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FORGETTING *FURMAN*: ARBITRARY DEATH PENALTY SENTENCING SCHEMES ACROSS THE NATION

Sarah A. Mourer*

Arbitrary: /'a:bIt(rə)ri/ Adjective

1. based on random choice or personal whim, rather than any reason or system.
2. (of power or a ruling body) unrestrained and autocratic in the use of authority.¹

INTRODUCTION

In 1976,² the poor, the forgotten, and the minority were condemned to die by *juries* who *were* not given adequate standards. In 2013, the poor, the forgotten and the minority are condemned to die by *judges* who *are* not given adequate standards. The decision in *Furman v. Georgia*³ was in response to discriminatory death-penalty decisions made by juries. The legislature has forgotten the lessons taught by *Furman* and today, the “untrammelled discretion”⁴ once held by juries is now held by the judiciary. Many death penalty sentencing procedures are unconstitutional, in violation of both the Sixth and Eighth Amendments, because the judge alone is authorized to sentence the defendant to life or death despite being uninformed of the jury’s factual findings. Pursuant to the Sixth Amendment as articulated in *Ring v. Arizona*,⁵ the factual findings upon which a death sentence rests must be found by the jury, and only the

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¹ *Arbitrary Definition*, OXFORD DICTIONARIES ONLINE, <http://www.oxforddictionaries.com/definition/english/arbitrary> (last visited Apr. 15, 2014).

² For convenience, the feminine pronoun will be used throughout this Article. Masculine pronouns could have been used equivalently.

³ 408 U.S. 238 (1972).

⁴ *Id.* at 247.

⁵ 536 U.S. 584 (2002).

jury.⁶ Nevertheless, many jurisdictions permit the judge to override a jury's sentencing recommendation even when the jury does not disclose their factual findings to the judge.⁷ In other words, many states sanction judicial death-penalty sentencing when the judge lacks any knowledge of the basis for the jury's recommendation. When a judge is confronted with making a death penalty sentencing decision, she is legally prohibited from making a factual assessment on which to base that decision.⁸ Consequently, she can only do one of three things, all of which are illegal: (1) she could make her own factual findings based on the evidence in violation of the Sixth Amendment; (2) she could guess what factual findings the jury made; or (3) she could base her decision on her own personal preconceptions and biases. Effectively, the judge must either violate the Sixth Amendment or make an arbitrary decision using guesswork or bias. A heightened risk of arbitrary judicial death sentencing developed as a result of the directive against judicial fact-finding in death-penalty sentencing. Recalling *Furman v. Georgia*,⁹ an arbitrary decision violates the Eighth Amendment as cruel and unusual punishment.

Judges and juries are human, with all of their attendant natural inadequacies and preconceptions. Yet, judges and juries differ in one meaningful way: Juries consist of a group of individuals and the judge is one person. One person may more readily introduce her own value system or notions into a decision-making process. Therefore, the Sixth Amendment provides the right to a jury trial.¹⁰ It attempts to protect defendants in criminal trials from partial or biased decisions. The Sixth Amendment entrusts the fact-finding power to a group of people, as opposed to one judge who could potentially exert her authority in an unfair or biased manner. Presumably, if a majority or unanimous decision is made by a group of at least six people, one person's individual biases or preconceptions cannot ordinarily dominate the decision-making process. In fact, judges may be more likely to make discriminatory decisions in an effort to pander to community standards as a result of the election process.¹¹ Nonetheless, both judges and juries hand down questionable verdicts thought to be a result of bias or

⁶ *Id.* at 609.

⁷ See William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 937–39 (2006).

⁸ See *Ring*, 536 U.S. at 609.

⁹ See *Furman*, 408 U.S. at 277.

¹⁰ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

¹¹ See Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1313 (1997).

preconceptions.¹² There will always be significant potential for social influence to operate in the legal system.¹³

In 1972, *Furman v. Georgia* held that the death penalty, as applied at that time, violated the Eighth Amendment's ban on cruel and unusual punishment.¹⁴ The case concluded that juries had "untrammelled discretion" in deciding who lives or dies.¹⁵ Juries were provided no guidance in their decisionmaking and were left with little more than their own human biases and personal value systems to govern their decisions. The result was that a disproportionate number of poor, minority, and black individuals received the death penalty.¹⁶ Thus, *Furman* effectively banned the death penalty in the United States until jurisdictions implemented specific procedures and guidelines for capital sentencing. In response to *Furman*, the states and federal government established standards for capital sentencing. Accordingly, the death penalty sentencing schemes and procedures designed by many states led to the reinstatement of the death penalty in America.¹⁷ Several states that maintain the death penalty in the United States¹⁸ utilize capital-sentencing standards that result in the arbitrary imposition of the

¹² Certainly, history proves that groups of people can also exhibit bias and predispositions unanimously or as a group decision. This topic is beyond the scope of this Article. It is, however, worth mentioning that many factors contribute towards a biased jury verdict. The personality make-up of the jury and the dominance of the foreperson is only one example. Occasionally, a strong and authoritative person may become foreperson with a jury comprised of "followers." "Followers" are those jury members who do not voice their opinion and tend to follow the leadership in the jury room. Other factors include the social media of the day in ways that powerfully affect entire communities. Bias may also pervade jury decisions when the law is not made clear or the juries' instructions are vague and difficult to follow. *See generally* NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007); Stephen A. Mourer, *Response Set in Personality Assessment*, *ARCHIVES GEN. PSYCHIATRY*, Dec. 1, 1968, at 763–65.

¹³ *See* PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 291 (1991). "[M]ost evidence is subjective, a matter of interpretation," and often evidence is verbal, in the form of peoples' words; thus, social influence enters into the very production of such evidence. These two variables are magnified by the fact that the justice system runs on an adversarial model in which two sides investigate and present competing versions of the truth and alternative views on what are the facts. *Id.*

¹⁴ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁵ *Furman v. Georgia*, 408 U.S. 238, 245–47 (1972) (citing *McGautha v. California*, 402 U.S. 183, 207 (1971)).

¹⁶ *See infra* notes 161–68 and accompanying text.

¹⁷ *See, e.g.*, *Jones v. United States*, 527 U.S. 373, 381 (1999); *Tuilaepa v. California*, 512 U.S. 967, 973 (1994); *Gregg v. Georgia*, 428 U.S. 153, 195–96 (1976).

¹⁸ Thirty-two states and two American jurisdictions maintain the death penalty. The following states and jurisdictions still impose the death penalty:

Alabama	Louisiana	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	South Dakota
California	Montana	Tennessee

death penalty in violation of the Eighth Amendment. These arbitrary schemes run the same risk of potential bias and prejudice in death sentencing as did the pre-*Furman* death cases and place fairness at great risk in the judicial process.

In *Ring v. Arizona*, the U.S. Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment as the functional equivalent of an element of a greater offense.¹⁹ Ring was convicted by a jury of felony murder.²⁰ Ring could not be sentenced to death unless additional factual findings were made by the judge at a sentencing hearing, in the absence of a jury.²¹ At this hearing the judge determined aggravating circumstances²² (facts that increase the gravity of the crime or escalate pain to the victim) and mitigating circumstances²³ (anything in the life of the defendant which

Colorado	Nebraska	Texas
Delaware	Nevada	Utah
Florida	New Hampshire	Virginia
Georgia	North Carolina	Washington
Idaho	Ohio	Wyoming
Indiana	Oklahoma	
Kansas	Oregon	U.S. Gov't
Kentucky		U.S. Military

States with the Death Penalty, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 15, 2014).

¹⁹ *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

²⁰ *Id.* at 591.

²¹ *Id.* at 594.

²² An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

FLA. STANDARD JURY INSTRUCTIONS, ch. 7.11 (citing FLA. STAT. ANN. § 921.141(5) (West 2010)), available at http://www.floridasupremecourt.org/jury_instructions/chapters/chapter7/p2c7s7.11.rtf.

²³ A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

Id. (citing FLA. STAT. ANN. § 921.141(6) (West 2010)).

potentially renders the death penalty inappropriate), and may impose death only if he finds at least one aggravator and no mitigators that outweigh the aggravator(s). The judge in *Ring* found that two aggravators were proven beyond a reasonable doubt and that the mitigation did not outweigh these aggravators.²⁴ Thus, the judge, alone, did the fact finding that led to the finding of the aggravating factors necessary to enhance Ring's sentence to death. Relying on the Sixth Amendment,²⁵ *Ring* held that the fact finding necessary to put a person to death must be done by the jury.²⁶ Therefore, the jury, not the judge, must determine whether aggravators that are conditional for the sentence of death were proven beyond a reasonable doubt.

