

RING AROUND THE JURY: REVIEWING FLORIDA'S CAPITAL SENTENCING FRAMEWORK IN *HURST V. FLORIDA*

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INTRODUCTION

In *Ring v. Arizona*, the Supreme Court struck down an Arizona capital sentencing statute that allowed a sentencing judge, sitting without a jury, to find an aggravating factor necessary for imposition of the death penalty.¹ The Court held that the jury needed to have found an aggravating factor to render the defendant eligible for the death penalty.² In Florida, the jury plays only an advisory role in the penalty phase. The trial judge is tasked with making independent findings as to the presence of aggravating factors, mitigating factors, and the balance between the two.³ Ultimately, the trial judge decides whether to sentence a defendant to death or life in prison.⁴

In *Hurst v. Florida*,⁵ the Court will review Florida's death sentencing scheme to determine whether it violates the Sixth⁶ or Eighth Amendments.⁷ Part I of this Commentary describes the factual background of the case. Part II explains the legal background and the evolution of Sixth and Eighth Amendment jurisprudence. Part III explains the Florida Supreme Court's holding in *Hurst v. Florida*, which affirmed Timothy Hurst's death sentence. Part IV outlines the arguments put forth by both parties. Part V argues that the Supreme Court should accept Petitioner's arguments and hold Florida's capital sentencing framework unconstitutional.

Florida's capital sentencing framework violates the Sixth Amendment

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

2. *Id.*

3. FLA. STAT. ANN. § 921.141(2)-(3) (West 2010).

4. *Id.*

5. 135 S. Ct. 1531 (2015).

6. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .").

7. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

as interpreted in *Ring* because (1) the trial judge makes the ultimate decision of whether to find aggravating factors necessary to sentence a defendant to death and, consequently, (2) the trial judge may override the jury's advisory sentencing recommendation. The Florida statute also violates the Eighth Amendment because death, due to its finality, is a fundamentally unique punishment in our legal system. A jury, rather than a judge, better reflects society's moral views, which are critical to weigh when deciding whether to impose the death penalty.

I. FACTUAL BACKGROUND

On the morning of May 2, 1998, the body of Cynthia Lee Harrison, an employee at a Popeye's Fried Chicken restaurant in Escambia County, Florida, was found in the restaurant's freezer.⁸ Her hands were bound with electrical tape, her mouth was taped shut, and her body was covered with "a minimum of sixty incised slash and stab wounds" that matched the use of a box cutter.⁹

Petitioner Timothy Lee Hurst, Harrison's co-worker, was charged and convicted of first-degree murder.¹⁰ Despite testimony during the penalty phase that Hurst was emotionally and mentally impaired, the jury recommended the death penalty.¹¹ The trial court then sentenced Hurst to death on its independent finding that the statutory aggravating factors of the case outweighed any mitigating factors.¹² The Florida Supreme Court affirmed the death sentence,¹³ and the U.S. Supreme Court denied Hurst's petition for a writ of certiorari.¹⁴

However, in 2009 the Florida Supreme Court vacated Hurst's death sentence on post-conviction review.¹⁵ The court held his attorney's failure to investigate or present evidence about Hurst's deficient mental condition

8. Joint Appendix, Vol. 1, at 28–29, *Hurst v. Florida*, 135 S. Ct. 1531 (2015) (No. 14-7505), 2015 WL 5562982, at *28–29 [hereinafter Joint Appendix].

9. *Id.* at 29.

10. *Id.* at 32.

11. *Hurst v. State*, 819 So. 2d 689, 694 (Fla. 2002).

12. *Id.* The trial court found three aggravating circumstances: (1) the murder was committed by a person engaged in the commission of a robbery ("great weight"); (2) the murder was especially heinous, atrocious, and cruel ("great weight"); and (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest ("great weight"). The State never argued the avoiding arrest aggravating circumstance, and the jury never received instruction on it.

13. *See Hurst v. State*, 819 So. 2d 689, 692 (Fla. 2002).

14. *See Hurst v. Florida*, 537 U.S. 977 (2002).

