Aftermath

1. Legislative Change Following Ring

At the time the Court decided *Ring*, five states reserved capital sentencing to judges alone.¹⁴⁸ Four others had “hybrid” systems, which reserved a role for the jury but allowed the judge to make the ultimate sentencing determination.¹⁴⁹ In response to *Ring*, each state with judge-only sentencing amended its statute, with three states opting in favor of jury sentencing¹⁵⁰ and Nebraska requiring that the jury find aggravating circumstances but then allowing a judge or panel of three judges to sentence the defendant.¹⁵¹ Of the hybrid states, two altered their schemes post-*Ring*, with Indiana requiring a unanimous finding of aggravating circumstances by a jury to sentence a defendant to death¹⁵² and Delaware retaining the advisory jury but requiring said jury to find at least one aggravating circumstance beyond a reasonable doubt before a judge could sentence the defendant.¹⁵³ Three states, Alabama, Florida, and Montana opted against changing their statutes, despite Justice O'Connor's identifying them as vulnerable in her *Ring* dissent.¹⁵⁴

2. Court Decisions Following Ring

Following *Ring*, one major question relevant to this Comment¹⁵⁵ remained regarding the scope of the Court's decision: did *Ring* create a constitutional right to jury sentencing in death penalty cases?¹⁵⁶ The Supreme Court left this issue mostly to state courts.

148. *Id.* at 608 n.6. (majority opinion) (acknowledging the Arizona statute and citing statutes from Colorado, Idaho, Montana, and Nebraska).

149. *Id.* (citing statutes from Alabama, Delaware, Florida, and Indiana).

150. See Act of Aug. 1, 2002, ch. 1, §§ 1–3, 2002 Ariz. Sess. Laws 2155, 2155–60 (codified as amended at ARIZ. REV. STAT. ANN. § 13-752); Act of July 12, 2002, ch. 1, § 1, 2002 Colo. Sess. Laws 1 (codified as amended at COLO. REV. STAT. § 18-1.3-1201 (2018)); Act of Feb. 13, 2003, ch. 19, § 1, 2003 Idaho Sess. Laws 71, 71 (codified as amended at IDAHO CODE 19-2515 (2018)).

151. See Act of Nov. 22, 2002, No. 1, §§ 11–14, 2002 Neb. Laws 1, 6–9 (codified as amended at NEB. REV. STAT. § 29-2520 to -2522 (Cum. Supp. 2018)).

152. See Act of May 5, 2003, No. 147, § 1, 2003 Ind. Acts 1115, 1120 (codified as amended at IND. CODE § 35-50-2-9(l) (2019)).

153. See Act of July 22, 2002, §§ 1–5, 73 Del. Laws ch. 423 (2002), *invalidated* by *Rauf v. State*, 145 A.3d 430 (Del. 2016).

154. See *Ring v. Arizona*, 536 U.S. 584, 621 (O'Connor, J., dissenting).

155. The other major question was whether *Ring* applied retroactively to cases in which convictions were final. A conviction is final when it has been affirmed on direct review and certiorari is denied or the time for seeking certiorari has lapsed. *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965). As to whether *Ring* was retroactively applicable, the Court answered in the negative. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

156. Cf. *Ring*, 536 U.S. at 613 (Scalia, J., concurring) (noting the possibility of confusion as a result of JUSTICE BREYER's opinion).

Among the states that retained judicial sentencing, the first to address *Ring*'s scope was Florida in *Bottoson v. Moore*.¹⁵⁷ In *Bottoson*, the Florida Supreme Court concluded that *Ring* did not disturb the Court's prior judgments in *Proffitt*, *Spaziano*, and *Hildwin*, each of which upheld the Florida statute.¹⁵⁸ Because the Supreme Court did not instruct the Florida Supreme Court to reconsider the law in light of *Ring*, the court determined that the previous decisions were controlling.¹⁵⁹ The Alabama,¹⁶⁰ Delaware,¹⁶¹ and Nebraska¹⁶² Supreme Courts followed suit. Uniquely among *Ring*-affected states, the Supreme Court of Montana has never addressed the issue of whether jury sentencing is required.¹⁶³ Unsettled questions remained, such as the status of the Florida statute, which did not require the jury to explicitly find aggravating circumstances,¹⁶⁴ and it took more than 13 years of litigation for the U.S. Supreme Court to address the statute.

3. Hurst Resolves Questions and Creates More

a. A Broad Question and a Narrow Holding

In October 2015, the Supreme Court heard arguments in *Hurst v. Florida*.¹⁶⁵ A jury convicted Timothy Hurst of murder, and a judge sentenced him to death following a trial in which the jury recommended death by a bare majority.¹⁶⁶ However, the jury “d[id] not make specific factual findings” regarding “the existence of . . . aggravating circumstances”¹⁶⁷ Over dissent, the Florida

157. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (per curiam).

158. *Id.* at 695 n.4 (citing Supreme Court cases upholding the Florida capital sentencing statute).

159. *Id.* at 695 (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1984))).

160. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002).