Although *Ring* was decided under the Sixth Amendment, many of today's jury instructions and capital-sentencing schemes also violate the Eighth Amendment as arbitrary punishment. When a death-penalty scheme does not require jury unanimity, the jury provides only an advisory recommendation to the judge, and especially if the jury does not disclose which aggravators it determined were proven beyond a reasonable doubt, then the sentencing scheme is arbitrary and unconstitutional. It is arbitrary because the judge, as the sentencing authority, must then use guesswork and conjecture in determining which aggravators the jury did or did not find proven beyond a reasonable doubt. Pursuant to *Ring*, the judge is constitutionally prohibited from determining whether the sentencing aggravators were proven beyond a reasonable doubt.²⁷ At the heart of *Furman* is the belief that if a defendant's life is at stake, the sentencing decision must be made pursuant only to specific boundaries and clear guidelines.²⁸ Although *Furman* reviewed decisions made by juries, judges are no less likely to allow personal feelings to influence decisions when not structured by specific parameters that must be followed. When a judge is left uninformed about the facts that she should use or not use when deciding a person's life or death, this exemplifies arbitrary punishment as described by the Eighth Amendment.

No death-penalty scheme can completely control or correct the biases and individual dispositions of judges or juries. This is true for any criminal case or trial; the human condition is a part of the criminal-justice system, for better or for worse. Bias and prejudice can be contained and reduced but cannot be entirely eliminated.

The question ultimately is, therefore, how much bias and error should society tolerate in death-penalty cases?²⁹ Human temperaments and personal bias will always

²⁴ *Ring*, 536 U.S. at 594–95.

²⁵ U.S. CONST. amend. VI.

²⁶ *Ring*, 536 U.S. at 609.

²⁷ *Id.*

²⁸ *Furman v. Georgia*, 408 U.S. 238, 247–48 (1972).

²⁹ Consequently, any death sentence is based in large part on the jury's or judge's personal notions and impulses, thereby arguably rendering any verdict arbitrary in violation of the Eighth Amendment. Given the finality and the various problems with the death penalty, including its unique place in the human psyche, no capital system of procedures, parameters, or policies can provide the justice system with the power to make capital sentencing fair, just, and logical. These various problems include but are not limited to: lack of deterrence of the death penalty, increasing awareness of wrongful convictions and risk of the execution of an innocent

factor into judges and juries' decisions. These propositions are supported by recent studies and research demonstrating that the death penalty is still disproportionately applied to the poor and minorities.³⁰ Although the death penalty in America may be on its way out,³¹ it remains in effect today and it is, therefore, incumbent on states to develop schemes that are reasonably systematic and logical, and that leave the decision fully with the jury pursuant to the law.³² There are schemes that can reduce the level of arbitrariness in the judge's review of juries' recommendations as well as provide judges with better guidance in their decisionmaking.³³ Due to the finality of death, each of these resolutions has drawbacks, but there can be significant improvements to many states' current arbitrary systems.

I. DEATH PENALTY SENTENCING SCHEMES THAT PROVIDE FOR A
JURY ADVISORY RECOMMENDATION ARE A VIOLATION OF THE
SIXTH AMENDMENT RIGHT TO A JURY TRIAL

The Sixth Amendment problems with judicial capital-sentencing decisions based on incomplete information are addressed in *Apprendi v. New Jersey*³⁴ and *Ring v.*

person, excessive cost of the death penalty, lack of closure or support provided to surviving friends and family, and the increasing community opinion that the death penalty exceeds the boundaries of human dignity. The arbitrary nature of the death penalty generally is not the focus of this Article. However, this issue is important to note because the abolition of the death penalty is a comprehensive and complete solution to the issues raised here.

³⁰ DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 150 (1990) (finding that black defendants who kill white victims have the greatest chance of being given the death penalty). Controlling for variables, Baldus found that the odds of being executed were 4.3 times greater for defendants who killed whites than for defendants who killed blacks. *Id.* at 154; see also *Race and the Death Penalty*, ACLU (Feb. 26, 2003), <http://www.aclu.org/capital-punishment/race-and-death-penalty> (indicating that as recently as 2003 the death penalty has been discriminatorily applied).

³¹ See *infra* notes 241–47 and accompanying text; see also *Public Opinion: 2012 Gallup Poll Shows Support for Death Penalty Remains Near 40-Year Low*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/public-opinion-2012-gallup-poll-shows-support-death-penalty-remains-near-40-year-low> (last visited Apr. 15, 2014). This recent Gallup Poll measured Americans' abstract support for the death penalty at sixty-three percent. *Id.* As recently as 1994, eighty percent of the respondents were in favor of the death penalty. *Id.* When Gallup and other polls offer respondents a choice of life in prison without parole or the death penalty, the public is nearly evenly split on the issue. *Id.* Conservatives, Republicans, men, older respondents, and those with a high school education or less were most likely to support the death penalty. *Id.* This poll was conducted December 19–22, 2012, and the margin of error was +/- four percentage points. *Id.*

³² *Ring*, 536 U.S. at 609.

³³ See, e.g., *infra* note 157 and accompanying text (describing a capital-sentencing scheme requiring jury unanimity); *infra* note 158 and accompanying text (highlighting a scheme requiring disclosure of all aggravators); *infra* Part VII (proposing a scheme that does not allow for judicial override).

³⁴ 530 U.S. 466 (2000).

Arizona.³⁵ *Apprendi* is a case with a majority opinion that reached two holdings. First: Any fact, other than an element of a prior conviction, that increases the penalty of a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.³⁶ Second: New Jersey's hate crime statute, which allowed a judge to increase the penalty beyond the maximum via a preponderance of the evidence, violated the Due Process Clause of the U.S. Constitution.³⁷ There were two concurrences and two dissents, with the majority opinion authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg. The State argued that the judge's actions involved a sentencing factor and not an "element of the offense"³⁸ but the Court did not find this persuasive. It was dismissed as a semantic disagreement over how to apply a rule.³⁹ If the defendant is exposed to a greater punishment than authorized by a jury's verdict, the judge may not increase the punishment unilaterally or by a lesser standard: Otherwise, it violates the Sixth Amendment.⁴⁰

In *Ring v. Arizona*, Ring and his friends robbed an armored car, killing the driver in the process.⁴¹ Ring was convicted of felony murder by the jury.⁴² Subsequently, a sentencing hearing was held without a jury and the judge found two aggravating circumstances: that the crime was committed for pecuniary gain and that the crime was committed "in an especially heinous, cruel or depraved manner" (also referred to as heinous, atrocious or cruel, or "HAC").⁴³ The judge also found a single mitigating factor, which was Ring's minimal criminal record.⁴⁴ However, the judge did not believe that this factor called for leniency and sentenced Ring to death.⁴⁵ On appeal, the Arizona Supreme Court agreed with Ring that the evidence was insufficient to prove HAC, but re-weighed the remaining aggravating factor against the mitigation and affirmed the death sentence.⁴⁶ On review by the U.S. Supreme Court, this judgment was reversed.⁴⁷ *Ring* does not dispute, however, that the judge may re-weigh the aggravators against the mitigators once an aggravator has been shown to be invalid and the Court has struck a particular aggravator, as the Arizona Supreme Court did here.⁴⁸

³⁵ 536 U.S. at 609.

³⁶ *Apprendi*, 530 U.S. at 476, 490.

³⁷ *Id.* at 476.

³⁸ *Id.* at 472.

³⁹ *Id.* at 475–76.

⁴⁰ *Id.* at 476.

⁴¹ *Ring v. Arizona*, 536 U.S. 584, 589, 593–94 (2002).

⁴² *Id.* at 591.

⁴³ *Id.* at 592–93 & n.1, 594–95.

⁴⁴ *Id.* at 595.

⁴⁵ *Id.*

⁴⁶ *Id.* at 596.

⁴⁷ *Id.* at 597.

⁴⁸ *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).

The *Ring* Court dealt with the holdings they handed down in both *Walton v. Arizona*⁴⁹ and *Apprendi*, announcing them as “irreconcilable” under Sixth Amendment jurisprudence.⁵⁰ The Court overruled *Walton* to the extent that it allowed a sentencing judge, without a jury, to find proven an aggravator necessary to impose the death penalty. *Ring* reasoned that because Arizona’s aggravating factors act as an equivalent to an element of a greater offense, then the Sixth Amendment requires the factors be found by a jury.⁵¹ The reasoning was to prevent *Apprendi* from being reduced to a nearly meaningless rule regarding statutory drafting:

Arizona . . . supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an “element” or a “sentencing factor” is not determinative of the question “who decides,” judge or jury.⁵²

Apprendi catalyzed the downfall of *Walton*, and *Ring* finished the job. The Court concluded that “[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”⁵³ The rule, as it stands in this case, is expressed in the portion of *Apprendi* quoted in *Ring*: “If a State makes an increase in a defendant’s 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.”⁵⁴

Justice Scalia’s concurrence in *Ring* further clarifies the Court’s ruling. He stated that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives—“whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”⁵⁵

Justice Scalia believes that the people’s belief in a right to trial by jury is in “perilous decline.”⁵⁶ He used evidence of state and federal legislatures adopting the “sentencing factor” strategy to circumvent the jury requirement and leaving punishment increases solely in the hands of judges.⁵⁷ Scalia observed that the community’s

⁴⁹ 497 U.S. 639, 649 (1990) (holding that it was acceptable under the Arizona sentencing statutes for a judge, without a jury, to enhance a defendant’s sentence).