15. Joint Appendix, *supra* note 8, at 127.

during the initial trial “had an identifiable detrimental effect on the process of weighing the aggravation and mitigation in this case.”¹⁶ Due to this failure, the court vacated the death sentence and ordered that Hurst be resentenced.¹⁷

On remand to the trial court, the State and defense counsel presented evidence of aggravating and mitigating circumstances to the jury.¹⁸ At the close of this penalty phase, the court instructed the jury that “the final decision as to which punishment shall be imposed is the responsibility of the judge . . . [and] the law requires you to render an advisory sentence as to which punishment shall be imposed.”¹⁹ After this instruction, the jury voted 7-5 to recommend the death sentence.²⁰ The verdict did not specify which aggravating factors the jury had found, and Hurst’s motion for an interrogatory verdict was denied.²¹ The trial court then “independently weigh[ed] the aggravating and mitigating circumstances,”²² and sentenced Hurst to death.²³

On appeal to the Florida Supreme Court, Hurst urged the court to invalidate Florida’s capital sentencing scheme under *Ring v. Arizona*.²⁴ The court ruled against him, citing Supreme Court precedent that had previously upheld Florida’s capital sentencing scheme.²⁵ Hurst successfully petitioned for a writ of certiorari from the Supreme Court.²⁶

On January 12, 2016, the U.S. Supreme Court held Florida’s capital sentencing scheme violated the Sixth Amendment in an 8-1 decision.²⁷

16. *Id.* at 190. In addition to brain abnormalities consistent with fetal alcohol syndrome, Hurst’s mental deficiencies were reflected in “an IQ of somewhere between 70 and 78” and “below average adaptive functioning skills.” *Id.* at 179–87.

17. *Id.* at 191.

18. *Id.* at 296.

19. *Id.* at 207.

20. *Id.* at 24–25.

21. *Id.* at 307.

22. *Id.* at 259.

23. *Id.* at 271.

24. *Id.* at 307.

25. See *Hurst v. State*, 147 So. 3d 435, 437 (Fla. 2014). Cf. *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (“The Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.”), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

26. See *Hurst v. Florida*, 135 S. Ct. 1531 (2015) (granting certiorari).

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

II. LEGAL BACKGROUND

A. Florida's Capital Sentencing Framework

In Florida, the death penalty is administered only “if the proceeding held to determine sentencing . . . results in findings by the court that such person shall be punished to death.”²⁸

Following the conviction phase, “a separate sentencing proceeding . . . shall be conducted by the [same] trial judge before the [same] trial jury.”²⁹ In that sentencing proceeding, “the jury shall deliberate and render an advisory sentence to the court.”³⁰ The jury must base its recommendation on “[w]hether sufficient aggravating circumstances exist”³¹ and “whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances.”³² For a death sentence, only “a majority vote is necessary,”³³ but “[n]othing in [Florida law] . . . requires a majority of the jury to agree on *which* aggravating circumstances exist.”³⁴ Additionally, a trial court cannot require “a special verdict form that details the jurors’ votes on specific aggravating circumstances.”³⁵

However, “[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.”³⁶ If the court chooses death, “it shall set forth in writing its findings upon which the sentence of death is based,” including aggravating and mitigating circumstances.³⁷ The court “is not bound by the jury’s recommendation,”³⁸ but must accord the jury’s recommendation “great weight and serious consideration.”³⁹ Further, “the trial court is required to make independent

28. FLA. STAT. ANN. § 775.082(1) (West 2014).

29. FLA. STAT. ANN. § 921.141(1) (West 2010).

30. *Id.* § 921.141(2).

31. *Id.* § 921.141(2)(a); *see also id.* § 921.141(5) (enumerating statutory aggravating circumstances).

32. *Id.* § 921.141(2)(b); *see also id.* § 921.141(6) (enumerating statutory mitigating circumstances).

33. *Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010).

34. *State v. Steele*, 921 So. 2d 538, 544 (Fla. 2006) (emphasis in original).

35. *Id.* at 548.

36. FLA. STAT. ANN. § 921.141(3); *see also* Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 553 (2011) (“In other words, regardless of the decisions of the jury regarding the presence of aggravating factors and the extent to which they outweigh the case in mitigation, the trial judge is to re-balance these factors and determine anew whether death or life is merited.”).

37. FLA. STAT. ANN. § 921.141(3).

38. *Williams v. State*, 967 So. 2d 735, 751 (Fla. 1983).