161. *See Brice v. State*, 815 A.2d 314 (Del. 2003).

162. *See State v. Gales*, 658 N.W.2d 604 (Neb. 2003).

163. It has, however, ruled that *Ring* is not retroactive. *Gratzer v. Mahoney*, 150 P.3d 343, 348 (Mont. 2006). Further, no inmate has been sentenced to death in Montana since 1996. *See Montana Prosecutors Drop Death Penalty Against Mentally Ill Defendant*, DEATH PENALTY INFO. CTR. (July 26, 2018), <https://bit.ly/2GA6yUK> [<https://perma.cc/64W4-TR9Q>]. Thus, a challenge to judicial sentencing based on *Ring* has not been necessary.

164. *See* FLA. STAT. ANN. § 921.141 (2001).

165. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

166. *See id.* at 620.

167. *Id.* at 622 (citation omitted) (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

Supreme Court upheld Hurst's death sentence.¹⁶⁸ Unlike *Ring*, in which the Court addressed a "tightly delineated" Sixth Amendment claim,¹⁶⁹ *Hurst* involved a direct challenge to the constitutionality of capital sentencing by judges on Eighth Amendment grounds in addition to bringing a challenge under the Sixth Amendment and *Ring*.¹⁷⁰ Florida, for its part, argued that the statute complied with *Ring* and, even if it did not, stare decisis should control based on the Court's earlier decisions in *Hildwin* and *Spaziano*.¹⁷¹

The Court held that, "[i]n light of *Ring*," Hurst's sentence violated the Sixth Amendment.¹⁷² Because the Florida Supreme Court had relied on the fact that the Court did not overrule its prior decisions upholding the death penalty,¹⁷³ the Court "expressly overrule[d] *Spaziano* and *Hildwin* in relevant part."¹⁷⁴ The Court then noted that *Walton* was a "mere application" of *Hildwin* to Arizona's capital sentencing law.¹⁷⁵ The Court did not address Hurst's Eighth Amendment claims.¹⁷⁶

b. Disagreement Post-*Hurst*

In *Hurst*'s immediate aftermath, Florida amended its capital sentencing statute to require juries to unanimously find aggravating

168. See *id.* at 620–21 (citing *Hurst v. State*, 147 So. 3d 435, 450 (Fla. 2014) (Pariente, J., concurring in part and dissenting in part)).

169. *Ring v. Arizona*, 536 U.S. 584, 594 n.4. (2002).

170. Brief for Petitioner at 26–31, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505).

171. *Hurst*, 136 S. Ct. at 622–23 (citing *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); and then citing *Spaziano v. Florida*, 486 U.S. 447 (1984)).

172. *Id.* at 622.

173. See *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (per curiam).

174. *Hurst*, 136 S.Ct. at 623 (emphasis added). The Court further stated that *Spaziano* and *Hildwin* were only "overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624 (emphasis added). This Comment submits that the "relevant part" and "to the extent" language placed a limit on the breadth of *Hurst*'s holding. See *State v. Wood*, 580 S.W.3d 566, 584 (Mo. 2019); *infra* Parts III.A.1 & III.A.2.

175. *Hurst*, 136 S. Ct. at 623 (citing *Walton v. Arizona*, 497 U.S. 639, 648 (1990)).

176. JUSTICE BREYER concurred in the judgment, restating his "view that 'the Eighth Amendment requires a jury, not a judge, make the decision to sentence a defendant to death.'" *Id.* at 624 (BREYER, J., concurring in judgment) (quoting *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (BREYER, J., concurring in judgment)). JUSTICE ALITO authored a lone dissent. See *id.* at 624–27 (ALITO, J., dissenting) (arguing that the Florida statute complied with *Ring* and that the Court erred in overruling prior precedents).

circumstances.¹⁷⁷ Under the amended statute, following a jury's unanimous determination of aggravating circumstances, the trial court could sentence the defendant to death based on the recommendation of ten jurors.¹⁷⁸ However, on remand, a divided Florida Supreme Court interpreted the Supreme Court's decision in *Hurst* along with the Eighth Amendment and the Florida Constitution to require a unanimous jury verdict as to the weighing requirement and the existence of sufficient aggravating circumstances.¹⁷⁹ In 2017, Florida amended its statute to comply with *Hurst II*'s mandate.¹⁸⁰

In the period between the passage of the new Florida statute and the Florida Supreme Court's decision in *Hurst II*—in the backdrop of a narrow failure to abolish the death penalty in Delaware¹⁸¹—the Delaware Supreme Court addressed the implications of *Hurst* as to its own sentencing scheme. In *Rauf v. State*,¹⁸² the Delaware Supreme Court held that the Sixth Amendment requires a jury alone to find that aggravating circumstances exist and that they outweigh mitigating circumstances.¹⁸³ The court's per curiam opinion spans less than three pages and provides scant reasoning for its decision.¹⁸⁴ Although *Rauf* was a better vehicle for certiorari

177. See Act of Mar. 7, 2016, ch. 2016-13, § 3, 2016 Fla. Laws 1, 4, *invalidated* by *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*) *cert denied*, 137 S. Ct. 2161, 2161 (2017).