⁵⁰ *Ring*, 536 U.S. at 609.

⁵¹ *Id.*

⁵² *Id.* at 604–05 (citations omitted).

⁵³ *Id.* at 589.

⁵⁴ *Id.* at 602 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482–83 (2000)).

⁵⁵ *Id.* at 610 (Scalia, J., concurring).

⁵⁶ *Id.* at 612.

⁵⁷ *Id.* at 611–12.

adoration of the jury trial in criminal cases cannot be protected if courts become “callous to the need for that protection by regularly imposing the death penalty without it.”⁵⁸

Thus, although *Ring* did not specifically hold that aggravators were elements of the crime (as opposed to sentencing factors), it did hold that allowing the judge to enhance a sentence (in other words, impose a death sentence) based on an independent finding of aggravators was a violation of the Sixth Amendment right to a jury trial.⁵⁹ This is based on the fundamental tenet that the jury is the fact finder and the judge determines the law. Aggravators are grounded in facts and must be proven with facts by the prosecutors beyond a reasonable doubt.⁶⁰ Some of the most serious and most compelling aggravators to jurors are Cold Calculated and Premeditated (CCP), and Heinous, Atrocious and Cruel (HAC).⁶¹ These aggravators can be proved only by using factual evidence from the crime. For HAC the prosecution must convince the jury beyond a reasonable doubt that the victim suffered unnecessarily, among other facts.⁶² Therefore, evidence presented might include how long it took the victim to die, or how much pain the victim was in and how long that pain lasted. For CCP, the prosecution must prove beyond a reasonable doubt that the defendant had a heightened level of planning and premeditation.⁶³ Therefore, evidence presented might include previous threats made to the victim or prior purchases of weapons. Pursuant to *Ring*, it is unconstitutional for the judge to make these factual findings.

II. HOW DEATH PENALTY SENTENCING SCHEMES WITHSTAND A SIXTH AMENDMENT ANALYSIS

Death-penalty schemes that fail to disclose the jury’s findings regarding aggravators and that provide for judicial overrides have survived repeated Sixth Amendment challenges across the nation. To illustrate the manner in which courts have reached such conclusions, Florida’s capital-sentencing scheme will be examined. Remarkably, Florida’s death-penalty scheme has withstood Sixth Amendment scrutiny. This is particularly troubling given that Florida’s death-penalty procedure gives the judge some of the most discretion and least information of all of the schemes in the country, thereby resulting in the greatest potential for bias. In Florida, the jury provides the judge a mere majority recommendation (not a unanimous vote) and an advisory

⁵⁸ *Id.* at 612.

⁵⁹ *Id.* at 609 (majority opinion).

⁶⁰ *See supra* note 22 and accompanying text.

⁶¹ *See, e.g.,* Hall v. State, 87 So. 3d 667, 673, 677 (Fla. 2012) (discussing the great weight afforded to HAC in this instance). *See generally* Ken Driggs, “The Most Aggravated and Least Mitigated Murders”: *Capital Proportionality Review in Florida*, 11 ST. THOMAS L. REV. 207 (1999).

⁶² *See* Walton v. Arizona, 497 U.S. 639, 655 (1990).

⁶³ *See* Sochor v. Florida, 504 U.S. 527, 531 (1992).

recommendation instead of a verdict.⁶⁴ The jury is also not required to disclose which aggravators they determined existed beyond a reasonable doubt.⁶⁵ Thus, when the judge enters a sentencing verdict, he does so not knowing if a particular aggravator was even found (assuming there were at least two). Judge Jose Martinez of the U.S. District Court for the Southern District of Florida in *Evans v. McNeil*⁶⁶ found this scheme unconstitutional as applied in Evans's case,⁶⁷ but the Eleventh Circuit overturned his decision in *Evans v. Secretary, Florida Department of Corrections*.⁶⁸

In the district court, in which Evans had petitioned for a writ of habeas corpus, Evans contended that Florida's death-penalty scheme, in which a jury recommends a sentence of life imprisonment or death but the trial judge actually decides what sentence to impose, is unconstitutional in light of *Ring v. Arizona*.⁶⁹ Recall that *Ring* held, under the Sixth Amendment, that a sentencing court cannot, over a defendant's objections, make factual findings with respect to aggravating circumstance necessary for the imposition of the death penalty.⁷⁰ Such findings must, as a constitutional matter, be made by a jury.⁷¹ In *Ring*, the Supreme Court identified four states with "hybrid" death penalty sentencing schemes similar to but not identical to Arizona's.⁷² The "hybrid" states provide for advisory verdicts from juries but leave ultimate sentencing determinations to the judge.⁷³ Those states are Florida, Alabama, Delaware, and Indiana.⁷⁴ Of those four states, two (Delaware and Indiana), require that juries make unanimous findings regarding particular, specified aggravating factors.⁷⁵ Alabama, which presently requires at least ten jurors to recommend the death penalty, proposed

⁶⁴ FLA. STANDARD JURY INSTRUCTIONS, *supra* note 22, ch. 7.11.

⁶⁵ *Id.*

⁶⁶ No. 08-14402-CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011).

⁶⁷ *Id.* at *54.

⁶⁸ *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (2013).

⁶⁹ *Evans v. McNeil*, 2011 WL 9717450, at *5.

⁷⁰ *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

⁷¹ *Id.*

⁷² *Id.* at 608 n.6.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See DEL. CODE ANN. tit. 11, § 4209 (2013) ("In order to find the existence of a statutory aggravating circumstance . . . beyond a reasonable doubt, the jury must be unanimous as to the existence of *that* statutory aggravating circumstance. As to any statutory aggravating circumstances . . . which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on *each such circumstance*. . . . [T]he Court shall discharge that jury after it has reported its findings *and* recommendation" (emphasis added)); IND. CODE § 35-50-2-9 (2013) ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt . . . and shall provide a special verdict form for each aggravating circumstance alleged.").

legislation pending that would commit the sentencing decision entirely to the jury.⁷⁶ Florida law, which requires a mere majority for a death-penalty recommendation and does not require special verdict forms to record specific findings by the jury, is an outlier.⁷⁷

Evans was a 1991 murder-for-hire case. The case involved a conspiracy between four people: Sarah Thomas (Evans's girlfriend), Donna Waddell (Evans's roommate), Connie Pfeiffer (the victim's wife), and Evans.⁷⁸ At trial the evidence established, primarily through the testimony of Sarah and Donna, that Connie wanted to kill her husband Alan for his insurance money.⁷⁹ Sarah testified that Evans said he would kill Alan in exchange for a stereo, some of the insurance money, and a camcorder.⁸⁰ Sarah further testified that the four of them conspired to come up with a plan to kill Alan without getting caught. The plan was that they would go to the fair and stay long enough to be seen.⁸¹ Donna and Sarah then took Evans back to the trailer where Evans staged a robbery.⁸² Donna and Sarah went back to the fair, leaving Evans in the trailer to wait for Alan's return to kill him.⁸³ Evans shot Alan when Alan entered the trailer.⁸⁴ Evans left with the electronics and the trailer in "disarray."⁸⁵ The police found no signs of forced entry and the back door open.⁸⁶ They also found Alan's life insurance policy papers on the table for \$120,000 with Donna named as the beneficiary.⁸⁷ The case became inactive until 1997 when the case was reopened and Sarah and Donna agreed to cooperate.⁸⁸ Based on their cooperation, Connie and Evans were arrested for murder.⁸⁹

On February 11, 1999, a jury found Evans guilty of first-degree murder.⁹⁰ The same jury recommended the death penalty for Evans by a vote of nine to three.⁹¹ Evans was subsequently sentenced to death by the Florida trial judge on June 16 of that year.⁹² The Supreme Court of Florida summed up the judge's findings as follows:

⁷⁶ See S. 247, 2011 Leg., Reg. Sess. (Ala. 2011). This bill did not pass.

⁷⁷ See *infra* Part V.A.

⁷⁸ *Evans v. State*, 808 So. 2d 92, 95 (Fla. 2001).

⁷⁹ *Id.* at 95–96.

⁸⁰ *Id.* at 96.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 96–97.

⁸⁵ *Id.* at 97.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 98.

⁸⁹ *Id.*

⁹⁰ See *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *4 (S.D. Fla. June 20, 2011), *aff'd in part, rev'd in part sub nom. Evans v. Sec'y, Fla. Dep't of Corrs.* 699 F.3d 1249 (11th Cir. 2012).

⁹¹ *Id.*

⁹² *Id.*

The trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (“CCP”) (great weight). The court found only one statutory mitigator: Evans’ [sic] age of nineteen when he committed the murder (little weight).

