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The False Promise Of *Proffit*

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The False Promise of *Proffitt*

STEPHEN K. HARPER*

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I. INTRODUCTION

In 1972, in *Furman v. Georgia*,¹ a per curiam decision (with five separate concurrences) by the U.S. Supreme Court, the Court found the death penalty to be unconstitutional because it gave juries an “untrammelled discretion to impose or withhold the death penalty.”² In a now famous quote, Justice Stewart wrote in his concurrence that it was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”³ Juries could simply impose the death penalty in an arbitrary and capricious manner.⁴ Justice Stewart went on to say, “I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”⁵ As it stood, there were no objective standards as to in which cases the death penalty should be properly imposed on a defendant.⁶

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1. 408 U.S. 238 (1972) (per curiam).

2. *Gregg v. Georgia*, 428 U.S. 153, 196 n.47 (1976) (plurality opinion) (discussing the holding of *Furman*).

3. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

4. *See id.* at 309–10.

5. *Id.* at 310.

6. *See id.* at 313 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

As a result of *Furman*, states passed new death sentencing schemes in order to overcome this "it just strikes by lightning" problem. Thirty-five states passed new legislation attempting to narrow those who could be sentenced to death and setting out the procedures and safeguards for sentencing someone to death.⁷ Four years later, Justice Stewart joined the plurality in upholding the death penalty in *Gregg v. Georgia*.⁸ Georgia had created a "carefully drafted statute"⁹ that ensured that, in a bifurcated proceeding (guilt/innocence and penalty), the sentencer is given adequate information and guidance relevant to the imposition of the death penalty.¹⁰ There must be "specific jury findings as to the circumstances of the crime or the character of the defendant."¹¹ Justices Blackmun and Stevens joined Justice Stewart's plurality opinion.¹² A decision released the same day, *Proffitt v. Florida*,¹³ upheld the sentencing scheme in Florida. Justices Powell, Stewart, and Stevens (with four other justices concurring) found that under the Florida statutes, the trial judge was required to "weigh the statutory aggravating and mitigating circumstances," as well as the facts of the crime,¹⁴ "when he determines the sentence to be imposed on a defendant,"¹⁵

There was some discussion then about whether a judge and not a jury could make the final decision.¹⁶ The plurality stated that it "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 . . . than a jury . . ."¹⁷ And since any risk of arbitrary and capricious sentencing would be minimized by a review of the Florida Supreme Court, the Florida statute was constitutional.¹⁸ A bifurcated trial, specified aggravating and mitigating factors, and a subsequent review by the Florida Supreme Court as to proportionality satisfied the Court's concerns for any challenges to the constitutionality of the death penalty.¹⁹ The Court concluded that "[t]he Florida capital-sentencing procedures thus seek to assure that the death

7. *Gregg*, 428 U.S. at 179-80.

8. *Id.* at 158, 207.

9. *Id.* at 195.

10. *Id.* at 162-68 (discussing Georgia's statutory scheme for imposing the death penalty).

11. *Id.* at 198.

12. *Id.* at 158.

13. 428 U.S. 242 (1976) (plurality opinion).

14. *Id.* at 250.

15. *Id.*

16. *Id.* at 252.

17. *Id.*

18. *Id.* at 252-53.

19. *Id.* at 245-46, 250-53.

penalty will not be imposed in an arbitrary or capricious manner.”²⁰

In *Proffitt*, the Court went on to address the challenge to the Florida sentencing scheme that arbitrariness is inevitable because discretion can be exercised at every stage of a prosecution.²¹ The challenger also argued that the new sentencing scheme did *not* end the arbitrary “infliction of death” because the aggravating and mitigating circumstances were overbroad and vague and the statute provided no guidance “as to how the mitigating and aggravating circumstances should be weighed in any specific case.”²² All these challenges were rejected by the Court.²³

The plurality also stated:

While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.²⁴

It then concluded:

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. . . .

. . . .

Th[e] legislation provides that *there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death.*²⁵

In Florida, there must be at least one statutory “aggravating” factor present before the state is permitted to seek death.²⁶

For the next thirty-six years, the U.S. Supreme Court decided literally hundreds of cases which refined, redefined, ignored, or changed elements of the death penalty. The Florida Supreme Court has dealt with many more than that. But the fundamental question after *Gregg* and *Proffitt*, which has plagued the death penalty world ever since, remains: Is this “focus on the individual circumstances of each homicide and each defendant,”²⁷ theoretically and as applied, enough to overcome the basic “strikes by lightning” problem?

20. *Id.* at 252–53.

21. *See generally id.* at 254–58.

22. *Id.* at 254.

23. *See id.* at 254–59.

24. *Id.* at 258.

25. *Id.* at 258–59 (emphasis added).

26. FLA STAT. § 921.141(3)(a).

27. *Id.* at 252.

This discussion begins with a general inquiry into whether subsequent death penalty decisions in Florida—whether by the jury, the trial court, or the Florida Supreme Court—were “informed, focused, guided, and objective.”²⁸ Many questions remain as to just how specific and narrowed the death penalty system in Florida is and how should it be tailored to bolster the claim that it is no longer applied in an arbitrary and capricious manner nor “wantonly and . . . freakishly imposed.”²⁹ How much of a focused and guided inquiry is constitutionally sufficient and is it only “total” arbitrariness and capriciousness that causes a constitutional defect? What about substantial arbitrariness and capriciousness? Can a jury and a judge ever weigh the aggravating factors against the mitigating factors in an “objective” way? Have the Florida legislature and the Florida Supreme Court expanded the cases in which death can be imposed contrary to the spirit and holding of *Proffitt*?

II. DEATH PENALTY LAW IN FLORIDA

Section 921.141 of the Florida Statutes sets out the procedures and criteria for the imposition of the death penalty.³⁰ If the state seeks death in the first instance³¹ (more on this below), then once a person is convicted of first-degree murder there will be a separate proceeding as to the death penalty.³² The jury shall render an “advisory sentence” to the court, to which the court must give great weight.³³ The court shall then weigh the proven aggravating factors against the mitigating factors and decide which to give the greater weight.³⁴ If the aggravating factors outweigh the mitigating factors, then death is the proper sentence.