178. Act of Mar. 7, 2016, ch. 2016-13, § 3, 2016 Fla. Laws 1, 4.

179. See *Hurst II*, 202 So. 3d at 44.

180. See Act of Mar. 13, 2017, ch. 2017-1, § 1, 2017 Fla. Laws 1, 1 (Codified at FLA. STAT. § 921.141(2)(c) (2019)). Later, the Florida Supreme Court held that unanimous jury recommendations of death under the scheme ruled unconstitutional in *Hurst* constituted harmless error and that *Hurst* was not retroactive. *Asay v. State*, 210 So. 3d 1, 11–12 (Fla. 2016) (addressing retroactivity); *Davis v. State*, 207 So. 3d 142, 174–75 (Fla. 2016) (addressing harmless error).

181. See Jessica Masulli Reyes, *Bill to Abolish Delaware Death Penalty Fails in House*, NEWS J. (Jan. 29, 2016, 12:46 AM), <https://bit.ly/2TqL4LW> [<https://perma.cc/B4UC-CEKE>].

182. *Rauf v. State* 145 A.3d 430 (Del. 2016) (per curiam).

183. *Id.* at 434.

184. There are, however two concurring opinions that received the support of majority of the court. See *id.* at 434–82 (Strine, C.J., concurring); *id.* at 482–87 (Holland, J., concurring).

than *Hurst II*,¹⁸⁵ the Delaware Attorney General did not appeal the ruling.¹⁸⁶

In *Ex parte Bohannon*¹⁸⁷ the Alabama Supreme Court reached the opposite conclusion from the Delaware and Florida courts in its application of *Hurst*. It held that, “because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama’s capital-sentencing scheme does not violate the Sixth Amendment.”¹⁸⁸ Despite the ruling in *Bohannon*, Alabama no longer allows a judge to override a jury’s recommendation.¹⁸⁹

In *State v. Jenkins*,¹⁹⁰ the Nebraska Supreme Court applied *Hurst* for the first time on the merits. The court expressed doubts as to whether Jenkins had standing to challenge Nebraska’s statutes because he had “waived a jury and expressly stated he would ‘rather have the judges’ for sentencing”¹⁹¹ The court nonetheless rejected Jenkins’s claim and reaffirmed its previous decisions holding that the Sixth Amendment does not require a jury to make the weighing decision in capital cases or issue the ultimate sentence.¹⁹²

185. The Delaware Supreme Court decided *Rauf* solely on Sixth Amendment grounds. *See id.* at 434. By contrast, the Florida Supreme Court decided *Hurst II* on partly independent state grounds. *See Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). The Supreme Court usually goes to great lengths to avoid cases decided on independent state grounds, which Justice Scalia has referred to as “none of [the Court’s] business” *Kansas v. Marsh*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring).

186. *See* Jessica Masulli Reyes & Matthew Albright, *AG Won’t Appeal Delaware Death Penalty Ruling*, NEWS J. (Aug. 16, 2016, 1:15 PM), <https://bit.ly/2D1qbjs> [<https://perma.cc/2LBD-2NW5>]. The Delaware Supreme Court later held that *Hurst* applied retroactively. *See Powell v. Delaware*, 153 A.3d 69, 76 (Del. 2016).

187. *Ex parte Bohannon*, 222 So. 3d 525 (Ala. 2016).

188. *Id.* at 532.

189. *See* ALA. CODE § 13A-5-46(f) (2017) (requiring ten jurors to recommend death in order to impose a death sentence).

190. *State v. Jenkins*, 931 N.W.2d 851 (Neb. 2019).

191. It is worth noting that three capital defendants in Nebraska post-*Hurst* have waived their right to a jury determination of aggravating circumstances. *See id.* at 880; Brief for Appellant at 4, *State v. Schroeder*, No. 18-582, (Neb. May 17, 2019), 2019 WL 2165872; Martha Stoddard, *It’s Now up to a Three-Judge Panel to Decide Whether Aubrey Trail Gets the Death Penalty*, OMAHA WORLD-HERALD (July 11, 2019), <https://bit.ly/2m7iZgG> [<https://perma.cc/977M-2H6T>].

192. *Jenkins*, 931 N.W.2d at 880 (citing *State v. Lotter*, 917 N.W.2d 850 (Neb. 2018), *cert denied*, 139 S. Ct. 2716 (2019); and then citing *State v. Gales*, 658 N.W.2d 604 (2003)).