39. *Ross v. State*, 386 So. 2d 1191, 1197 (Fla. 1980).

findings on aggravation, mitigation, and weight.”⁴⁰ If the trial court decides that death is the appropriate sentence, the Florida Supreme Court automatically reviews that decision.⁴¹ At that stage, it is the trial court’s “written findings of fact and the trial record which furnish the basis for [the Florida Supreme] Court’s review of the death sentence.”⁴²

B. *Capital Sentencing and the Sixth Amendment: Ring v. Arizona*

1. Capital Sentencing in Arizona Before *Ring*

Prior to *Ring*, when a Arizona jury convicted someone of first-degree murder, the trial judge alone was tasked with finding the aggravating factor or factors necessary to impose the death penalty. The jury was excluded from making any findings at the sentencing stage.⁴³ Specifically, the Arizona statute required the trial judge to “conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed.”⁴⁴ An individual could not be given a death sentence “unless at least one aggravating factor [was] found to exist beyond a reasonable doubt” by the trial judge.⁴⁵ Finally, the statute mandated that “[t]he court alone shall make all factual determinations” when determining if an aggravating factor is present.⁴⁶

In *Walton v. Arizona*,⁴⁷ the Supreme Court upheld the Arizona scheme as consistent with the Sixth Amendment “because the additional facts found by the judge qualified as sentencing considerations, not as ‘element[s] of the offense of capital murder.’”⁴⁸ Just ten years after *Walton*, however, the Supreme Court decided in *Apprendi v. New Jersey* that the Sixth Amendment protects a defendant from being “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”⁴⁹ Overruling *Walton*, the *Apprendi* Court held, “[i]f a State makes an increase in a defendant’s

40. Russ v. State, 73 So. 3d 178, 198 (Fla. 2011).

41. FLA. STAT. ANN. § 921.141(4).

42. Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988), *receded from on other grounds in* Franqui v. State, 699 So. 2d 1312 (Fla. 1997).

43. Ring v. Arizona, 536 U.S. 584, 588 (2002).

44. ARIZ. REV. STAT. ANN. § 13-703(c) (West 2001), *invalidated by* Ring v. Arizona, 536 U.S. 584, 588 (2002).

45. *Id.*

46. *Id.*

47. 497 U.S. 639 (1990).

48. Ring, 536 U.S. at 588 (quoting Walton v. Arizona, 497 U.S. 639, 649 (1990)).

49. Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”⁵⁰ Importantly, the Court noted “the relevant inquiry is one not of form, but of effect.”⁵¹

2. *Ring v. Arizona*: Arizona’s Capital Sentencing Scheme Struck Down

In 1996, Timothy Ring was convicted of first-degree murder in the killing of a Wells Fargo armored van driver.⁵² Ring’s maximum potential sentence—life imprisonment—could not be increased to the death penalty without additional findings of fact.⁵³ The judge then found two aggravating factors and one mitigating factor, but decided that the mitigating factor did not “call for leniency.”⁵⁴ The judge sentenced Ring to death.⁵⁵

The Supreme Court granted certiorari to determine “whether that aggravating factor may be found by the judge . . . or whether the Sixth Amendment’s jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury.”⁵⁶ *Ring* recognized that *Apprendi* was “irreconcilable” with *Walton*.⁵⁷ The Court acknowledged the importance of stare decisis, but noted it has “overruled prior decisions where the necessity and propriety has been established.”⁵⁸ *Ring* overruled *Walton* because it took the jury’s constitutionally mandated fact-finding role and placed it entirely in the judge’s purview.⁵⁹ Therefore, in capital sentencing schemes where aggravating factors “operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.”⁶⁰

C. *Capital Sentencing and the Eighth Amendment: “Death is Different”*

The Supreme Court “almost always treats death cases as a class apart.”⁶¹ The Court has consistently held that a state must “minimize the risk of wholly arbitrary and capricious action in imposing the death

50. *Ring*, 536 U.S. at 585–86 (citing *Apprendi*, 530 U.S. at 482–83).

51. *Apprendi*, 530 U.S. at 494.

52. See *Ring*, 536 U.S. at 591 (“The jury . . . convicted Ring of felony murder occurring in the course of armed robbery.”).

53. *Id.*

54. *Id.* at 594–95.

55. *Id.* at 595.

56. *Id.* at 597 (footnotes omitted).

57. *Id.* at 589, 609.

58. *Id.* at 608 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

59. *Id.* at 609 (citing *Walton v. Arizona*, 497 U.S. 647–49 (1990)).