III. THE STATUTORY AGGRAVATING FACTORS

Again, the purpose of specific statutory aggravating factors was to narrow the kinds of cases in which one could be sentenced to death.³⁵ In *Proffitt*, the U.S. Supreme Court stated, “On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies

28. *See id.* at 259.

29. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

30. FLA. STAT. § 921.141 (2012).

31. According to the Florida Rules of Criminal Procedure, “[a] capital trial is defined as any first-degree murder case in which the State has not formally waived the death penalty on the record.” FLA. R. CRIM. P. 3.112(B).

32. FLA. STAT. § 921.141(1).

33. FLA. STAT. § 921.141(2). However, “[i]n order to sustain a sentence of death following a jury recommendation of *life*, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (*per curiam*) (emphasis added).

34. FLA. STAT. § 921.141(3).

35. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983).

identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh *eight* aggravating factors against seven mitigating [14] factors to determine whether the death penalty shall be imposed.”³⁶

However, the number of aggravating factors in Florida has expanded dramatically since the U.S. Supreme Court first ruled in *Proffitt*.³⁷ In fact, the legislature has doubled the number of aggravating factors that were present in 1976—from eight to now sixteen.³⁸ Some examples of aggravating factors that have come into existence subsequent to *Proffitt* are if the victim was a law-enforcement officer in the performance of his or her duties,³⁹ if the victim was an elected official in the performance of his or her duties,⁴⁰ if the victim was under twelve years of age,⁴¹ if the crime was committed by a “gang member,”⁴² or if the victim was an older, vulnerable person due to advanced age.⁴³ If one of these new aggravators exists, the state can seek death.

The problem with many of these post-*Proffitt* aggravating factors—apart from significantly expanding those who would now be eligible for the death penalty—is that the focus shifts more and more to who the victims are rather than who the defendant is and whether he should or should not be executed for the crime. In an otherwise non-capital case, the fact that the victim was a policeman, a government official, a child under twelve years of age, or a vulnerable person of advanced age would now tend to make it a capital case. There are many instances in which a person who would not be eligible for the death penalty at the time of *Proffitt* would now be eligible.

IV. RACE

The U.S. Supreme Court failed to deal with the fundamental American problem of race when it concluded in *McCleskey v. Kemp*⁴⁴ that a comprehensive study by academic David Baldus, showing the “racially disproportionate impact” of the death penalty in Georgia, was not enough to overturn a death sentence.⁴⁵ A defendant must fail in his challenge to the sentence if he cannot show that it was the result of an actual

36. *Proffitt v. Florida*, 428 U.S. 242, 251 (plurality opinion) (emphasis added).

37. See FLA. STAT. § 921.141(5)(a)-(p) (2012).

38. *Id.*

39. *Id.* § 921.141(5)(j).

40. *Id.* § 921.141(5)(k).

41. *Id.* § 921.141(5)(l).

42. *Id.* § 921.141(5)(n).

43. *Id.* § 921.141(5)(m).

44. 481 U.S. 279 (1987).

45. See *id.* at 298–99, 319.

“discriminatory purpose.”⁴⁶ The Court went on to say that a defendant “must prove that the decisionmakers in *his* case acted with discriminatory purpose,”⁴⁷ and dismissed evidence of general disparities in sentencing, such as the Baldus study, as “an inevitable part of our criminal justice system.”⁴⁸

Race has always been an issue in death penalty cases.⁴⁹ In his concurrence in *Furman*, Justice Stewart said, “My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side.”⁵⁰

In 2012, 59% of those on Florida’s death row were white, 37% were black, and 4% were Hispanic.⁵¹ A 2006 report by the American Bar Association found that while Florida has undertaken three initiatives exploring the impact of racial discrimination in the criminal justice system, Florida “should fully investigate and evaluate the impact of racial discrimination . . . and develop strategies that strive to eliminate it.”⁵²

In 1991, researchers Michael L. Radelet and Glenn L. Pierce reviewed the empirical research on Florida and found that eleven different studies “give strong evidence of racial disparities in capital sentencing in Florida.”⁵³ A more recent study concluded that the “racial composition of the jury pool has a substantial impact on conviction rates.”⁵⁴ All-white jury pools in Florida convicted black defendants sixteen percent more often than white defendants.⁵⁵ In cases with no black potential jurors in the jury pool, black defendants were convicted eighty-

46. *See id.* at 297–99.

47. *Id.* at 292.

48. *Id.* at 312.

49. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 433 (1995) (stating that the death penalty has always disproportionately affected the poor and racial minorities).

50. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (footnotes and citation omitted).

51. *Death Row Roster*, FLA. DEP’T. OF CORR., <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

52. ABA DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT & FLA. DEATH PENALTY ASSESSMENT TEAM, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT 353–55* (2006) [hereinafter ABA PROJECT], available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf>.

53. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 16 (1991).

54. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1020 (2012).

55. *Id.* at 1035.

one percent of the time, while white defendants were convicted sixty-six percent of the time.⁵⁶ When at least one member of the jury pool was black, the conviction rates for white (73%) and black (71%) defendants were nearly identical.⁵⁷

In its 2006 report, the ABA concluded that “Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.”⁵⁸ The 2006 ABA report came up with ten recommendations to deal with the unresolved problem of race as a factor in capital cases.⁵⁹ Florida, like other states, has failed to adequately deal with the fundamental issue of race and fairness.

V. FELONY MURDER

One of the statutory aggravating factors in Florida is felony murder.⁶⁰ Section 921.141(5)(d) of the Florida Statutes states that if the killing “was committed while the defendant was engaged, or was an accomplice in, the commission of [certain enumerated felonies],” this would be an aggravating factor and thus make one eligible for death.⁶¹ The felony-murder doctrine is that if one commits a specified felony and a murder takes place, it does not matter if the perpetrator had no intent to kill.⁶² Because a person was committing an underlying felony, that person is responsible for all the consequences, intended and unintended. If one commits a specified underlying crime (e.g., robbery, sexual battery, aggravated child abuse, arson, or burglary) and a killing occurs, this would be an aggravating factor that would make one eligible for death in Florida.⁶³

The Florida Supreme Court defends this aggravating factor by claiming that it does narrow the imposition of the death penalty:

Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. *This*

56. *Id.* at 1019.