III. ANALYSIS

A. *The Sixth Amendment Does Not Require a Jury to Sentence a Capital Defendant to Death*

1. *Hurst Did Not Completely Overturn Spaziano and Failed to Address Proffitt*

The Delaware Supreme Court engaged in a strained reading of *Hurst* in holding that the Court's decision requires jury sentencing.¹⁹³ To accept the Delaware Supreme Court's result in light of that court's prior precedent¹⁹⁴ requires a conclusion that *Hurst* went further than simply applying the Court's decision in *Ring* to the Florida death penalty statute. The *Hurst* Court never represented its opinion as anything other than an application of *Ring* to Florida's capital sentencing statute.¹⁹⁵ Indeed, unlike Timothy Ring, who framed his argument to the Court to avoid the constitutional question of jury sentencing,¹⁹⁶ the petitioner in *Hurst* explicitly asked the Court to consider the constitutionality of jury sentencing in the context of the Eighth Amendment,¹⁹⁷ but the Court refused. Further, the jury sentencing question that the petitioner presented to the Court was premised on Eighth Amendment grounds,¹⁹⁸ but the Delaware Supreme Court decided *Rauf* purely on the Sixth Amendment.¹⁹⁹ Most state²⁰⁰ and federal²⁰¹ courts that have considered the issue have disagreed with the Delaware

193. Cf. Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1, 7 n.37. Then-Professor (now-Third Circuit Judge) Bibas suggested that states that interpreted *Ring* to require a jury to weigh life or death “have overread *Ring* as reserving for juries the finding and weighing of mitigators, even though *Ring*'s rationale is limited to the initial aggravator that raises the maximum to death.” *Id.* The same reasoning holds true post-*Hurst*. Additionally, to avoid going down the rabbit hole of Florida Constitutional Law, this Comment treats the Florida Supreme Court's decision in *Hurst II* differently than it treats the Delaware Supreme Court's decision in *Rauf* because *Rauf* was decided on purely federal constitutional grounds. As such, the soundness—or lack thereof—of *Hurst II* is immaterial to this Comment.

194. See *State v. Brice*, 815 A.2d 314, 322 (Del. 2003) (finding that *Ring* did not require jury sentencing).

195. See *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

196. See *Ring v. Arizona*, 536 U.S. 584, 594 n.4. (2002) (referring to *Ring*'s claim as “tightly delineated”).

197. See Brief for Petitioner, *Hurst v. Florida*, *supra* note 170, at 26–31.

198. See *id.*

199. See *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016).

200. *State v. Lotter*, 917 N.W.2d 850, 863 & n.60 (Neb. 2018) (citing cases from Alabama, Indiana, Mississippi, Nevada, and Ohio), *cert denied*, 139 S. Ct. 2716 (2019).

201. *Id.* at 863 & n.59 (citing federal cases).

Supreme Court, concluding instead that *Hurst* does not require a jury to weigh aggravating and mitigating factors.

At best, the Supreme Court's decision in *Hurst* is ambiguous. One of the dissenters in *Rauf*—who would have held that *Hurst* did not require jury sentencing—noted the *Hurst* Court's vague language as to the facts a jury must find and suggested that said vagueness may have been intentional.²⁰² The other dissenting opinion in *Rauf* noted that *Hurst* did not expressly overrule *Spaziano* in its entirety and did not even address *Proffitt*.²⁰³ If the majority opinion in *Hurst* requires jury sentencing, it is curious that JUSTICE BREYER concurred only in the judgment and found it necessary to write an opinion expressing his belief that the Constitution requires jury sentencing.²⁰⁴ Both dissents in *Rauf* took note of the existence of JUSTICE BREYER's opinion,²⁰⁵ and one suggested that, if the majority's intention was to create a right to jury sentencing, Justice Scalia would not have joined the opinion.²⁰⁶ The combination of JUSTICE BREYER's opinion and the fact that *Proffitt* is not cited a single time in *Hurst*—let alone overruled—is fatal to the suggestion that a jury must serve as sentencer in capital trials.

2. *Hurst Addressed Death Eligibility Rather than Death Selection*

In *Tuilaepa v. California*,²⁰⁷ the Supreme Court identified two separate aspects of capital sentencing, “the eligibility decision and the selection decision.”²⁰⁸ “To render a defendant eligible for the death penalty” for murder, “the trier . . . must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.”²⁰⁹ The death se-

202. See *State v. Rauf*, 145 A.3d 430, 507 (Del. 2016) (Vaughn, J., dissenting) (citing *Ex parte State*, 223 So. 3d 954, 973 (Ala. Crim. App. 2016) (Joiner, J., concurring)). Justice Vaughn reasoned that an earlier dissent from denial of certiorari by JUSTICE SOTOMAYOR, where she suggested that a jury must find that aggravating circumstances outweigh mitigating factors, supported this conclusion. See *id.* (citing *Woodward v. Alabama*, 571 U.S. 1045, 1052–54 (SOTOMAYOR, J., dissenting)).

203. See *id.* at 497–98 (Valihura, J., concurring in part and dissenting in part) (citing *Hurst*, 136 S. Ct. at 623–24) (noting that the Supreme Court only overturned *Spaziano* in “relevant part”).

204. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (BREYER, J., concurring in judgment).

205. See *Rauf*, 145 A.3d at 498 (Valihura, J., concurring in part and dissenting in part); *id.* at 503 (Vaughn, J., dissenting).

206. See *id.* at 503 (Vaughn, J., dissenting).

207. *Tuilaepa v. California*, 512 U.S. 967 (1994).

208. *Id.* at 971.