In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans’ [sic] good conduct while in jail (little weight); (2) Evans’ [sic] good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans’ [sic] family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans’ [sic] [evident] artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the mitigation, the trial court imposed the death penalty.⁹³

In Florida, the jury instructions (1) provide for a majority only vote (nonunanimous); (2) provide the judge with an advisory opinion that the judge may override; and (3) do not require the jury to disclose which aggravators it found to be proven beyond a reasonable doubt.⁹⁴ In Florida, the judge must give the jury recommendation “great weight.”⁹⁵ Further, the sentencing judge cannot override a jury recommendation of life imprisonment if the jury had a “reasonable basis” for the recommendation.⁹⁶ It is inexplicable how the sentencing judge knows if the jury has a reasonable basis for its recommendation when she is not communicated the basis. It is noteworthy that

⁹³ *Evans v. State*, 808 So. 2d at 99–100.

⁹⁴ See FLA. STANDARD JURY INSTRUCTIONS, *supra* note 22, ch. 7.11. See generally FLA. STAT. § 921.141(3) (2010).

⁹⁵ See *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

⁹⁶ See *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989).

all but one aggravator must be determined by the jury. Courts do not contemplate that the aggravator “prior conviction of an aggravated violent felony” must be determined by the jury beyond a reasonable doubt.⁹⁷ This is not a fact that juries are in an adequate position to determine. Juries are not well versed or familiar with court documents that list individuals’ criminal records and how these documents are obtained. The defendants’ attorneys are in a better position to analyze these documents and make any arguments that may be proper, and the judge is in the better position to determine if such arguments are supported. This aggravator is an anomaly. Other statutory aggravators are based on witness evidence, and must be proven beyond a reasonable doubt by the prosecution and will involve an assessment of credibility and sensibility by the jury (for example, HAC or Vulnerable Victim).

In *Evans*, the trial judge made his own separate factual findings.⁹⁸ Without a special verdict form that informs that judge of which of the aggravators the jury found proven, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for a defendant based on an invalid aggravator, in other words, an aggravator not found by the jury. This fact cannot be reconciled with *Ring*. Further, nothing in the record shows that the *Evans* jury found the existence of a single aggravating factor by even a simple majority.⁹⁹ The jury was presented with two aggravating factors for consideration,¹⁰⁰ and it is possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another. Either of these results would have the aggravator found by less than a majority of the jurors. Although the court noted that unanimity may not be required, it cannot be that *Evans*’s death sentence is constitutional when there is no evidence to suggest that even a simple majority found the existence of any single aggravating circumstance.¹⁰¹ There may have been no one aggravating factor found by a majority of the jury beyond a reasonable doubt. This is also true for any state where the jury provides a recommendation as opposed to a verdict and does not reveal the aggravators upon which they relied. The Eleventh Circuit’s interpretation of *Ring* in *Evans*’s habeas proceeding is such that, at the very minimum, the defendant is entitled to a jury’s majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence.¹⁰² Because the jury may not have reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual

⁹⁷ See *Almendarez-Torres v. United States*, 523 U.S. 224, 246 (1998).

⁹⁸ See *Evans v. State*, 808 So. 2d at 107–09.

⁹⁹ See generally *Evans v. State*, 808 So. 2d 92.

¹⁰⁰ *Id.* at 99.

¹⁰¹ *Id.* at 109.

¹⁰² *Evans v. Sec’y, Fla Dep’t of Corrs.*, 699 F.3d 1249, 1260–62 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2393 (2013).

findings necessary for the imposition of the death penalty as opposed to the jury as required by *Ring*. The district court in determining Evans's habeas petition found 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 Sixth Amendment; rather, it is simply a sentencing recommendation made without a clear factual finding. As the district court stated, "in effect, the only meaningful findings regarding aggravating factors are made by the judge."¹⁰³ Therefore, Judge Martinez granted Habeas relief on these grounds.¹⁰⁴

Prior to *Evans*, in *State v. Steele*¹⁰⁵ the Florida Supreme Court addressed the *Ring* holding but expressly stated that the court is not deciding whether *Ring* applies to the Florida system.¹⁰⁶ *Steele* does however discuss whether *Ring* requires Florida to use a specialized verdict form which discloses the jury's findings of particular aggravators. *Steele* strongly suggests that a unanimous jury verdict may well be within the scope of Eighth Amendment jurisprudence for Florida.¹⁰⁷ *Steele* ultimately concluded that, because Florida's scheme requires the jury to determine the existence of at least one aggravating circumstance beyond a reasonable doubt before recommending death, no disclosure is needed and there are no constitutional issues.¹⁰⁸ *Steele* also held that the jury's majority does not have to agree on the existence of the same aggravating circumstance but only a majority must agree that one of them was in fact proven.¹⁰⁹

The Eleventh Circuit in *Evans v. Secretary, Florida Department of Corrections*,¹¹⁰ with Judge Carnes writing for the majority, overturned Judge Martinez's ruling regarding Florida's death-penalty scheme.¹¹¹ In sum, the court held that, because the sentencing judge does know that the jury found at least one aggravator to be proven by evidence beyond a reasonable doubt, it necessarily comports with *Ring* and the Sixth Amendment.¹¹² The court cited *Ault v. State*,¹¹³ noting that "a jury cannot advise in favor of death unless it finds the existence of at least one statutory aggravating circumstance" to be proven beyond a reasonable doubt.¹¹⁴ Judge Carnes also placed emphasis on the Florida rule that the judge must give the jury's recommendation

¹⁰³ *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *53 (S.D. Fla. June 20, 2011), *aff'd in part, rev'd in part sub nom.* *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012).

¹⁰⁴ *Id.* at *54.

¹⁰⁵ 921 So. 2d 538 (Fla. 2005).

¹⁰⁶ *Id.* at 545-46.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 546.

¹¹⁰ *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2393 (2013).

¹¹¹ *Id.* at 1265.

¹¹² *Id.* at 1250, 1253, 1255-56, 1260.

¹¹³ *Ault v. State*, 53 So. 3d 175, 200 (Fla. 2010).

¹¹⁴ *Evans v. Sec'y*, 699 F.3d at 1256 (citing *Ault*, 53 So. 3d at 205).

“great weight.”¹¹⁵ The court went to great effort to underscore that the sentencing judge’s findings must be in writing and specify each aggravator and mitigator the judge found to exist, as well as the weight the judge allocated to the factor. The court stressed that the Florida Supreme Court cannot sustain an opinion of a trial judge unless the record reflects substantial competent evidence to support the trial judge’s weighing process.¹¹⁶ *Evans v. Secretary* used *Proffitt v. Florida*¹¹⁷ to find that Florida’s sentencing scheme is anything but arbitrary, in part because it is “judge-based.”¹¹⁸ This 1976 case goes as far as to state:

[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.¹¹⁹

Proffitt and indeed *Evans v. Secretary* missed the mark. An argument that protections are in place to insure that the judge’s decisionmaking is fair in capital sentencing is contradictory to what the law requires.¹²⁰ *Apprendi* and *Ring* compel the jury, and only the jury, to make any factual finding that increases a defendant’s sentence. The judge’s hands are tied in this regard. He is prohibited from ascertaining the facts, or speculating as to what facts the jury found. The notion that a judge should be consistent, from case to case, is counter-intuitive with the fundamental tenet of death-penalty jurisprudence that each case should be decided on an individual basis.¹²¹ Procedures should be consistent but the judge’s application of those procedures must be individualized for each unique defendant. Judges are instructed to sentence each capital defendant on an individual basis.¹²² Whether an individual morally deserves to live or die as determined by the applicable mitigators and aggravators is a highly individualized decision. Each case necessarily differs because death-penalty sentencing hearings involve the close examination of the character, personality, and value of the defendant holistically. Each death-penalty sentencing is as different as each person is to another. To create the need for capital-sentencing consistency is paramount to

¹¹⁵ *Id.* (citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

¹¹⁶ *Id.* (citing *Oyola v. State*, 99 So. 3d 431, 446 (Fla. 2012)).

¹¹⁷ 428 U.S. 242 (1976).

¹¹⁸ *Evans v. Secretary*, 699 F.3d at 1257 (citing *Proffitt*, 428 U.S. at 252–53).

¹¹⁹ *Proffitt*, 428 U.S. at 252.

¹²⁰ *See Ring v. Arizona*, 536 U.S. 584, 607–08 (2001) (“In any event, the superiority of judicial fact finding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.”).