57. *Id.*

58. ABA PROJECT, *supra* note 52, at 351 (Recommendation #1).

59. *See id.* at 353–66.

60. FLA. STAT. § 921.14(5)(d) (2012).

61. *Id.*

62. *Lewis v. State*, 34 So. 3d 183, 184 (Fla. Dist. Ct. App. 2010).

63. FLA. STAT. § 921.14(5)(d) (2012).

*scheme thus narrows the class of death-eligible defendants.*⁶⁴

But given all the aggravating factors and the fact that almost all the felony-murder crimes are aggravating, it is very difficult to find a first-degree murder case in which there is not at least one aggravating factor.⁶⁵ The overall effect of this is to widen rather than narrow in any meaningful way the cases in which death can be sought.⁶⁶

Now first-degree murder, when perpetrated with a premeditated design to effect the death of another (malice aforethought), is not by itself enough to warrant the death penalty.⁶⁷ So, if you intend to kill (and that is all) you cannot get the death penalty. But, if you do not intend to kill, you can nevertheless be subject to the death penalty. Under specified circumstances, such as participating in a robbery when the “degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life,” a person is eligible for the death penalty even though he or she *did not intend* to kill the victim.⁶⁸

Another twist to the felony-murder statute concerns a defendant who kills more than one person in a rage without premeditation. The first person killed would not be a first-degree murder case because it was committed in reckless disregard for life but without any premeditation. However the second person killed—even though the intent is the same—would nevertheless be a first-degree felony murder based on the simultaneous murder of another human being. In other words the first murder was a second-degree murder, but it was also an enumerated felony and therefore the defendant could be eligible for the death penalty for the second homicide.⁶⁹

VI. PRIOR VIOLENT CRIME

One of the more serious statutory aggravating factors is “[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.”⁷⁰ It would appear at first blush that this is meant to punish someone who was and continues to be violent. This is sometimes, but not always, the case.

64. *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997) (emphasis added) (footnotes omitted).

65. See O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact The Death Penalty in Florida*, 34 STETSON L. REV. 9, 49 (2004).

66. See *id.* (quoting *Blanco*, 706 So. 2d at 12 (Anstead, J., concurring)).

67. See FLA. STAT. § 921.14(3) (2012). (requiring the existence of an aggravating factor to impose the death penalty).

68. *Tison v. Arizona*, 481 U.S. 137, 151 (1987).

69. FLA. STAT. § 782.04(2)(o).

70. FLA. STAT. § 921.141(5)(b) (2012).

Prosecutors are also permitted to use a crime committed subsequent to the charged crime to establish an aggravating factor.⁷¹ Even though that crime was committed *after* the murder in question, the prosecutor can still use it.⁷² Prosecutors often prosecute the subsequent case first in order to create this aggravating factor. The Florida Supreme Court has concluded that this is a valid practice because the statute is silent on when the prior violent felony has to occur.⁷³

Moreover, the state can also use a violent crime committed *simultaneously* with the current murder to establish a prior violent offense.⁷⁴ Thus if a person has no prior record for any violent felony, this aggravating factor is nevertheless provable by a conviction for another violent crime that happened at the same time as the murder.⁷⁵ For example, if a person commits two homicides, these are considered separate violent acts.⁷⁶ The Florida Supreme Court “has repeatedly held that where a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim.”⁷⁷ Although it would carry considerably less weight, even a simultaneous aggravated assault is admissible to prove a prior violent felony.⁷⁸

VII. COLD, CALCULATED, AND PREMEDITATED

One of the most serious aggravating factors is cold, calculated, and premeditated killing (“CCP”). The Florida Supreme Court has said that CCP is something much more than regular premeditation, which is malice aforethought.⁷⁹ It would be “heightened premeditation.”⁸⁰ While it has never been clear how much premeditation would have to be heightened, the Florida Supreme Court has continuously expanded the circumstances that could show this “heightened premeditation.”

Historically, in order to establish the CCP aggravating factor, the evidence must show

that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and*

71. Knight v. State, 746 So. 2d 423, 434 (Fla. 1998) (per curiam) (citing Elledge v. State, 346 So. 2d 998 (Fla. 1977)).

72. See *id.*

73. See *Elledge*, 346 So. 2d at 1001.

74. Snelgrove v. State, 37 Fla. L. Weekly S303, S308 (Fla. Apr. 19, 2012) (per curiam).

75. *Id.*

76. Frances v. State, 970 So. 2d 806, 816–17 (Fla. 2007) (per curiam).

77. Francis v. State, 808 So. 2d 110, 136 (Fla. 2001) (per curiam).

78. See Scott v. State, 66 So. 3d 923, 935 (Fla. 2011) (per curiam).

79. See Hudson v. State, 992 So. 2d 96, 115–16 (Fla. 2008) (per curiam).

80. *Id.*

that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification.⁸¹

“‘CCP involves a much higher degree of premeditation’ than is required to prove first-degree murder.”⁸²

Careful planning can now be just before the crime itself.⁸³ The Florida Supreme Court has also widened the circumstances in which a “careful plan” can be made by not requiring much thinking to go into a plan to be considered “careful.”⁸⁴ It has simultaneously expanded the circumstances in which the state can demonstrate “heightened premeditation” and the kind of evidence that can arguably show that this heightened premeditation is present.

For example, the Florida Supreme Court has cited the defendant’s procurement of a weapon in advance of the crime as indicative of preparation and a heightened premeditated design.⁸⁵ Heightened premeditation can be also be established by examining the circumstances of the killing and the conduct of the accused. The CCP aggravating factor “can also be indicated by . . . lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.”⁸⁶

In *Buzia v. State*,⁸⁷ the Florida Supreme Court found that the defendant

had the opportunity to leave the residence with the [victim’s] money and valuables without committing further harm. We have “found . . . heightened premeditation . . . where a defendant had the opportunity to leave the crime scene and not commit the murder but, instead, commit[ted] the murder.” We conclude in part that, by remaining there and murdering [the victim], Buzia developed “heightened premeditation.”⁸⁸

81. *Evans v. State*, 800 So. 2d 182, 192 (Fla. 2001) (per curiam) (quoting *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (per curiam)).