209. *Id.* at 971–72 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244–46 (1988); *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

lection decision—the ultimate sentencing decision—allows the “sentencer” to make an “*individualized* determination on the basis of the character of the individual and the circumstances of the crime.”²¹⁰ The Fourth Circuit has stated that the selection decision is “not a factual determination, but a complex moral judgment.”²¹¹

The Supreme Court’s decisions regarding the presentation and weight of mitigating evidence underscore how the selection decision is different from the eligibility decision. *Lockett v. Ohio*²¹² and *Walton v. Arizona* are two prime examples of this difference. In *Lockett*, the Court held that Ohio’s post-*Furman* death penalty statute²¹³ unconstitutionally limited the presentation of relevant mitigating evidence.²¹⁴ The statute in question provided three grounds for mitigating a death sentence.²¹⁵ The Supreme Court invalidated the statute, holding that the Eighth Amendment requires that the sentencer consider “*as a mitigating factor*[] any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”²¹⁶ In *Walton*, the Court upheld an Arizona law that required defendants to prove by a preponderance of the evidence that mitigating circumstances existed.²¹⁷ If the existence of a mitigating factor were the type of factual determination that *Ring* and *Hurst* addressed, it would face serious constitutional questions as a presumption against the defendant.²¹⁸ The *Walton* Court rejected that the existence of mitigating circumstances was this type of factual determination.²¹⁹

210. *Tuilaepa*, 512 U.S. at 972 (quoting *Zant*, 462 U.S. at 479).

211. *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013) (citing *United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008); then citing *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007); then citing *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir. 2007); and then citing *United States v. Fields*, 483 F.3d 313, 345–46 (5th Cir. 2007)); *see also* *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc).

212. *Lockett v. Ohio*, 438 U.S. 586 (1978).

213. OHIO REV. CODE ANN. § 2929.04(B) (1975).

214. *Lockett*, 438 U.S. at 608.

215. OHIO REV. CODE ANN. § 2929.04(B)(1)–(3) (1975).

216. *Lockett*, 438 U.S. at 604. The Court suggested that there may be cases in which consideration of mitigation is not required, such as a murder committed by a person serving life in prison. *See id.* n.11. However, in a later case, the Court foreclosed that possibility. *See Sumner v. Shuman*, 483 U.S. 66, 85 (1987).

217. *See Walton v. Arizona* 497 U.S. 639, 649 (plurality). In *Kansas v. Marsh*, 548 U.S. 163 (2006), the Court ruled that the case was controlled by the plurality in *Walton*. *Marsh*, 548 U.S. at 169.

218. *See generally* *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (striking down a state statute that required the defendant to prove a negated element defense for murder by a preponderance of the evidence).

219. *See Walton*, 497 U.S. at 650.

The Court's decisions in *Hurst* and *Ring* concern proving aggravating facts to a jury to make a defendant eligible for the death penalty, but they make scant mention of selection. A finding that aggravating circumstances outweigh mitigating circumstances is neither constitutionally required,²²⁰ nor is it a factual determination.²²¹ The concession of *Hurst*'s counsel at oral argument that the case primarily involved death selection²²² only bolsters the argument that statutes providing for a judge (or panel of judges) to make the selection rather than eligibility decision complies with the Constitution.

B. Not Only Is Judicial Sentencing Constitutional, It Is Preferable to Jury Sentencing

1. A Survey of the Issues with Jury Sentencing

a. The "Stealth Juror" and the "Single-Juror Veto"

A series of high-profile death penalty trials in recent years ended with a single juror sparing the life of the killer, bringing the power of a single juror in capital cases to the public consciousness.²²³ In 20 states and under federal law, a single juror has the power to sentence a capital defendant to life imprisonment without the opportunity for the state to seek a new penalty phase.²²⁴

In his opinion in *Ring*, JUSTICE BREYER advanced the argument that, because retribution is the main justification for capital punishment, a jury is best equipped to handle that role because they are members of the community where the crime took place.²²⁵ The *Gregg* triumvirate recognized that the death penalty exists because of a "community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response

220. See *Marsh*, 548 U.S. at 165–66 (holding that it is constitutionally permissible for a capital sentencing statute to mandate death when aggravating and mitigating evidence are in equipoise).

221. See, e.g., *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013).

222. See Transcript of Oral Argument at 3, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505).

223. See Associated Press, *Juror: Panel Split 11–1 Favoring Execution in Guard's Murder*, *READING EAGLE*, (July 11, 2017), <https://bit.ly/2GydyRZ> [<https://perma.cc/MAY6-UM32>]; Peter Holley, *A Lone Holdout Was Likely All That Stood Between Theater Shooter and Death Sentence, Juror Says*, *WASH. POST* (Aug. 8, 2015), <https://wapo.st/2WZrubM> [<https://perma.cc/8VQR-MDEL>].

224. See *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, *supra* note 19 (noting that, in most states with capital punishment, a single holdout juror in favor of life results in a life sentence).