¹²¹ *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

¹²² *See, e.g., id.*

saying all lawyers are alike or anyone that works at a bank is the same. It is not just or reasonable to make attempts at consistency when sentencing a person to life or death. One defendant's crime that was particularly heinous, but was committed by a person with brain damage, might legally require a life sentence, where another with the same aggravators and mitigators may not. These decisions fundamentally rely on the jury's assessment of the value of the defendant as a person and the weight of the aggravators, if proven beyond a reasonable doubt. In cases like *Tuilaepa v. California*¹²³ and *Jones v. United States*,¹²⁴ the U.S. Supreme Court emphasized that each death-penalty case must be given individualized review and that the State is entrusted with the task of ensuring that the process be principled and *neutral*.¹²⁵ Although judges are understood to be neutral, in circumstances such as these, judges are unable to be neutral because they are prohibited from knowing the evidence, knowing the findings, or knowing the facts. *Evans v. Secretary* also cited *Hildwin v. Florida*,¹²⁶ which stated that the judge does not need to know specific facts from the jury to determine that sufficient aggravating circumstances apply.¹²⁷ Again, this case is pre-*Apprendi* and *Ring* and is contrary to their holdings. Further, neither *Ring* nor any other case has put any restraints on the jury's power to place as much or little weight on any mitigators as they see fit. Perplexingly, the *Evans* court cited *Spaziano v. Florida*¹²⁸ in support of its position that Florida's sentencing scheme is constitutional in the face of new law holding that the jury must make all factual decisions regarding aggravators.¹²⁹ *Spaziano* held:

There is no . . . danger [of an erroneously imposed death penalty] involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.¹³⁰

¹²³ 512 U.S. 967 (1994).

¹²⁴ 527 U.S. 373 (1999).

¹²⁵ *See id.* at 381; *Tuilaepa*, 512 U.S. at 973.

¹²⁶ 490 U.S. 638 (1989) (per curiam).

¹²⁷ *Id.* at 640–41.

¹²⁸ 468 U.S. 447 (1984).

¹²⁹ *Evans v. Sec'y, Dep't of Corrs.*, 699 F.3d 1249, 1257 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (2013) (citing *Spaziano*, 468 U.S. at 459).

¹³⁰ *Spaziano*, 468 U.S. at 459 (citations omitted).

Although neither *Ring* nor *Apprendi* disputed that the judge may determine the ultimate punishment for a defendant as *Spaziano* holds, *Spaziano* specifically disregarded that the judge as sentencer may only base his sentence on jury-determined facts. *Spaziano* is a direct contradiction of today's law. Thus, *Evans v. Secretary* is an example of the court's dodging of the question. The Supreme Court has held on numerous occasions, as in *Jefferson County v. Acker*,¹³¹ that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court, the prerogative of overruling its own decisions."¹³² Therefore, *Evans v. Secretary* chose to let the Supreme Court handle this issue if it so desired. Not surprisingly, the Supreme Court denied certiorari and elected to let this injustice persist.¹³³

III. 2013: *ALLEYNE V. UNITED STATES*: CAPITAL SENTENCING JURY FACT-FINDING CLARIFIED

In 2013, *Alleyne v. United States*¹³⁴ further clarified *Apprendi v. New Jersey*. *Alleyne* held that if a fact constitutes an element or ingredient of a charged offense, the jury must have found it beyond a reasonable doubt.¹³⁵ It further explained that anything that increases a punishment in any way is, by rule, a fact.¹³⁶ *Alleyne* broadened the rule from both *Ring* and *Apprendi* in that it held not only that a judge cannot enhance a defendant's sentence above the statutory maximum, but also that she cannot raise the ceiling either, even if the sentence remains within the statutory range.¹³⁷ In *Alleyne*, the jury found that the defendant had "used or carried a firearm in relation to a crime of violence."¹³⁸ This crime carried a minimum sentence of five years.¹³⁹ However, the statute allowed the minimum to be increased to seven years if the weapon was brandished.¹⁴⁰ The jury did not find that the weapon was "brandished."¹⁴¹ The judge disagreed with the jury's factual finding, made his own factual finding, and increased the minimum sentence to seven years.¹⁴² *Alleyne* objected but was defeated on appeal to the Fourth Circuit.¹⁴³ The U.S. Supreme Court held that the judge did not

¹³¹ 210 F.3d 1317 (11th Cir. 2000).

¹³² *Evans v. Secretary*, 699 F.3d at 1263 (citing *Acker*, 210 F.3d at 1320).

¹³³ *Evans v. Crews*, 133 S. Ct. 2393 (2013).

¹³⁴ 133 S. Ct. 2151 (2013).

¹³⁵ *Id.* at 2163.

¹³⁶ *Id.* at 2155.

¹³⁷ *Id.* at 2162–63.

¹³⁸ *Id.* at 2156.

¹³⁹ *Id.* at 2155.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2156.

¹⁴² *Id.* at 2164–65.

¹⁴³ *Id.* at 2156.

have this authority because the fact of brandishing the weapon increased Alleyne's punishment, and as a result, that fact has to be determined by the jury beyond a reasonable doubt.¹⁴⁴ Further, this case clarified that any fact that enhances a defendant's punishment is considered an element of the crime (as opposed to a sentencing factor).¹⁴⁵

It is difficult to dispute that facts increasing the legally prescribed minimum sentence may also increase the punishment, heightening the loss of liberty associated with the crime. The fact of brandishing the weapon had to be determined by the jury beyond a reasonable doubt before the statutory minimum could be raised. Therefore, *Alleyne* solidified the finding that the judge cannot make factual determinations that increase a defendant's sentence; these factual determinations must be founded in evidentiary determinations made by the jury beyond a reasonable doubt. It is hard to fathom that the Eleventh Circuit could have overruled *Evans* if *Alleyne* had existed at the time. However, the Sixth Amendment subject addressed in *Ring*, *Apprendi*, *Evans*, and *Alleyne* is not likely over. There has been considerable dispute regarding the matter even among the Supreme Court itself. The *Alleyne* decision was a hotly disputed decision and was a split decision, five votes to four.¹⁴⁶ Although, the Florida scheme has survived a Sixth Amendment analysis so far, its scheme and other similar schemes would not likely survive Eighth Amendment scrutiny. These schemes are arbitrary as defined in *Furman v. Georgia*.¹⁴⁷

IV. JURY ADVISORY RECOMMENDATIONS VIOLATE THE EIGHTH AMENDMENT'S BAN ON ARBITRARY PUNISHMENT

Death-penalty sentencing procedures that allow the judge to override the jury's decision and that do not require the jury to disclose which aggravators they determined to be proven are unconstitutional. These capital-sentencing schemes are problematic because they violate the Sixth Amendment pursuant to *Ring* and its progeny. Resulting from the Sixth Amendment mandate against judicial fact finding, an Eighth Amendment concern arose. When a judge overrides a jury recommendation, because the judge may not assess the facts without running afoul of the Sixth Amendment, the judge has no other route to travel in which to make a decision other than speculation and supposition. The result is arbitrary death sentencing in violation of the Eighth Amendment. Today, a minimum of one-third of the states that maintain the death penalty have arbitrary capital-sentencing schemes that possess the grave potential for producing haphazard or indiscriminate death sentences in violation of the Eighth Amendment.¹⁴⁸ Arbitrary death sentencing was first held to be a violation of the

¹⁴⁴ *Id.* at 2163–64.

¹⁴⁵ *Id.* at 2158.

¹⁴⁶ *See id.* at 2154–55.

¹⁴⁷ *See infra* Part IV.

¹⁴⁸ Thirty-two states maintain the death penalty and at least eleven have arbitrary procedures. *See supra* note 18 and accompanying text.

Eighth Amendment in *Furman v. Georgia*.¹⁴⁹ *Furman* centered its opinion upon the proscription of cruel and unusual punishments and stated that the Eighth Amendment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”¹⁵⁰

Furman was the first case to coin the phrase “arbitrary and capricious” in the Eighth Amendment context and held that “[a] penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”¹⁵¹ *Furman* is a long opinion, consisting of five concurring opinions and four dissenting opinions. Three of the four dissenting opinions are joined by the other three dissenters, who also wrote their own opinions.¹⁵² The per curiam opinion is about a paragraph long and held that the imposition of the death penalty in the cases reviewed fit the definition of “cruel and unusual punishment” and reversed the judgment, remanding for further proceedings.¹⁵³ In essence, *Furman* found that because the states had not adopted specific sentencing procedures and guidelines for death-penalty cases, these states had imposed arbitrary death sentences. The opinion served as a de facto ban on the death penalty: “[T]here is increasing recognition of the fact that the basic theme of equal protection is implicit in ‘cruel and unusual’ punishments. ‘A penalty . . . should be considered “unusually” imposed if it is administered arbitrarily or discriminatorily.’”¹⁵⁴

Furman recognized that human bias and social attitudes necessarily influence judges and juries. *Furman* reviewed a number of studies and found that individual dispositions of judges and juries resulted in the disproportionate imposition of death on “the poor, the Negro, and the members of unpopular groups.”¹⁵⁵ Subsequently, many states’ legislatures drafted specific procedures to be followed before the imposition of the death penalty.¹⁵⁶ These schemes led to the reinstatement of the death penalty in many jurisdictions on the premise that specific jury instructions with structure and guidelines would prevent bias and discrimination in death-penalty sentencing.