82. *Deparvine v. State*, 995 So. 2d 351, 381–82 (Fla. 2008) (per curiam) (quoting *Foster v. State*, 778 So. 2d 906, 921 (Fla. 2001) (per curiam)).

83. *See Mason v. State*, 438 So. 2d 374, 379 (Fla. 1983) (concluding that breaking into a house, procuring a weapon inside the house, and attacking the victim in her bed demonstrated sufficient planning to qualify as CCP).

84. *See, e.g., Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001) (holding that killing qualified as CCP where defendant used multiple weapons and had to stop and reload the weapons prior to shooting the victims); *Walls v. State*, 641 So. 2d 381 (Fla. 1994) (holding that the killing was calculated when defendant tied up the victim and taunted her prior to killing her).

85. *Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997) (per curiam).

86. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (per curiam); *see also Thompson v. State*, 648 So. 2d 692, 696 (Fla. 1994) (per curiam) (explaining that defendant took precaution of carrying a gun and a knife with him to a meeting with the victims).

87. 926 So. 2d 1203 (Fla. 2006) (per curiam).

88. *Id.* at 1214–15 (alteration in original) (citations omitted).

The court went on to say:

Most importantly, during this final lapse of time, Buzia procured his own weapon. “[T]he facts supporting [the CCP aggravator] must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course. . . .” We have found the CCP aggravator where the defendant procured a weapon beforehand. However, such procurement *need not [30] be that far in advance*. In *Jackson*, the defendant went upstairs, obtained a gun, and made a deliberate and conscious choice to shoot a law enforcement officer. We found heightened premeditation because the defendant could have left the scene, but instead purposely returned with the gun to confront the officer. We have found the CCP aggravator in other cases where the defendant did not procure his own murder weapon before arriving at the scene.⁸⁹

It is increasingly more and more difficult to distinguish what is and is not CCP and just how heightened the premeditation must be. Again, the Florida Supreme Court has expanded the criteria under which an aggravating factor can be established and proven. In so doing, it has also once again expanded rather than narrowed the circumstances under which a person can be sentenced to death.

VIII. VICTIM IMPACT EVIDENCE

Subsequent to *Proffitt*, Florida adopted a statute that now permits “victim impact” testimony in the sentencing phase of a capital case.⁹⁰ “[T]he prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim’s uniqueness as an individual human being and the resultant loss to the community’s members by the victim’s death.”⁹¹ In *Payne v. Tennessee*⁹² the U.S. Supreme Court overruled its precedent and stated, “We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.”⁹³

The problem is that victim impact testimony can be very prejudicial because it focuses the jury’s attention on the emotions of the victim’s family and friends instead of the facts that should be considered, such as the circumstances of the crime and the character of the defendant.⁹⁴ The

89. *Id.* at 1215 (alterations in original) (emphasis added) (citations omitted).

90. See FLA. STAT. § 921.141(7) (2012).

91. *Id.*

92. 501 U.S. 808 (1991).

93. *Id.* at 827.

94. See *id.* at 860–61, 864 (Stevens, J., dissenting).

risk that the jury will make an emotional and not a rational decision is very much enhanced.

In Florida, the sentencing procedures are that a jury must weigh the aggravating factors against the mitigating factors.⁹⁵ It is difficult to figure out how this victim impact evidence is to be incorporated into the jury's recommendation. The jury is later instructed by the judge:

You have heard evidence about the impact of this homicide on the 1. family, 2. friends, 3. community *However, you may not consider this evidence as an aggravating circumstance.* Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.⁹⁶

Any juror would think that if victim impact evidence is presented and argued then he or she could indeed consider it as an aggravating factor. It is counterintuitive (and indeed intellectually dishonest) to allow a jury to hear this and then tell the jury that it cannot consider this emotional evidence when determining aggravating factors.

IX. NON-UNANIMOUS JURY AND RING PROBLEMS

In Florida it is the judge who ultimately sentences the defendant giving "great weight and deference by the Court in determining which punishment to impose."⁹⁷ All but three states (Florida, Alabama and Delaware) "require, at least, a unanimous jury finding of aggravators."⁹⁸ In Florida, if the recommendation by the jury is seven in favor of death and five in favor of life, that is nevertheless a death recommendation.⁹⁹ Florida is the only state that allows over forty percent of the jury to believe that life is the appropriate sentence and yet the recommendation is death. Judges are required to give great weight to the jury's recommendation.¹⁰⁰ In the vast majority of cases, judges will follow the recommendation of the jury.

In 2005, the Florida Supreme Court, in *State v. Steele*, urged the legislature to change the sentencing law before it was subject to a constitutional challenge:

The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the pen-

95. See generally FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 7.11 (2012 [hereinafter JURY INSTRUCTIONS], available at http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejuryinstructions.pdf).

96. *Id.* (emphasis added).

97. *Id.*

98. *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005).

99. *Id.* at 550.

100. JURY INSTRUCTIONS, *supra* note 95, at 7.11.

alty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.¹⁰¹

Moreover, there is no requirement for a special verdict form for jurors to find the same aggravating factor beyond a reasonable doubt.

As retired Florida Supreme Court Justice Cantero stated, “if a capital sentencing scheme requires only a simple majority to decide whether [aggravating] factors exist and determine their relative weight, it will still fail to produce ‘consistent and rational’ outcomes or ‘minimize the risk of wholly arbitrary and capricious action’” as prohibited by *Gregg* and *Proffitt*.¹⁰²

For many, the fact that the judge makes the final decision and not the jury flies in the face of *Ring v. Arizona*.¹⁰³ In *Ring*, the U.S. Supreme Court found that Arizona’s capital sentencing scheme violated the Sixth Amendment’s jury trial guarantee by entrusting to a judge the finding of a fact that raised the defendant’s maximum penalty to death.¹⁰⁴ Under the U.S. Constitution, it is the jury not the judge who is required to make such factual decisions.¹⁰⁵

Florida’s capital sentencing statute seems to be exactly the same as the one overturned by the U.S. Supreme Court in *Ring*. Like Arizona, the death penalty is imposed after the judge makes factual findings as to the existence of aggravating factors.¹⁰⁶ Further, “[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.”¹⁰⁷ Like Arizona, a defendant cannot be sentenced to death without additional findings of fact made by the *judge, not the jury*.¹⁰⁸ One of the issues was articulated by Florida Supreme Court Justice Pariente:

In short, what is of concern about Florida’s death penalty scheme in light of *Ring* is that our statute appears to reverse the traditional roles of the judge and the jury in sentencing. . . . [U]nder Florida’s sentencing scheme the jury’s role is to *advise* the judge on the *sentence*, and it can make a recommendation of death based on a bare

101. *Steele*, 921 So. 2d at 550.

102. Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 17 (2009).

103. 536 U.S. 584 (2002).

104. *Id.* at 609.

105. *Id.*

106. See FLA. STAT. § 775.082(1) (2012); FLA. STAT. § 921.141(3) (2012).

107. *Id.* § 921.141(3) (2012).

108. See *id.*

majority. The jury does not *find* specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who *finds* the specific aggravators.¹⁰⁹

In *Evans v. McNeil*,¹¹⁰ Federal District Court Judge Martinez found another a violation of *Ring*:

As the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge.

...
... There are no specific findings of fact made by the jury. Indeed, the reviewing courts never know what aggravating or mitigating factors the jury found. It is conceivable that some of the jurors did not find the existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them. . . . After the jury's recommendation, there is a separate sentencing hearing conducted before the judge only. . . . The defendant has no way of knowing whether or not the jury found that [sic] same aggravating factors as the judge. Indeed, the judge, unaware of the aggravating factor or factors found by the jury, may find an aggravating circumstance that was not found by the jury while failing to find the aggravating circumstance that was found by the jury. . . . This cannot be reconciled with *Ring*.¹¹¹

X. TOO MUCH DISCRETION TO THE TRIAL COURT

The single most pressing and difficult question in death penalty cases is how much weight to give to specific aggravating factors and mitigating factors. It is the trial judge that does the ultimate weighing of the aggravating and mitigating factors.¹¹² There is simply no way to

109. *Bottoson v. Moore*, 824 So. 2d 115, 121–22 (Fla. 2002) (Pariente, J., concurring) (footnote omitted).

110. No. 08-14402-CIV-MARTINEZ, 2011 U.S. Dist. LEXIS 155138 (S.D. Fla. June 20, 2011), *aff'd in part and rev'd in part sub nom.* *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F. 3d 1249, 2012 U.S. App. LEXIS 22072 (11th Cir. 2012). As to the *Ring* issue: "And, to reiterate it one last time, the Supreme Court has told us exactly what we are to do in this situation: we must follow the decision that directly controls, unless and until the Supreme Court makes it non-controlling by overruling it. We understand that instruction, we have always taken it seriously, and we follow it here." 2012 U.S. App. LEXIS 22072, at *42.

111. *Id.* at *154–58 (citations omitted).

112. § 921.141(3) (2012).

make these decisions consistent and rational. By giving the judge the ability to give whatever weight he thinks necessary to every mitigating factor, one invites wholly capricious and arbitrary actions. For example, one judge could hear testimony about horrific child abuse, find it indeed existed and give it little weight. Another judge could give the exact same kind of evidence great weight. Or one judge could give great weight to the fact that a mentally ill person's capacity to "conform her or his conduct to the requirements of law was substantially impaired."¹¹³ Another judge could give the exact same evidence little weight. How much weight an aggravating factor or mitigating factor will have depends more on who the judge is than on what the evidence is. The ultimate decision on whether to impose death depends far more on the experiences, attitudes, knowledge and proclivities of the sentencing judge than it does on the aggravation and mitigation. The comparative weight of mitigating factors to aggravating factors is fundamental to how the sentencing process works. And yet, there is no way in which to instruct or review how aggravation and mitigation should be weighed. How can this legal fact possibly survive the original complaint of "untrammelled discretion"?¹¹⁴

For example, as the Florida Supreme Court noted in *Henyard v. State*:¹¹⁵

The [trial] court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance *and* accorded it 'some weight.' The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired and accorded these mental mitigating factors 'very little weight.' As for nonstatutory mitigating circumstances, the trial court found the following circumstances but accorded them 'little weight': (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family¹¹⁶

Another court could easily find that these mitigating factors were compelling and outweighed the aggravating factors.

Yet another example of this untrammelled discretion is the recent case of *Oyola v. State*.¹¹⁷ In *Oyola*, the Supreme Court of Florida wrote:

The defense then submitted the testimony of Manuel Oyola, the brother of Oyola. Manuel is nine years older than Oyola, and he

113. § 921.142(7)(e).

114. *Furman v. Georgia*, 408 U.S. 238, 248 (1972) (Douglas, J., concurring).

115. *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (per curiam).

116. *Id.* at 244 (footnote and citations omitted).

117. *Oyola v. State*, 37 Fla. L. Weekly S580 (Fla. Sept. 20, 2012) (per curiam).

remembered Oyola at a young age while Oyola was living with their parents in Connecticut. Manuel claimed that their parents physically abused Oyola, hitting Oyola and his siblings with belts, broomsticks, and pointed shoes. According to Manuel, this type of physical abuse occurred often and was so rampant that it caused Manuel, Oyola, and their siblings to leave home around the age of fifteen.

Miguel believed that their abusive home life affected Oyola's intellectual development during childhood by hindering Oyola's study habits. According to Miguel, the abuse also affected the way Oyola handled stress and emotional situations, heightening his temper. Miguel also testified that Oyola began using drugs when he was approximately twelve years old.¹¹⁸

In *Oyola*, there was also testimony by a psychologist who found that the defendant had been treated for "a working diagnosis of schizophrenia/paranoid type, which is a form of psychosis that involves hallucinations and delusions."¹¹⁹ This was confirmed by Oyola's prison mental health records.¹²⁰ There was also a significant history of mental illness in the defendant's family.¹²¹ Nevertheless, the trial court "gave slight weight to 'non-statutory mitigation [that] included serious drug abuse, an abusive home life as a child [that] created a cycle of violence, and mental disorder.'"¹²²

There is simply no way in which to effectively review these findings. The Florida Supreme Court has ruled, "Where it is clear that the trial court has considered all evidence presented in support of a mitigating factor, the court's decision as to whether that circumstance is established will be reviewed only for abuse of discretion."¹²³ And "[d]etermining whether a mitigating circumstance exists and *the weight to be given to existing mitigating circumstances* are matters within the discretion of the sentencing court."¹²⁴

This takes one right back to the appellant's claim in *Proffitt* that there is "no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case."¹²⁵ That very claim was rejected by the U.S. Supreme Court in *Proffitt*.¹²⁶ [19]

118. *Id.* at S582.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at S583 (alterations in original).