225. See *Ring v. Arizona*, 536 U.S. 584, 614–616 (2002) (BREYER, J., concurring in judgment).

may be the penalty of death.”²²⁶ By the very nature of democratic governance, such a community response need not be unanimous. A single juror holding power to impose a lesser sentence without considering death for a crime that the community deems worthy of death serves as a direct refutation of the community.²²⁷

b. Jurors Do Not Understand Jury Instructions, but Jury Instructions Are Vital in Capital Cases

The presumption that jurors understand and follow jury instructions is “[a] crucial assumption underlying [the criminal justice] system”²²⁸ Recently, however, social science has come to light suggesting that this presumption is wishful thinking.²²⁹ While it is important for the criminal justice system that jurors understand instructions, it is even more important in the capital sentencing context because the result of the jury’s decision is literally life or death.²³⁰ Unsurprisingly, given the stakes, the Supreme Court frequently hears cases challenging capital jury instructions.²³¹

The Supreme Court does not require jurisdictions to adopt standards for jury instructions.²³² The lack of such a requirement may seem puzzling; but, if a standard jury instruction is later found to be constitutionally flawed, the consequences can be drastic.²³³

226. See *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

227. Of course, implicit in the suggestion that some crimes deserve death is that some crimes do not deserve death. See BLECKER, *supra* note 5, at 32–33 (suggesting that some murderers do not deserve to die based on their lack of moral culpability). Thus, it is also a refutation of the community if a jury refuses to consider life. Cf. Marla Sandys & Adam Trahan, *Life Qualification, Automatic Death Penalty Voter Status, and Juror Decision Making in Capital Cases*, 29 JUST. SYS. J. 385, 386–87 (referring to jurors who refuse to consider life as automatic death penalty voters or “ADPs”).

228. *Parker v. Randolph*, 442 U.S. 62, 73 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987).

229. See, e.g., Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 164 (2004).

230. *State v. Bey*, 548 A.2d 887, 906 (N.J. 1988) (citations omitted).

231. A Westlaw KeyCite report reveals that the Supreme Court has decided at least 60 cases since *Furman* where capital jury instructions were at issue.

232. *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

233. As of 2006, the Third Circuit and U.S. District Courts in Pennsylvania reversed at least eleven death sentences based on improper jury instructions under *Mills v. Maryland*, 486 U.S. 367, 384 (1988). See Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1895–96 & n.166 (2006) (citing Pennsylvania cases). This number has increased since then. See, e.g., *Steele v. Beard*, 830 F. Supp. 2d 49, 94 (W.D. Pa. 2011) (finding that Pennsylvania’s pattern jury instructions violated *Mills*).

Of course, the adoption of “plain language” pattern jury instructions²³⁴ does not ensure that jurors will understand said instructions.²³⁵ Judicial sentencing would eliminate this dilemma. While it is true that judges do not always understand or follow the law—because they are human—it is safe to assume that a judge with legal training and experience would produce substantially more consistent results than a group of 12 laypeople can.²³⁶

2. *Crafting a Capital Sentencing Scheme That Better Ensures Justice and Complies with the Constitution*

a. Do as Nebraska Does

The unanimous decision of a jury of laypersons is an ideal to strive for. If the conventional wisdom that capital trials are won and lost in jury selection²³⁷ is true, then the natural urge of the defense to pick a stealth juror (a juror who will automatically vote for life) and the prosecution to pick an ADP (an automatic death penalty voter)²³⁸ makes jury selection in capital cases a zero-sum game. In the ideal criminal justice system, death sentences would require unanimous jury sentencing, but the current criminal justice system is not ideal.²³⁹ The ideal capital sentencing structure would be composed of a jury finding aggravating circumstances followed by a panel of three judges issuing a unanimous sentence. While sentencing by a single judge is constitutional²⁴⁰—and still preferable to jury-sentencing—the three-judge system provides a more effective safeguard against pitfalls of a single judge possessing such author-

234. See, e.g., JUD. COUNCIL OF CAL. CRIM. JURY INSTRUCTIONS 760–75 (2018).

235. See Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 L. & HUM. BEHAV. 339, 341–32 (2011) (finding that, on a scale of 0 to 16, in a study testing comprehension of California’s “plain language” capital jury instructions, the mean score was 8.55 with a high score of 13).

236. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (describing advantages of judicial sentencing).

237. See Symposium: *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1209–11 & n.1 (2001).

238. See Sandys & Trahan, *supra* note 227, at 386–87.

239. Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (BREYER, J., dissenting).