An example of one of the most structurally sound procedures for determining life or death for a defendant is (ironically) in Georgia. In Georgia, the jury is instructed in their jury instructions that their decision regarding the sentence of life or death “must be unanimous, and it must be in writing, dated, signed by [their] foreperson and returned and read in open court.”¹⁵⁷ Further, the Georgia jury instructions advise that

¹⁴⁹ 408 U.S. 238, 249 (1972).

¹⁵⁰ *Id.* at 270 n.10 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

¹⁵¹ *Id.* at 249 (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

¹⁵² *See Furman*, 408 U.S. at 240.

¹⁵³ *Id.* at 239–40.

¹⁵⁴ *Id.* at 249 (citations omitted).

¹⁵⁵ *Id.* at 249–50.

¹⁵⁶ For an example of how one state changed its procedures after *Furman*, see *Gregg v. Georgia*, 428 U.S. 153, 196–208 (1976) (upholding Georgia’s post-*Furman* death-penalty regime).

¹⁵⁷ GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, § 2.15.80 (4th ed. 2013).

the jury must “set out in writing such aggravating circumstance(s) that [they] may find from the evidence in this case to exist beyond a reasonable doubt”¹⁵⁸ An aggravating circumstance is a circumstance that the state must prove through facts to the jury that increases the moral culpability of the defendant for the crime.¹⁵⁹ Most jurisdictions define an aggravating circumstance as a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.¹⁶⁰ Georgia’s capital-sentencing procedures do an adequate job informing the judge of the factual findings of the jury.

Nonetheless, today, just as in 1972 when *Furman* was decided, the death penalty is discriminatorily applied. In 1983, over a decade after *Furman*, a group of researchers performed a study to assess potential bias in the Georgia death-penalty system. This study has come to be known as the Baldus study.¹⁶¹ Its findings were unmistakable, in that death sentences were being given in a highly prejudiced manner. The study found that black defendants who kill white victims have a much greater chance of being given the death penalty than do white defendants that kill black victims with generally equal mitigators and aggravators.¹⁶² Further, more than twenty independent studies around the nation, as recently as 2008, have reached similar conclusions.¹⁶³ These studies include states that disclose the aggravators to the judge and states that do not, like Florida. Baldus found that the odds of being executed were 4.3 times greater for defendants who killed whites than for defendants who killed blacks.¹⁶⁴ The results of the Baldus study did not lead to improvements in capital-sentencing structures or the controlling of personal bias in death-penalty proceedings. From 1976 to 2003, people of color have accounted for a disproportionate forty-three percent of the total executions in the United States.¹⁶⁵ While white victims account for nearly half of all murder victims, a whopping eighty percent of all death-penalty cases involve

¹⁵⁸ GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, § 2.15.62 (4th ed. 2013).

¹⁵⁹ See *supra* note 22 and accompanying text.

¹⁶⁰ See, e.g., *supra* note 22 and accompanying text.

¹⁶¹ See BALDUS ET AL., *supra* note 30.

¹⁶² *Id.*

¹⁶³ See Adam Liptak, *A New Look at Death Sentences and Race*, N.Y. TIMES, Apr. 29, 2008, at A10.

¹⁶⁴ See BALDUS ET AL., *supra* note 30, at 154. The Baldus study also found that (1) defendants who kill white victims receive the death penalty in eighteen percent of cases; (2) defendants who kill black victims receive the death penalty in ten percent of cases; (3) the death penalty was given in thirty-one percent of cases of a black defendant and a white victim; (4) the death penalty was given in eight percent of cases of a white defendant and a white victim; (5) the death penalty was given in ten percent of cases of a black defendant and a black victim; and (6) the death penalty was given in ten percent of cases of a white defendant and a black victim. *Id.* at 141.

¹⁶⁵ *Race and the Death Penalty*, *supra* note 30.

white victims.¹⁶⁶ Additionally, as of 2002, a grand total of twelve people were executed in cases where the defendant was white and the victim black.¹⁶⁷ Conversely and disturbingly, 178 black defendants have been executed for the murder of white victims.¹⁶⁸

Why is this discrepancy still occurring? Preconceptions, prejudices, and biases are often learned very early and are incorporated both consciously and unconsciously into a person's behavior. Unconscious bias and prejudice are the most dangerous types of error because they are outside the person's awareness and therefore not available for attempts at conscious control and modification. Similarly, when confronted with the termination of a human's life, each individual is prone, at least in part, to react in a highly personal and sometimes biased manner. Statutes that fail to provide the sentencing judge with which aggravators the jury found proven beyond a reasonable doubt lead to arbitrary judicial decisionmaking because they result in a context which can promote the expression of the judges conscious or unconscious prejudice in her sentencing decision. This brand of arbitrary judicial decisionmaking provides a fertile ground for capital judicial sentencing to reflect personal bias and may account for many of the results seen in the Baldus study and studies of its kind. A lack of parameters and specific guidelines for the judge leaves room for prejudicial decisionmaking. Prejudice is defined as a sentiment that lacks adequate factual information to support a conclusion; an uninformed decision based on personal preconceptions.¹⁶⁹

An uninformed decision is arbitrary. What does the judge rely on when making a capital-sentencing decision when she must make the decision without the necessary and sufficient information to do so? In a capital sentencing, the judge is prohibited from weighing the facts in order to determine the existence of aggravators, thus the judge cannot rely on the facts from the sentencing hearing to make her decision. The judge is forced into a speculative endeavor to *guess* which aggravators the jury found to be proven. As a result, judges are left with wide discretion to decide if the defendant lives or dies.

Too much judicial discretion provides occasion for potential prejudice and bias. This risk of bias is enhanced when the judge's sentencing decision does not contain the safeguards that are provided by jury decisions. The Sixth Amendment intends to provide defendants with a degree of fairness because it is less probable that one person's prejudice or bias will dictate a jury's decision. A one-person decision leaves no room for other individuals to provide guidance, balance, and alternative viewpoints. Two individuals may hear the same information and interpret it differently.¹⁷⁰

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ "Prejudice" is defined from many sources as an opinion or decision made without sufficient knowledge or factual basis. *See, e.g., Prejudice Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/prejudice> (last visited Apr. 15, 2014); *see also Prejudice Definition*, FREE DICTIONARY, <http://www.thefreedictionary.com/prejudice> (last visited Apr. 15, 2014).

¹⁷⁰ ZIMBARDO & LEIPPE, *supra* note 13, at 291–92.

For example, the term “often” may mean something very different to different listeners.¹⁷¹ Therefore, group decisions provide a level of fairness and objectivity.

Although death-penalty schemes where aggravators remain unrevealed and where judges make the final sentencing decisions have so far survived a Sixth Amendment analysis, they are unlikely to survive an Eighth Amendment analysis. Picture this: A jury is presented with only three aggravators; even in a unanimous vote jurisdiction, four jurors may agree on one aggravator and reject the other two, another four jurors may agree on only one different aggravator and the last four on another, resulting in only four votes for each aggravator, but a unanimous jury verdict for death. This occurs because jury instructions do not inform juries that they must all agree that the same aggravator was proven beyond a reasonable doubt, but that they simply must unanimously agree that at least one aggravator was proven beyond a reasonable doubt and that the aggravator(s) outweigh the mitigators.

In 1976, in *Gregg v. Georgia*,¹⁷² the Supreme Court held that proper guidelines for the judge could ensure that the death penalty is not imposed in an arbitrary or capricious manner.¹⁷³ However, in *Gregg*, the Court mandated that the sentencing judge must be given adequate information and guidance so that the sentence would not be arbitrary or capricious.¹⁷⁴ It further required that the judge be apprised of the information relevant to the imposition of sentence. At a minimum, *Gregg* construed *Furman* as holding that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”¹⁷⁵

Pursuant to *Gregg* and in conjunction with *Ring*, a state where the jury does not divulge which aggravators it found beyond a reasonable doubt cannot pass Eighth Amendment scrutiny. *Gregg* considers a sentence arbitrary if a judge does not have the relevant information needed to decide whether she should impose life or death.¹⁷⁶ Which aggravators the jury determined existed beyond a reasonable doubt is precisely

¹⁷¹ To demonstrate individual interpretation of written or spoken material, one study used the term “often” as a part of a question asking how often a subject did something. The listeners translated the term “often” into the following percentages: weekly or more often (forty-one percent), once or twice a month (thirty-three percent), and less than once a month (twenty-six percent). The term “often” is a verbal construct and in the absence of very specific and concrete denotation may result in an unexpected range of responses that essentially render meaningless and unhelpful the construct “often.” See LEE J. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* 515–16 (5th ed. 1990); C. Robert Pace & Jack Friedlander, *The Meaning of Response Categories: How Often Is “Occasionally,” “Often,” and “Very Often”?*, 17 *RES. IN HIGHER EDUC.* 3, 267–81 (1982).

¹⁷² 428 U.S. 153 (1976).

¹⁷³ *Id.* at 195.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 189.

¹⁷⁶ *Id.* at 194–95.

the information the judge requires to make an informed sentencing decision or else the decision is arbitrary. This problem is demonstrated when the judge maintains sentencing authority in death cases.