60. *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

61. *Furman v. Georgia*, 408 U.S. 238, 286–87 (1972) (Brennan, J., concurring).

penalty” by adding procedural safeguards to its capital sentencing framework.⁶² Historically, three justifications—deterrence, incapacitation, and retribution—have supported the imposition of the death penalty.⁶³ Additionally, the sentence imposed must be reasonable with respect to the defendant’s background and character, and the crime committed.⁶⁴

III. HOLDING

The Florida Supreme Court affirmed Hurst’s death sentence, citing U.S. Supreme Court precedent upholding Florida’s capital sentencing framework.⁶⁵ The court distinguished Florida’s sentencing procedures from those in *Ring v. Arizona* because “Florida’s sentencing procedures do provide for jury input[,]. . . a process that was completely lacking in the Arizona statute struck down in *Ring*.”⁶⁶ The dissent noted that “the jury recommended death by the slimmest margin permitted under Florida law . . . seven-to-five . . . [making it] actually possible that there was not even a majority of jurors who agreed that the same aggravator applied,” thereby violating *Ring*.⁶⁷

The U.S. Supreme Court overruled the Florida Supreme Court, holding Florida’s capital sentencing scheme unconstitutional for violating the Sixth Amendment.⁶⁸ The Court determined that the trial judge, not the jury, had found the facts necessary to authorize Hurst’s death sentence, thus violating *Ring*’s clear requirement.⁶⁹ The Court rejected Florida’s arguments, ruling that a jury’s advisory recommendation is insufficient to support imposing the death sentence.⁷⁰

62. Brief of Amici Curiae Former Florida Circuit Court Judges in Support of Petitioner at 7, *Hurst v. Florida*, 135 S. Ct. 1531 (2015) (No. 14-7505), 2015 WL 3623138, at *7 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976)).

63. See *Gregg v. Georgia*, 428 U.S. 153, 183–84, 183 n.28 (1976) (explaining the reasoning behind each of the justifications).

64. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

65. *Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014). The Florida Supreme Court based its decision on *Hildwin v. Florida*, which held that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989), overruled by *Hurst v. Florida*, 136 S. Ct. 616 (2016).

66. *Hurst*, 147 So. 3d at 447.

67. *Id.* at 449 (Pariente, J., concurring in part and dissenting in part).

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

69. *Id.* at 622.

70. *Id.*

IV. ARGUMENTS

A. *Hurst's Arguments*

Hurst argued that Florida's capital sentencing scheme violates the Sixth and Eighth Amendments. In formulating his Sixth Amendment challenge, Hurst singled out the jury's "advisory role" as being especially problematic in light of *Ring v. Arizona*.⁷¹ Hurst proceeded to argue that, in Florida, the trial judge's independent finding of statutory aggravating factors impermissibly abrogates the jury's essential function as the fact-finder.⁷² Hurst contended that Arizona's and Florida's capital sentencing statutes are not materially different, and because *Ring* invalidated Arizona's statute, it should also invalidate Florida's.⁷³

Tracing the history of the Sixth Amendment, Hurst argued that the jury has always played an essential fact-finding role in capital sentencing cases.⁷⁴ Further, Hurst argued that, although *stare decisis* is normally adhered to, it "is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."⁷⁵ Therefore, the Court should overturn its decision in *Hildwin v. Florida* and strike down Florida's capital sentencing scheme.⁷⁶

Second, Hurst argued that Florida's capital sentencing scheme "assigns to the judge the power to impose the death penalty," thereby violating the Eighth Amendment.⁷⁷ Hurst looked to the Court's "three guideposts of . . . Eighth Amendment jurisprudence—history, current practice, and independent judgment"—to conclude that "juries, not judges, must be responsible for imposing the death penalty."⁷⁸ Hurst borrowed the reasoning from Justice Breyer's concurring opinion in *Ring*, in which he asserted that retribution is the only constitutionally permissible basis for the death penalty, and that jurors are superior to judges in making that determination.⁷⁹

71. See Brief for Petitioner at 14, *Hurst v. Florida*, 135 S. Ct. 1531 (2015) (No. 14-7505), 2015 WL 3523406, at *14 ("[T]he jury makes no express findings as to aggravating factors, and its recommendation of death is neither necessary nor sufficient for imposition of the death sentence.").

72. See *id.* at 22 (arguing that "jury input" does not satisfy *Ring* or the Sixth Amendment).

73. *Id.* at 23.