240. See *supra* Part III.A.

ity²⁴¹ while gaining the benefit of a decision by a deliberative body with judges of different views.²⁴²

The provision of Nebraska's death penalty law addressing the sentencing determination²⁴³ confronts each of these concerns. In Nebraska, if a defendant pleads guilty to or is convicted of first degree murder in a case in which the information includes aggravating circumstances, the trial court must set a date for an aggravation hearing.²⁴⁴ Unless the defendant waives his right to a jury determination, the aggravation hearing may be before the jury that found the defendant guilty,²⁴⁵ or the court may impanel a new jury for the aggravation hearing.²⁴⁶ The statute codifies an implicit preference for trying the aggravation hearing with the guilt-phase jury by allowing the jury that found the defendant guilty at trial to consider evidence presented during the guilt trial as evidence of aggravation, while allowing a newly impaneled jury to only consider evidence presented at the aggravation hearing.²⁴⁷ If the jury unanimously finds one or more aggravating circumstances beyond a reasonable doubt,²⁴⁸ the jury is discharged,²⁴⁹ and the court convenes a panel of three judges for a sentencing hearing to "receive evidence of mitigation and sentence excessiveness or disproportionality"²⁵⁰ The court is prohibited from conducting that hearing until a presentence investigation is completed.²⁵¹

241. See 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, 793–94 (1995) (noting that, in states with judicial elections, jury-overrides in favor of death were more common than jury-overrides in favor of life). *But cf.* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 758–64 (2009) (criticizing the "merit selection" scheme known as the "Missouri Plan" as elitist and undemocratic because it bypasses both selection elections and confirmation by elected bodies).

242. *Cf.* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155, 2173–74 (1998) (finding that ideologically diverse three-judge appellate panels moderated the decisions of a panel's majority).

243. NEB. REV. STAT. § 29-2521 (Cum. Supp. 2018).

244. *Id.* § 29-2520(1).

245. *Id.* § 29-2520(2)(a).

246. *Id.* § 29-2520(2)(b)(i)–(ii).

247. *Id.* § 29-2520(4)(c).

248. *Id.* § 2520(4)(f). The court must issue a sentence of life imprisonment if the jury is not unanimous as to the existence of any aggravating circumstance or is unanimous as to the non-existence of aggravating circumstances. *Id.* § 29-2520(h).

249. *Id.* § 29-2520(g).

250. *Id.* § 29-2520(4)(h).

251. *Id.* § 29-2261(1). A collateral benefit of a pre-sentence investigation is that it addresses areas commonly used in mitigation of death sentences, such as the offender's mental condition and background. See Penny White, et al., *National Public Defense Symposium: "Unique Ethical Dilemmas in Capital Representation,"*

Unless he is disqualified,²⁵² the judge who presided over the conviction presides over the panel for the sentencing hearing.²⁵³ The Chief Justice of the Supreme Court of Nebraska chooses the other two judges on the panel at random.²⁵⁴ During the sentencing hearing, the defense may present any information the judge deems relevant to mitigation and sentence excessiveness or disproportionality, and both the state and defense may present arguments for or against death.²⁵⁵ At the conclusion of the presentation, the panel determines the sentence.²⁵⁶

A sentence of death may only be imposed upon a unanimous determination of the sentencing panel.²⁵⁷ The panel's determination "shall be based upon the following considerations":

- (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;
- (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.²⁵⁸

7 TENN. J. L. & POL'Y 203, 227–28 (2010). Failure of defense counsel to adequately investigate relevant mitigating evidence is an unfortunately common mode of relief for prisoners sentenced to death. *See, e.g.*, Saylor *supra* note 6, at 29–30 (citing Pennsylvania cases).

252. NEB. REV. STAT. § 29-2521(1)(b). A well-functioning judicial sentencing scheme should serve the same function as jury selection. It should require that judges are able to apply the law and vote for life or for death. Ideally, judges should self-disqualify in cases when they are unable to apply the law based on personal beliefs. *Cf.* Bright & Keenan, *supra* note 241, at 817. If they do not self-disqualify, courts should intervene. *Accord In re Pulaski Cty. Cir. Ct.*, No. 17-155, 2017 Ark. LEXIS 154, at *2 (Ark. Apr. 17, 2017) (per curiam) (disqualifying a judge from future death penalty cases based on his public protests against capital punishment); *see also* Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016) (concluding that, under a "likelihood of bias" standard, the Chief Justice of Pennsylvania should have recused himself from a capital case). Disqualification provisions, statutory or otherwise, should not be construed "to require recusal from the courts of all who have experienced the fullness of life-good and bad" or "to enable forum shopping by parties to litigation." *Strickler v. Pruett*, Nos. 97-29, 97-30, 1998 WL 340420, at *14 (4th Cir. June 17, 1998) (opinion of Luttig, J.) (declining a disqualification motion in death penalty case triggered by the murder of the judge's father by someone who was sentenced to death).

253. NEB. REV. STAT. § 29-2521(1)(a) (Cum. Supp. 2018).

254. *Id.*

255. *Id.* § 29-2521(3).

256. *Id.*

257. *See id.* § 29-2522.

258. *Id.* § 29-2522(1)–(3).