To further illustrate, assume the judge is a robot, therefore lacking any human capacity for prejudice or bias. The robot judge is presented with a capital-sentencing decision under a scheme similar to Florida's, where the judge is uninformed as to which aggravators the jury found proven. The robot judge would follow the law precisely and under *Ring*, *Apprendi*, and *Alleyne*, it would refrain from an evaluation of the facts in which to ascertain which aggravators were proven beyond a reasonable doubt. Faced with the task of weighing the aggravators against the mitigators in order to determine the appropriate sentence, the robot judge would be unable to render a sentence. The robot judge would lack sufficient information to calculate a sentence. Such an analogy makes clear that under such a capital-sentencing scheme, a judge necessarily must assess the facts in violation of the Sixth Amendment or rely on her personal value system and innate biases. A robot judge would not compute a sentence and likely self-destruct due to cognitive dissonance. A human judge must choose between violating the law or using personal feelings and prejudice. The result is an uninformed and arbitrary decision in violation of the Eighth Amendment.

If a jurisdiction does not require the exposure of aggravators, and also only requires a mere majority vote, then even a specific jury form indicating which aggravators the jury found beyond a reasonable doubt would not cure the problem. This is because the jury form does not assure the judge that the aggravators were agreed upon by a majority of the jury. The district court in *Evans* on habeas review discussed that with a jury vote for death of nine to three, when two aggravators were presented to the jury for consideration, five jurors could have been convinced as to one aggravator and four jurors could have been convinced as to the other.¹⁷⁷ A specialized verdict form disclosing which aggravators the jury found existed beyond a reasonable doubt does not cure this problem. If the jury form only indicated that both aggravators were found then the judge would be affirmatively misled into the false assumption that a majority of the jury found both aggravators to be proven.

This holds true if even the jurisdiction requires a unanimous jury vote. Even with a unanimous vote for death the jury may not have even agreed by a majority vote that even one aggravator was proven beyond a reasonable doubt. In a jurisdiction that requires a unanimous jury verdict, if the jury is presented with three aggravators, four jurors could find one, four could find another, and four could find a third, thereby reaching a unanimous jury verdict that the aggravators outweigh the mitigators. The jury verdict form may simply say that three aggravators were found and again the judge is misled. In both of these examples, an individual is likely to be sentenced to death when not one aggravator was agreed upon by a majority in one case or unanimously in another. To be clear, these are circumstances where the judge is guessing

¹⁷⁷ *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *54 (S.D. Fla. June 20, 2011).

and speculating that the jury did in fact find the aggravators proven by a majority vote or unanimously. How many individuals have been executed under these circumstances?

The judge may know that the jury determined the existence of one aggravating circumstance if they recommended death. Yet this is not meaningful unless there was only one aggravating circumstance presented to the jury in the first place. If two or more aggravating circumstances were presented to the jury, then the jury may have rejected one or more and the judge has no way of knowing this. Thus, it is impossible for the judge to base her decision on the jury's decision because the jury's decision remains a mystery.

In states with a judicial override, like Florida, the judge may even impose a death sentence when the jury has recommended life. The Florida death-penalty statute empowers the court to enter a sentence of life or death notwithstanding the jury's recommendation.¹⁷⁸ The court must base this decision on the existence of sufficient aggravating circumstances and insufficient mitigating circumstances. As discussed, the judge does not know which aggravating circumstances exist, if any. This occurred in *Spaziano v. State*.¹⁷⁹ In this circumstance, in a state that does not reveal any of the jury's findings, the court will not know whether the jury found that no aggravators exist or whether the jury found that aggravators did exist but the mitigators outweighed them. In the first instance, if a judge sentenced a defendant to die, this would clearly violate both the Sixth and Eighth Amendments as the judge would have to assume that the jury did find aggravators and also assume she knew what the aggravators were. Then the judge would be re-weighing them and reaching a different result. Again, the process devolves into a form of judicial mysticism.

If juries do not disclose their decisions regarding aggravators, it would be just as likely that a jury rejected one or more aggravators entirely, yet the judge may presume

¹⁷⁸ Findings in Support of Sentence of Death—*Notwithstanding 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, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment

FLA. STAT. § 921.141(3) (2010) (emphasis added).

¹⁷⁹ 393 So. 2d 1119 (Fla. 1981).

that the jury rested their decision on that aggravator. In jurisdictions where the judge imposes the sentence, she is charged with sentencing the defendant pursuant to the jury's recommendation, presumably without redetermining the facts already established by the jury. As is abundantly clear, the jury must decide the facts, so when the judge is sentencing she should not reassess the facts. In spite of this, judges in many states do just that.

V. SPECIFIC STATES' CAPITAL-SENTENCING SCHEMES THAT VIOLATE THE SIXTH AND EIGHTH AMENDMENTS

One-third of the states' capital-sentencing schemes are arbitrary and in violation of the Eighth Amendment and the Sixth Amendment. In Georgia, as in the majority of death-penalty jurisdictions, the penalty phase in which the jury renders a sentencing verdict is bifurcated from the guilt phase. In other words, most jurisdictions, state and federal, have death-penalty trials in two phases, phase I, in which the jury determines whether or not the prosecution has proven the defendant's guilt, and if the defendant is found guilty, phase II, in which the same jury determines by verdict or advisory recommendation if the defendant should be sentenced to death or life without parole. Other than some general issues that will be discussed in the solutions and conclusions section, Georgia's death-penalty scheme and others like it reflect a scheme that comes close to providing proper guidance for the courts and meeting constitutional requirements.¹⁸⁰ Georgia's procedures come close to meeting constitutional requirements because:

- (1) The jury renders a verdict, not merely an advisory opinion or recommendation;
- (2) Their vote must be unanimous as to the aggravators proven beyond a reasonable doubt and to their verdict of death; and
- (3) They must disclose to the judge in the verdict form which aggravators the jury determined were proven beyond a reasonable doubt by evidence.¹⁸¹

However, many other states' procedures encompass several problems with their death-penalty schemes. For example, in Alabama and Florida, among others, the jury does not render a verdict as to life or death but only an advisory recommendation to the judge.¹⁸² Further, in many states, the jury does not disclose to the judge the aggravating circumstances upon which it relied in finding for death. Consequently, in these jurisdictions, judges sentence defendants to death while remaining uninformed of the specific jury findings. In these circumstances, judges are left without the proper guidance to render a constitutional verdict. The law requires that the jury make all factual findings.¹⁸³ Thus, if the judge is charged with rendering the verdict blind to these

¹⁸⁰ See GA. CODE ANN. § 17-10-30 (West 2013).

¹⁸¹ See *supra* notes 157–58 and accompanying text.

¹⁸² See *infra* text accompanying notes 186, 199.

¹⁸³ *Alleyne v. United States*, 133 S. Ct. 2151, 2154–63 (2013); *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

factual findings, such verdict is necessarily arbitrary. These states' schemes are arbitrary and in obvious violation of the Eighth Amendment.

A number of states' capital-sentencing statutes require that the jury merely recommend a sentence to the judge and then the judge makes the final life or death determination. These states include Alabama, Delaware, Florida, Montana, and Nebraska.¹⁸⁴ In addition, a number of states do not require juries to divulge which aggravators they determined to exist beyond a reasonable doubt. These states include California, Florida, Montana, Utah, and Virginia.¹⁸⁵ If a judge determines a death sentence wholly unaware of the jury's factual findings regarding the aggravators, then such a decision meets the Eighth Amendment's prohibition against arbitrary punishment. In a majority-vote jurisdiction like Florida, the jury could provide a recommendation for death while outright rejecting one or more aggravators with the judge never knowing. This is a clear example of arbitrary sentencing on the part of both the judge and the jury.

A. Florida

The following example of the Florida jury instructions indicates that the fact finding power is left to the judge:

If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death. The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you

¹⁸⁴ See Robbie Brown, *In Georgia, Push to End Unanimity for Execution*, N.Y. TIMES (Dec. 17, 2008), http://www.nytimes.com/2008/12/17/us/17death.html?_r=1&.

¹⁸⁵ See, e.g., UTAH CODE ANN. § 76-3-207(1)(a) (West 2013); VA. PRACTICE JURY INSTRUCTIONS, § 79:4 (2013).

alone, are to decide what weight is to be given to a particular factor. In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. The fact that the jury can recommend a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory sentence. If a majority of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory sentence will be¹⁸⁶

In these jury instructions, it is not indicated that the majority of jurors must agree that the same aggravator was proven beyond a reasonable doubt. It merely states that a majority of the jurors must agree to advise the judge that the defendant should be sentenced to death, and that this decision should be based on the belief that the aggravators outweigh the mitigators. In jurisdictions that require a unanimous jury decision but also do not require the jury to disclose which aggravators they found to be proven beyond a reasonable doubt, the instructions are similar.¹⁸⁷ Therefore, especially when the jury's sentence is only advisory, if the aggravators remain undisclosed, the judge's final sentence is necessarily arbitrary. This is true because the judge does not know upon which facts the jury relied in making its recommendation and therefore the judge must impose a sentence without the knowledge of the jury's fact finding. This is nothing more than guesswork. Indeed, the sentence is meted out based on the judge's factual findings in this circumstance, not the jury's because the jury's factual finding remains unknown.