74. See *id.* at 24 (discussing the jury's "traditional" role as the fact-finder at the time of the ratification of the Sixth Amendment).

75. See *id.* at 24–25 (quoting *Alleyne v. United States*, 133 S. Ct. 2151, 2163 n.5 (2013)).

76. *Id.* at 25–26.

77. *Id.* at 26.

78. *Id.*

79. See *id.* at 30 (citing *Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring) ("Of the principal functions of criminal sentencing . . . only retribution provides a constitutionally

Finally, the American Bar Association,⁸⁰ Former Justices of the Supreme Court of Florida,⁸¹ Former Florida Circuit Court Judges,⁸² and the American Civil Liberties Union⁸³ filed amicus curiae briefs in support of Hurst arguing for a robust role of juries in capital sentencing.

B. Florida's Arguments

Florida argued that its capital sentencing scheme is fully compliant with the requirements of *Ring*, which are “narrow and specific.”⁸⁴ Because Florida’s framework “still provides for a jury determination of whether there is at least one aggravating circumstance,”⁸⁵ the jury’s finding of at least one aggravating circumstance would make the defendant eligible for the death penalty.⁸⁶ At that point, the judge’s findings cannot enhance the maximum penalty available.⁸⁷ Instead, Florida argued, the judge’s fact-finding ability would afford the defendant greater protection.⁸⁸ To counter Hurst’s assertion that a judge may impose the death penalty even when the jury recommends life, Florida underlined the rarity of such an occurrence, pointing out that the last time a judge overrode a jury’s life recommendation was in 1999.⁸⁹ Moreover, the Court has consistently

defensible basis for application of the death penalty . . . [and] jurors possess an important comparative advantage over judges.”)).

80. Brief of Amicus Curiae American Bar Association in Support of Petitioner, *Hurst v. Florida*, 135 S. Ct. 1531 (2015) (No. 14-7505), 2015 WL 3623139 (arguing that a unanimous vote is required when a capital sentencing jury finds and weigh aggravating factors, or recommends that a death sentence should be imposed).

81. Brief of Amici Curiae Former Justices of the Supreme Court of Florida in Support of Petitioner, *Hurst*, 135 S. Ct. 1531 (No. 14-7505), 2015 WL 3623137 (arguing that Florida jury recommendations are “devoid” of factual findings and are “essentially meaningless” for the sentencing judge) [hereinafter Brief of Amicus Curiae Former Justices of the Supreme Court of Florida].

82. Brief of Amici Curiae Former Florida Circuit Court Judges in Support of Petitioner, *Hurst*, 135 S. Ct. 1531 (No. 14-7505), 2015 WL 3623138 (arguing Florida’s capital sentencing framework violates the Eighth Amendment because the death penalty has unique features that only a jury is capable of weighing).

83. Brief Amici Curiae of the American Civil Liberties Union, the ACLU of Florida, and the Constitutional Accountability Center, in Support of Petitioner, *Hurst*, 135 S. Ct. 1531 (No. 14-7505), 2015 WL 3608900 (arguing that a unanimous jury verdict is required by Sixth and Eighth Amendment jurisprudence).

84. Brief for Respondent at 12, *Hurst*, 135 S. Ct. 1531 (No. 14-7505), 2015 WL 4607695, at *12 [hereinafter Brief for Respondent].

85. *Id.*

86. *Id.* at 13.

87. *Id.*

88. *Id.* See also Brief of Amici Curiae Alabama and Montana in Support of Respondent, *Hurst v. Florida*, 135 S. Ct. 1531 (2015), 2015 WL 4747983 (arguing that Supreme Court precedent, history, and policy considerations such as the judge’s “less arbitrary and more consistent” sentencing support Florida’s capital sentencing framework).

89. *Id.* at 6.

upheld Florida's capital sentencing scheme in precedents such as *Hildwin*, characterizing the scheme as placing judge and jury on equal grounds as "cosentencer[s]." ⁹⁰

V. ANALYSIS

The Court should accept Hurst's arguments and hold that Florida's capital sentencing framework violates the Sixth Amendment based on its previous holding in *Ring v. Arizona*. The Court should also hold that Florida's scheme violates the Eighth Amendment, but that argument hinges on less substantial authority. The scheme violates the Sixth Amendment because (1) the trial judge makes the ultimate decision in finding the aggravating factors necessary to sentence a defendant to death and, consequently, (2) the trial judge may override the jury's advisory sentencing recommendation. Florida's statute also raises serious Eighth Amendment concerns because the imposition of death requires a wholly different analysis due to its unique finality. Only a jury can reflect society's views on the moral decisions that death sentences inevitably involve.