123. *Ault v. State*, 53 So. 3d 175, 186–87 (Fla. 2010) (per curiam).

124. *Hurst v. State*, 819 So. 2d 689, 697 (Fla. 2002) (per curiam) (emphasis added) (citation omitted).

125. *Proffitt v. Florida*, 428 U.S. 242, 254 (1976) (plurality opinion).

126. *See id.* at 255–56.

XI. WHO IS THE PROSECUTOR?

Perhaps the single most important factor as to whether someone will be sentenced to death is the initial decision, made with unfettered discretion, by the prosecuting authority. After retiring from the U.S. Supreme Court in 2012, Justice John Paul Stevens wrote:

Today one of the sources of such arbitrariness is the decision of state prosecutors—which is not subject to review—to seek a sentence of death. It is a discretionary call that may be influenced by the prosecutor's estimate of the impact of his decision on his chances for reelection or for election to higher office.¹²⁷

For example, the Fourth Judicial Circuit of Florida (Duval, Clay, and Nassau counties) is responsible for sentencing thirteen people to death from 2004 to 2009.¹²⁸ The Eleventh Judicial Circuit of Florida, which is composed of Miami-Dade County (the largest metropolitan area in Florida with approximately 2.5 million persons), sentenced only four.¹²⁹ In 2011, Duval County's per capita murder rate was 8.79 murders per 100,000 residents; Miami-Dade's was 8.66.¹³⁰

This decision to seek and impose death in a first-degree murder case is far more a function of the current prosecutor's decisions rather than the higher murder rate itself.¹³¹ In 2010, Duval County had the highest incarceration rate in all of Florida of any jurisdiction with more than 500,000 residents.¹³² Duval County sentenced thirteen people to death from 2004 to 2009.¹³³ Since the new prosecutor took over in August 2009, there have been seventeen people sentenced to death in Duval County.¹³⁴ The prosecutor in the Fourth Judicial Circuit has no written policies or procedures as to when and how to seek the death penalty. The prosecutor in Miami-Dade County does. There were two people sentenced to death since 2010 in Miami-Dade County.¹³⁵ This is

127. John Paul Stevens, *A Struggle with the Police & the Law*, N.Y. REV. BOOKS, Apr. 5, 2012, at 56, 56 (reviewing IRVING MORRIS, *THE RAPE CASE: A YOUNG LAWYER'S STRUGGLE FOR JUSTICE IN THE 1950s* (2011)).

128. Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 232 & n.15 (2012).

129. *Id.* at 242 & n.96.

130. Dana Treen, *Violent crime rates drop but Duval edges to top in Florida murders for 2011*, JACKSONVILLE.COM (May 1, 2012, 10:08 AM), <http://jacksonville.com/news/crime/2012-04-30/story/violent-crime-rates-drop-duval-edges-top-florida-murders-2011>.

131. See Michael Hallett & Daniel Pontzer, *No Peace Dividend for Duval? Posing Questions About Jacksonville's Civic Infrastructure*, SMART JUST. J., Spring 2012, at 1, 10–11, available at http://www.unf.edu/uploadedfiles/aa/coas/ccj/faculty/hallett_no_peace_dividend_for_duval.pdf.

132. *Id.* at 10.

133. Smith, *supra* note 128, at 232 & n.15.

134. See *Death Row Roster*, FLA. DEPARTMENT CORRECTIONS, http://www.dc.state.fl.us/active_inmates/deathrowroster.asp (last visited Nov. 28, 2012).

135. See *id.*

because there is no legislation or statewide regulation of prosecutors. Nor is there any mechanism in place to ensure that, statewide, the same criteria and factors are considered as to when to seek or waive death. Rather, the elected prosecutor in each of the twenty judicial circuits of Florida can make different decisions as whether to seek death in the first instance, whether to waive death in return for a plea, or not to waive the death penalty. State law does not require state attorneys' offices to have any written policies regarding the exercise of prosecutorial discretion. It is up to each prosecutor as to when and what they will do when at least one of the statutory aggravating factors exists.

Thus, where the crime is committed in Florida, who the prosecutor is in that jurisdiction, what that prosecutor's attitudes are with respect to the death penalty, and whether the prosecutor is facing reelection will have a much greater impact on the decision as to whether a person should receive a life or death sentence.¹³⁶ There is no objectivity in this kind of decision-making process.

XII. PRACTICAL AND LEGAL LIMITATIONS OF THE FLORIDA SUPREME COURT

In *Proffitt*, a plurality of the U.S. Supreme Court wrote:

[T]o assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants[,] [t]he Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.

...

In fact, it is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency.¹³⁷

Each case "is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'"¹³⁸

According to a study by Professor James Liebman and others, the reversal rate on direct appeal for Florida death penalty cases was 49% between 1973 and 1995, and it was 17% for state post-conviction litigation.¹³⁹

Now, however, "the Florida Supreme Court's average rate of vacat-

136. See Stevens, *supra* note 127, at 56.

137. *Proffitt v. Florida*, 428 U.S. 242, 258-59 (1976) (plurality opinion).

138. *Id.* at 253 (quoting *Songer v. State*, 322 So. 2d 481, 484 (Fla. 1975)).

139. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1975*, at 45, 48 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 15, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712.

ing death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period.”¹⁴⁰ There has been a gradually decreasing number of reversals (with some oscillation) since 1989.¹⁴¹

How does one account for this? According to the ABA report, “political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court appear to have caused the court to engage in a less vigorous proportionality review and, in turn, vacate fewer death sentences on proportionality grounds.”¹⁴² Moreover, the Florida Supreme Court only reviews cases in which the death penalty has been imposed and compares them with other cases in which it was imposed but reversed.¹⁴³ *The Florida Supreme Court does not look for cases in which the death penalty was imposed compared to cases in which the death penalty was waived before trial.*¹⁴⁴

The ABA report went on to say that:

[T]he Florida Supreme Court is no longer holding true to its own rule that proportionality review should be a “qualitative review . . . of the underlying basis for each aggravator and mitigator” and not simply a comparison between the number of aggravating and mitigating circumstances. Because the Court uses a “precedent-seeking” or “comparative culpability” approach in its proportionality review, which limits its review only to cases in which a death sentence has been imposed, the Court must determine what “level of aggravation is sufficiently low” and what “level of mitigation is sufficiently high to raise concerns of arbitrariness.”¹⁴⁵

In the ABA report’s chapter entitled “Direct Appeal Process,” recommendation number one was:

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, manner, [and] (2) provide a check on broad prosecutorial discretion, . . . direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.¹⁴⁶

140. ABA PROJECT, *supra* note 52, at 212.

141. See Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299, 318 Figure 1 (2004).

142. –ABA PROJECT, *supra* note 52, at 213 (citing Durham, *supra* note 141, at 343–48).

143. See *id.* at 212–13.

144. See *id.*

145. *Id.* at 213 (footnotes omitted).

146. *Id.* at 212.

The proportionality review promised by *Proffitt* has been significantly reduced by the politics and the personalities involved in the death penalty. This too has had a significant effect on the expansion of the types of cases in which the death penalty can be sought and imposed.

XIII. WHO IS THE PUBLIC DEFENDER AND HOW DOES SHE ALLOCATE HER LIMITED RESOURCES?

Nearly every person facing death receives a public defender because it is rare that anyone can afford to pay the many and large costs of a capital case. The amount of money that should be afforded someone facing death is significant. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* lays out the many things that must be done by lawyers preparing for a death penalty case: extensive records gathering, extensive client interviewing (often requiring overcoming the barriers of shame or denial), mental health evaluations, potential witness interviews, and reviews of medical history, family and social history, educational history, military history, employment history, and juvenile history.¹⁴⁷ As stated in the ABA's guidelines, "The collection of corroborating information from multiple sources—a time consuming task—is important wherever possible to ensure the reliability and thus persuasiveness of the evidence."¹⁴⁸

The guidelines also require a mitigation specialist and that "[t]he defense team should contain at least one member qualified . . . to screen individuals for the presence of mental or psychological disorders"¹⁴⁹ All this mitigation work requires significant time and funding. It is necessary for a presentation of all of the mitigating evidence available so that a sentencer can make a full and informed decision on whether to sentence someone to death. Therefore, a public defender's office must have the funds, resources, and personnel available to meet the demands of a death penalty case.

Public defender offices in Florida are not funded adequately to do what is necessary to prepare and litigate all the death penalty cases that are assigned to them.¹⁵⁰ Public defenders must choose where to spend the limited funds that are appropriated to them. Death penalty cases, when litigated properly, can take much, if not most, of those limited

147. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1016–26 (2003).

148. *Id.* at 1025.

149. *Id.* at 952.

150. See Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants Is Not Enough: Budget Cuts Render the Right to Counsel Virtually Meaningless*, FLA. B.J., Apr. 2009, at 43, 44.

resources.¹⁵¹

In 2008 in Duval County, for example, a newly elected public defender fired very experienced and seasoned assistant public defenders and replaced them with far less experienced lawyers.¹⁵² This was, in part, because the capital lawyers made too much money compared to other assistant public defenders. In making the decision to save money or to use it differently, public defenders may have to hire people far less qualified to handle capital cases. Statewide, each public defender has to make critical decisions as to how much of its allotted budget can and should be spent on very expensive death penalty litigation.

In Florida there is simply not enough money allocated to handle capital cases in the ways required by the ABA's standards.¹⁵³ And, given these financial constraints, who the public defender is, what kind of lawyers she hires, and the kinds of preparation skills the hired lawyers have are critical to death penalty litigation.

As discussed above, the justice system relies on lawyers who are paid and experienced enough to do all the things necessary to present to the jury everything that it needs to know in order to make a full, well-informed, and intelligent decision as to whether a defendant deserves life or death. Most death penalty cases involve extensive litigation, investigation, and preparation. Again, according to the ABA's guidelines, attorneys spend twelve times as much time on a capital case as a non-capital first-degree murder case and "recent studies indicate that several thousand hours are typically required to provide appropriate representation."¹⁵⁴ In federal capital cases that proceeded to trial from 1990 to 1997, the total number of attorney hours spent averaged 1,889.¹⁵⁵

In the Miami-Dade Public Defender's Office, there are currently nine cases for each lawyer in the Capital Litigation Unit.¹⁵⁶ This case load exceeds the number of cases that would ensure that the "workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation."¹⁵⁷ The Office of Criminal Conflict and Civil Regional Counsel (OCCRC), which is the backup office for conflicts

151. See Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER (Fall 1994), <http://www.deathpenaltyinfo.org/node/599>.

152. See Gwynedd Stuart, *Courting Disaster*, FOLIO WKLY. (Dec. 16, 2008), <http://www.folioweekly.com/documents/December162008.pdf>.

153. See Mandel, *supra* note 150, at 44.

154. Am. Bar Ass'n, Guidelines *supra* note 147, at 968.

155. *Id.* At 965

156. Conversation with Edith Georgi, Co-coordinator, Capital Litigation Unit, Office of the Public Defender in the Eleventh Judicial Circuit of Florida.