The panel's determination must "be in writing and refer to the aggravating and mitigating circumstances weighed in the determination of the panel."²⁵⁹ In *Gregg*, the plurality endorsed proportionality review, saying that it "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant [sentencer]."²⁶⁰ The *Proffitt* plurality recognized that a written judgment "can assure consistency, fairness, and rationality in the evenhanded operation of the state law."²⁶¹

On direct appeal, the Nebraska Supreme Court conducts *de novo* review of the record regarding sufficiency of the aggravating circumstance(s), weight given to mitigation, and the proportionality of the sentence.²⁶² If the Nebraska Supreme Court finds that the trial court erred by failing to consider a mitigating circumstance or invalidates an aggravating circumstance, then the court must review the error to determine if it is harmless beyond a reasonable doubt, but it cannot reweigh the weighing decision.²⁶³ If the error is harmless, the defendant is not entitled to relief.²⁶⁴ The combination of the panel's written findings and the lack of an anonymously deliberating jury makes a determination of harmless error easier,²⁶⁵ which in turn lessens the burden on the lower courts. This is not to suggest that Nebraska's system is perfect.²⁶⁶

b. Allow the Jury to Make Recommendations as to Weight of Aggravating Circumstances

An issue with the Nebraska capital sentencing scheme, as well as that of Montana,²⁶⁷ is that it removes juries from the process as

259. *Id.* § 29-2522. For an example of a written sentencing order in a Nebraska death penalty case, see *State v. Schroeder*, No. CR 17-17 (Johnson Cty., Dist. Ct., Neb., June 1, 2018), available at <https://bit.ly/2SgJ2gO> [<https://perma.cc/4A62-2Q89>].

260. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). However, comparative proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

261. *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

262. *State v. Galindo*, 774 N.W.2d 190, 248 (Neb. 2009).

263. See *State v. Sandoval*, 788 N.W.2d 172, 215, 222 (Neb. 2010) (citations omitted).

264. *Id.* at 215; see also *id.* at 237 (Connolly, J., concurring in part and dissenting in part) (accusing the majority opinion of reweighing).

265. Cf. James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 756 (1987) (concluding that harmless error is inappropriate when juries make the weighing decision).

266. See *infra* Part III.B.2.b.

267. See MONT. CODE ANN. § 46-18-305 (2017) (providing for sentencing by the trial judge alone).

much as is constitutionally permissible. Although one of the central tenets of this Comment is that judicial sentencing is preferable to jury sentencing, a system that takes the life of a capital defendant should reserve a role for the jury, given the important societal function juries play.²⁶⁸ Still, the ideal role of a jury is an advisory one—albeit one entitled to consideration by the trial court as a safeguard against the worst instincts of judges. Under the former sentencing scheme in Alabama, the jury issued an advisory verdict as to both aggravation and mitigation, which the sentencing judge was required to consider.²⁶⁹ In *Harris v. Alabama*,²⁷⁰ the Supreme Court upheld that provision.²⁷¹

This Comment proposes a novel system in which a jury would not provide a recommendation as to mitigation but would rather assign weight to aggravating circumstances based on some fixed measure that specifies weight from lowest to highest. The jury's recommendation as to the weight of aggravators should be unanimous as to the highest weight that all jurors agree upon.²⁷² When considering the jury's recommendation as to the weight of aggravation, the panel—or lone sentencing judge—should be required to give such recommendation “great weight.”²⁷³ Such would strike the right balance between the advantages of the Nebraska statute and the value of the jury in the Anglo-American system.²⁷⁴

IV. CONCLUSION

As this Comment demonstrates, there is substantial disagreement among lower courts as to the extent to which a jury is required in capital sentencing. While these courts mostly agree that the Supreme Court's decisions do not mandate jury sentencing in

268. See *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

269. ALA. CODE § 13A-5-47(e) (1994), *superseded by* Act of Apr.11, 2017, § 1, 2017 Ala. Acts 231.

270. *Harris v. Alabama*, 513 U.S. 504 (1995)

271. See *id.* at 515. The Supreme Court has never overruled *Harris* and “the Eleventh Circuit has continued to apply and accept *Harris* as settled law.” Taylor v. Dunn, No. CV 14-0439-WS-N, 2018 WL 575670, at *67 (S.D. Ala. Jan. 25, 2018) (citing *Madison v. Commissioner, Ala. Dep’t of Corr.*, 677 F.3d 1333, 1336 (11th Cir. 2012)).

272. For example, if ten members of the jury agree that, on a scale of one to ten—with one being lowest and ten being highest—that the assigned weight of the aggravating circumstances should be a ten, and two members of the jury believe the weight should be eight, then the jury's recommendation as to the weight of an aggravating circumstance should be eight.

273. Cf. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), *abrogated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

274. See *supra* Part III.B.2.a; *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

capital cases,²⁷⁵ enough uncertainty remains that clarification is necessary for states like Nebraska and Montana to execute their laws. There is no use in speculating when—or even if—the court will take up jury sentencing, but JUSTICE SOTOMAYOR has shown interest in revisiting the Florida cases decided under the statute *Hurst* invalidated.²⁷⁶ However, given the incoherence of post-*Furman* death penalty jurisprudence,²⁷⁷ the author is not optimistic for a satisfactory resolution.

275. See *State v. Lotter*, 917 N.W.2d 850, 863 & nn.59–60 (Neb. 2018) (citing state and federal cases).

276. See *Reynolds v. Hill*, 139 S. Ct. 27, 32 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

277. See *Kansas v. Marsh*, 548 U.S. 163, 182 (2006) (Scalia, J., concurring).