A. Florida's Capital Sentencing Scheme Violates the Sixth Amendment

Ring held that any fact that increases the penalty at sentencing beyond the statutory maximum must be found by the jury.⁹¹ Accordingly, *Ring* requires a Florida jury to find at least one aggravating factor beyond a reasonable doubt before a defendant can be sentenced to death. Otherwise, the maximum punishment a defendant could receive is life imprisonment.

However, a Florida jury serves only an advisory role in sentencing.⁹² The question of whether there were any aggravating circumstances is presented to the jury, but no express finding is ever made.⁹³ Although the trial judge is required to assign "great weight" to the jury's determinations,⁹⁴ the judge cannot possibly know the specifics of the jury's findings and makes her own findings.⁹⁵ As Florida case law notes, "the trial court is required to make independent findings on aggravation, mitigation, and weight."⁹⁶ The jury's recommendation therefore has no identifiable binding effect at the sentencing stage.

90. *Id.* at 13.

91. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

92. *See* FLA. STAT. ANN. § 921.141(2) (West 2010).

93. *See id.* (describing determinations of the jury in sentencing as merely "advisory").

94. *Ross v. State*, 386 So. 2d 1191, 1197 (Fla. 1980).

95. *See* FLA. STAT. ANN. § 921.141(3) (West 2010).

96. *Russ v. State*, 73 So. 3d 178, 198 (Fla. 2011).

Abrogating the jury's role as the fact-finder violates the Sixth Amendment as it was interpreted in *Ring*. One may imagine a situation in which the jury first finds no aggravating circumstances, thereby recommending a life sentence, only to be followed by the trial judge finding an aggravating circumstance and imposing the death penalty, despite the jury's recommendation. As *Ring* noted, the question is "who decides, judge or jury."⁹⁷ Clearly, in Florida the judge is the one who decides.

This abrogation is further evidenced by the trial judge's power to hear evidence on aggravating and mitigating circumstances not initially presented to the jury.⁹⁸ This *Spencer v. State* hearing further reduces the jury's role in the fact-finding process, rendering the jury recommendation "essentially meaningless."⁹⁹ Accordingly, the judge may impose a death sentence based on evidence of an aggravating circumstance that was never presented to the jury.¹⁰⁰ Furthermore, because the jury is not required to make specific findings as to each element, the judge does not even receive an effective recommendation from the jury—she has no idea what aggravating circumstance the jury potentially found, only that the jury found *something*.¹⁰¹ The judge could disagree with the jury, find a different aggravating circumstance, and still impose the death penalty. More disconcerting is the fact that even if the jury recommends life, the judge can separately find a new aggravating circumstance and impose the death penalty anyways.

This lack of specificity presents further difficulties for Florida's capital sentencing framework in light of *Ring*. As the dissent in the Florida Supreme Court decision stated, "[It is] actually possible that there was not even a majority of jurors who agreed that the same aggravator applied."¹⁰² For example, in the event of a 7-5 jury vote recommending death, it is possible that there were three votes for Aggravator A, four votes for Aggravator B, and five votes for no aggravators. In that scenario, nine jurors voted that Aggravator A did not apply, and eight voted that Aggravator B did not apply. Therefore, it may not be true that "Hurst

97. *Ring*, 536 U.S. at 587 (citing *Apprendi v. New Jersey*, 530 U.S. 465, 492 (2000)).

98. See *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993) (specifying that the trial judge must "afford, if appropriate, both the State and the defendant an opportunity to present additional evidence").

99. Brief of Amici Curiae Former Justices of the Supreme Court of Florida, *supra* note 81, at 8.

100. *Id.* at 3.

101. See *Walton v. Arizona*, 497 U.S. 639, 648 (1990) ("A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than [did] a trial judge in Arizona . . .").