157. Am. Bar Ass'n Guidelines, *supra* note 147, at 965-969.

filed by the public defender in Miami-Dade, is (as of late 2012) not taking new capital appointments and will move to have itself removed as counsel on existing capital cases because, given the limited resources allocated, it cannot provide effective assistance of counsel.¹⁵⁸

XIV. FURTHER LEGISLATIVE AND BUDGETARY CONSTRAINTS

If the Public Defender and OCCRC both conflict, then the case will go to private court-appointed counsel.¹⁵⁹ Under current law, the maximum amount the Justice Administration Commission will pay for a death penalty case at the trial level is \$15,000.¹⁶⁰ One can only go over this cap if granted permission from a judge.¹⁶¹ And there are extensive procedures in place to prove that one was required to exceed the statutory cap (e.g., affidavits, review by the Justice Administrative Commission, an evidentiary hearing).¹⁶² If one can prove that “extraordinary and unusual efforts” were necessary, then one can receive \$100.00 per hour for additional hours necessary.¹⁶³ One cannot bill for any interim expenses and must wait until the case is completed to receive payment (even though capital cases routinely go on for far more than a year).¹⁶⁴ In 2012, the Florida Legislature amended section 27 of the Florida Statutes which now provides that if the money allotted to pay the expenses of attorneys fees exceeds the amount appropriated for this purpose, then the funds shall be paid by the Justice Administrative Commission¹⁶⁵—in other words, the courts’ budget. This creates an obvious conflict of interest¹⁶⁶ because a judge will have to measure her budget against a defendant’s right to effective representation. Another effect of this legislation is that better lawyers will get off the appointment list because of the disincentive to register.

XV. ADDITIONAL PROBLEMS

The state has a financial incentive to file death penalty cases, even if, in the end, the death penalty will be waived. There is they have a

158. Conversation with Kelly Peterson, Office of Criminal Conflict and Civil Regional Counsel in the 11th Judicial Circuit of Florida.

159. See FLA. STAT. § 27.5304 (2012).

160. FLA. STAT. § 27.5304(5)(a)(4) (2012).

161. § 27.5304(12).

162. See *id.*

163. § 27.5304(12)(d).

164. See *id.* In Federal court, a lawyer is currently paid \$178 per hour and there is no cap. 7A JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 630.10.10 (2011), available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf.

165. § 27.5304(12)(f)(2).

166. Miami Dade Circuit Court Judge Victoria Sigler indeed found this to be a conflict of interest in *State v. Martin*, F11-003648, at *5–6 (Fla. Cir. Ct. Oct. 24, 2012).

much better chance of getting much needed state funding if they have forty death cases as opposed to twenty death cases on their books. If the prosecutor does not seek death, other prosecutors in the state will get money and she will not. Who the individual prosecutor is in the same office will oftentimes will determine whether it is a death case or not. Different prosecutors have different perspectives on the same case.¹⁶⁷

Another factor in whether a case is a death penalty case is the wishes of the victim's family as well as those of the police involved. Who the victims are in the case, whether they loudly vocalize their concerns, and whether they are forgiving or angry will have a significant impact on the prosecutor's decision as to whether to try and resolve the case short of death. By law, the state must consider the views of the victim.¹⁶⁸ Does this narrow or expand the field of those eligible? Another important decisionmaker is the lead detective and other police witnesses on the case. Does the detective want the death penalty or not? How determined is the police officer and will he push strongly for the imposition of death? Again, politically, a prosecutor would create problems for him or herself if he or she did not consult with, and often defer to, the policemen involved in the case. These are just some of the everyday realities of the death penalty world.

XVI. CONCLUSION

Given all these factors and variables at play, one must concede that *Proffitt* has not narrowed the number of death penalty cases in any meaningful way in Florida. One must also concede that the death penalty is sought and imposed arbitrarily and—dare it be said?—capriciously.

These many factors and systemic failures led Justice Blackmun—who *dissented* in *Furman* and who *joined* the pluralities in the *Gregg* and *Proffitt* decisions—to say years later in *Callins v. Collins*:¹⁶⁹

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with pro-

167. In one case in Miami-Dade, one prosecutor had the case for two years and it was not a capital case. Another prosecutor received the case and filed a death notice. A third prosecutor inherited the case and did not think it was capital. A fourth prosecutor has not yet decided whether it is capital.

168. Fla.Stat. § 960.0021 (2012).

169. 510 U.S. 1141 (1994) (denying certiorari).

cedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.

....

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.¹⁷⁰

In April 2008, in *Baze v. Rees*,¹⁷¹ Justice Stevens, who also joined the plurality in *Gregg* and *Proffitt* in upholding the death penalty, stated:

Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman*, of arbitrary application identified by Justice Stewart, and of excessiveness identified by Justices Brennan and Marshall. In subsequent years a number of our decisions relied on the premise that "death is different" from every other form of punishment to justify rules minimizing the risk of error in capital cases. Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.¹⁷²

In 1997, the American Bar Association, which has no policy on the death penalty *per se*, passed the following resolution:

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment *not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:*

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death penalty Cases" (adopted Feb. 1989)

170. *Id.* at 1143–45 (Blackmun, J., dissenting from the denial of certiorari) (footnote and citations omitted).

171. 553 U.S. 35 (2008) (plurality opinion).

172. *Id.* at 84 (Stevens, J., concurring) (citations omitted).

and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal *habeas corpus* proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant"¹⁷³

The prominent American Law Institute concluded this past year that it would no longer attempt to write an update dealing with capital punishment in its Model Penal Code because of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."¹⁷⁴ The following statement was submitted to the ALI citing the reasons why it should adopt that new policy:

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.¹⁷⁵

Stevens, Blackmun, the ABA, and the ALI all address the flaws of the death penalty nationwide. But, as we have seen, the law and application of the death penalty is far worse in Florida. Regardless of one's beliefs in the moral acceptability of the death penalty in theory, the legal

173. AM. BAR ASS'N, RECOMMENDATION 1 (Feb. 3, 1997) (emphasis added), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/aba_policy_consistency97.authcheckdam.pdf.

174. Debra Cassens Weiss, *ALI Disavows Its Death Penalty Framework*, A.B.A. J. (Jan. 5, 2010, 7:31 AM), http://www.abajournal.com/news/article/ali_disavows_its_death_penalty_framework (internal quotation marks omitted).

175. Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment, in REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY*, at Annex B 1, 49 (2009), available at <http://www.deathpenaltyinfo.org/documents/alicoun.pdf>.

and practical worlds of death are simply too arbitrary and flawed. There are too many variables in play and the net is ever widening, not narrowing. The death penalty in Florida still strikes like lightning.