102. *Hurst v. State*, 147 So. 3d 435, 449 (Pariente, J., concurring in part and dissenting in part).

received a death sentence only after the jury found beyond a reasonable doubt at least one aggravating circumstance.”¹⁰³

Finally, *stare decisis* should not control here. Although the Court has previously upheld Florida’s capital sentencing scheme in *Hildwin v. Florida*, the Court has “overruled prior decisions where the necessity and propriety of doing so has been established.”¹⁰⁴ In Florida, capital defendants’ Sixth Amendment rights are violated. In this system, Florida judges are permitted to occupy a position that is meant for twelve citizens. Further, *Hildwin* was decided before the Court affirmed the right to jury fact-finding in *Ring*.

B. Florida’s Capital Sentencing Scheme Violates the Eighth Amendment

The Court should also strike down Florida’s capital sentencing scheme as violating the Eighth Amendment. As Justice Breyer stated in his concurring opinion in *Ring*, “retribution provides the main justification in capital punishment, and . . . [the jury has a] comparative advantage in determining, in a particular case, whether capital punishment will serve that end.”¹⁰⁵ In retributive decisions, jurors are superior because they “reflect more accurately the composition and experiences of the community as a whole.”¹⁰⁶ Moreover, only the jury can “express the conscience of the community.”¹⁰⁷

Despite this comparative advantage, the judge is the true decision maker in Florida. Because death’s permanence makes it fundamentally different from every other form of punishment, morals are heavily involved in death penalty cases. And because the judge usurps the jury’s rightful role as the fact-finder in capital cases, defendants in Florida are robbed of their ability to appeal to the moral inclinations of the members of their communities. Those moral inclinations may go directly to the heart of whether something should truly be considered an aggravating or mitigating factor.

However, it is unlikely that the Court will hold this scheme violates the Eighth Amendment. The *Ring* majority never decided whether Arizona’s

103. Brief for Respondent, *supra* note 84, at 14.

104. *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

105. *Id.* at 614 (2002) (Breyer, J., concurring in the judgment).

106. *Id.* at 615 (quoting *Spaziano v. Florida*, 468 U.S. 447, 486 (1984) (Stevens, J., concurring in part and dissenting in part)).

107. Brief for Petitioner, *supra* note 71, at 30 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

scheme violated the Eighth Amendment. Only Justice Breyer's concurrence argued that the scheme violated the Eighth Amendment. As no other justices joined him in that opinion, the chances of others joining him this time are probably low.

C. Analysis of the Supreme Court's Recent Ruling

The U.S. Supreme Court ruled that the Florida capital sentencing scheme violated the Sixth Amendment because it based Hurst's death sentence on a judge's fact-finding, not a jury's verdict.¹⁰⁸ Using reasoning that closely tracked its decision in *Ring*, the Court held that in Florida's capital sentencing scheme, the jury was not required "to make the critical findings necessary to impose the death penalty."¹⁰⁹ Further, the Court held that the Florida capital sentencing scheme's incorporation of an advisory jury verdict—a feature that Arizona lacked—was insufficient to satisfy the Sixth Amendment's requirements.¹¹⁰

In addition, the Court rejected Florida's argument for upholding the capital sentencing scheme on the basis of stare decisis.¹¹¹ The Court expressly overruled *Hildwin*, which had previously held Florida's capital sentencing scheme constitutional.¹¹²

The majority opinion did not reach the question of the Eighth Amendment.¹¹³ Only Justice Breyer, as in *Ring*, would have held that the Florida sentencing scheme violated the Eighth Amendment.¹¹⁴

CONCLUSION

For the reasons stated above, the Supreme Court should reverse the holding of the Florida Supreme Court and find that Florida's capital sentencing framework violates both the Sixth Amendment in light of the Court's ruling in *Ring* and the Eighth Amendment. Currently, capital defendants in Florida are being deprived of their Sixth Amendment right to have a jury determine any fact upon which the death penalty may be imposed. No longer should Florida be allowed to circumvent this right by assigning the jury a merely advisory role. As Justice Scalia so pertinently

108. See *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) ("The Sixth Amendment . . . required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.").

109. *Id.* at 622.

110. *Id.*

111. *Id.* at 623.

112. See *id.* ("Time and subsequent cases have washed away the logic of . . . *Hildwin*.").

113. *Id.* at 616.

114. *Id.* at 624 (Breyer, J., concurring).

said, the Court should no longer accept “the repeated spectacle of a man’s going to his death because a *judge* found that an aggravating factor existed.”¹¹⁵

115. *Ring v. Arizona*, 536 U.S. 584, 612 (Scalia, J., concurring).