The Florida sentencing statute leaves open the very real possibility that in substance the judge, not the jury, still makes the factual findings necessary for the imposition of the death penalty. Further increasing the haphazard nature of the Florida sentencing structure, after the jury's recommendation, there is a separate sentencing hearing conducted before the judge only, where after the jury has passed judgment, the judge may hear further evidence prior to rendering her sentence.¹⁸⁸ This involves fact finding. At that hearing, both the State and the defendant may introduce additional evidence not presented to the jury.¹⁸⁹ The judge then determines and imposes the sentence. The defendant has no way of knowing whether the jury found the same aggravating factors as the judge. Indeed, the judge, unaware of the aggravating factor(s) 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.

¹⁸⁶ FLA. STANDARD JURY INSTRUCTIONS, *supra* note 22, ch. 7.11.

¹⁸⁷ *See, e.g.*, VA. MODEL JURY INSTRUCTIONS, CRIMINAL, P33.122, P33.126 (2003).

¹⁸⁸ *See, e.g.*, *Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993).

¹⁸⁹ *See id.*

Under the current statute, the State could have presented additional evidence that Evans qualified for an entirely different aggravating factor that the jury had never considered. Surely, these circumstances fall under the definition of arbitrary and random, when the judge is not using the jury's factual finding, as required by law, to impose life or death. This opens the door for the judge to use her judgment regarding facts not law. This peels off her layer of judicial neutrality and allows her natural value system, and even the potential for her personal biases, to sneak in.

Prior to *Ring*, the U.S. Supreme Court repeatedly reviewed and upheld Florida's capital-sentencing statute.¹⁹⁰ The Court has repeatedly denied certiorari in case after case when asked to review the constitutionality of Florida's death scheme; the most patently unconstitutional scheme in the nation.¹⁹¹ Florida has "executed fifty-three individuals [since the decision in *Ring*, *all*] in reliance on the constitutionality of Florida's capital-sentencing statute as determined by the decisions of the U.S. Supreme Court."¹⁹² If the Supreme Court struck down Florida's death-penalty statute after so many executions, it would appall the conscience of the community and the nation. Florida has the second largest death row in the nation with 412 people waiting to be executed today.¹⁹³ It should, therefore, be no surprise that the Supreme Court shies away from review of the State's death-penalty procedures. The Court would be placed in a no win situation: Either find the scheme constitutional, paving the path for other jurisdictions to loosen their standards, or strike it down and shock the nation with how long the Court permitted this procedure to continue and with how many individuals have been put to death under its regimen. Florida courts themselves hide from their own flawed capital scheme and refuse to abolish it. In *King v. Moore*,¹⁹⁴ Justice Wells explicitly stated his belief that to strike down Florida's death-penalty procedures after a quarter century of Supreme Court review would "have a catastrophic effect on the administration of justice in Florida and seriously undermine our citizens' faith in Florida's judicial system."¹⁹⁵

He then proceeded to assert that Florida heeding the ruling in *Ring* would open the floodgates to the jam-packed death row inmates and inundate the courts with

¹⁹⁰ See *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976).

¹⁹¹ For examples of Florida death-penalty cases where certiorari was denied by the U.S. Supreme Court, see *Bottoson v. State*, 813 So. 2d 31, 33–34 (Fla. 2002), *cert. denied*, 536 U.S. 962 (2002); *Davis v. State*, 703 So. 2d 1055 (Fla. 1997), *cert. denied*, 524 U.S. 930 (1998); *Sims v. State*, 681 So. 2d 1112 (Fla. 1996), *cert. denied*, 520 U.S. 1199 (1997); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), *cert. denied*, 510 U.S. 836 (1993); *Engle v. State*, 438 So. 2d 803 (Fla. 1983), *cert. denied*, 465 U.S. 1074 (1984), *appeal after remand*, 510 So. 2d 881 (Fla. 1987), *cert. denied*, 485 U.S. 924 (1988); see also *Bottoson v. Moore*, 833 So. 2d 693, 696 n.5 (Fla. 2002).

¹⁹² *Bottoson*, 833 So. 2d at 698.

¹⁹³ See *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Apr. 15, 2014).

¹⁹⁴ 831 So. 2d 143 (Fla. 2002).

¹⁹⁵ *Id.* at 148.

newfound claims, making justice impossible to administer efficiently.¹⁹⁶ Consequently, Florida repeatedly chose to remain with the status quo until Judge Martinez's decision in *Evans*.¹⁹⁷ As discussed, and not surprisingly, Judge Martinez was overturned and the status quo prevailed.¹⁹⁸ Judge Martinez's ruling was founded on Sixth Amendment grounds and although it is evident that Florida's capital-sentencing statute does violate the Sixth Amendment, perhaps it will have more difficulty passing appellate review when facing both Sixth Amendment review along with the Eighth Amendment review.

B. Alabama

Since 1976, Alabama judges have overridden jury verdicts 107 times. Although judges have authority to override life or death verdicts, in 92% of overrides elected judges have overruled jury verdicts of life to impose the death penalty.¹⁹⁹

Alabama is a hybrid scheme. It requires that the jury unanimously agree on which aggravators were proven beyond a reasonable doubt.²⁰⁰ The jurors must also note on the jury form which aggravators they believe were proven.²⁰¹ However, the jury vote for death only needs a minimum of ten jurors to pass.²⁰² Therefore, the jury could be convinced that the aggravators were proven beyond a reasonable doubt but that the mitigators outweighed them. The jurors' vote is not a verdict, but a recommendation. If the jurors (by a vote of ten or more) return a verdict of life because no aggravators were proven beyond a reasonable doubt, this vote is not binding on the judge.²⁰³ In this instance, the judge is aware of which aggravators were found beyond a reasonable doubt. This provides a great deal more information for sentencing. However, it remains unclear, per case law, how a judge who does the actual sentencing can comport with *Apprendi*, *Ring*, and *Alleyne*. If the majority vote is not binding on the judge then presumably the judge could override this decision. This begs the question: based on what? It is established that the judge cannot base it on facts, find an aggravator invalid, and then re-weigh. This statute, because it allows for a jury override, presents

¹⁹⁶ *Id.*

¹⁹⁷ *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011).

¹⁹⁸ *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (2013).

¹⁹⁹ *The Death Penalty in Alabama: Judge Override*, EQUAL JUSTICE INITIATIVE (July 2011), available at http://www.eji.org/files/Override_Report.pdf.

²⁰⁰ ALA. CODE § 13A-5-46 (2012).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ "It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence, is required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance." ALA. CODE § 13A-5-47 (2012).

significant problems. For example, in 2010 in *Mitchell v. State*,²⁰⁴ the jury recommended life for Mr. Mitchell on four counts of capital murder.²⁰⁵ Because the jury did find that aggravators existed beyond a reasonable doubt, the judge was permitted an override.²⁰⁶ The judge sentenced Mr. Mitchell to death on all four counts.²⁰⁷ The court held that because the override was not without standards, that it met constitutional requirements and was not arbitrary in violation of the Eighth Amendment.²⁰⁸ Because the jury disclosed to the judge the aggravators that it found proven beyond a reasonable doubt, the court found the Sixth Amendment not to be an issue.²⁰⁹ In this instance, the judge is speculating not as to what aggravators the jury found to exist, but how much weight the jury chose to give them. This is not a Sixth Amendment issue but an Eighth Amendment concern because Alabama provided no guidelines for balancing the aggravators for the judge or for a judicial override. As Katheryn Russell stated of judicial discretion in capital sentencing:

The erosion of public confidence is only one of the possible fall-outs from a capital sentencing scheme which allows the judge to operate without adequate checks and balances. Not only does a standardless scheme make a mockery of long-standing constitutional protections—thereby making justified cynics out of those who work with capital defendants—but more importantly, such a scheme is likely to leave former and future capital jurors skeptical at best about the value of their time, effort, and energy.²¹⁰

C. Delaware

Delaware has a problematic capital-sentencing scheme. For example, pursuant to the capital-sentencing scheme in Delaware, the jury only reports its findings regarding (1) whether they unanimously agree that at least one aggravator was proven beyond a reasonable doubt; and (2) whether by a preponderance of evidence the aggravators outweigh the mitigators; on this question, they note how each juror votes.²¹¹ Therefore, this question need not be unanimous. The jury never makes a recommendation regarding death. If the jury finds that an aggravator was not proven beyond a reasonable doubt, then the judge may not impose death. The jury never advises the judge what aggravator they found beyond a reasonable doubt, whether they found

²⁰⁴ 84 So. 3d 968 (Ala. Crim. App. 2010).

²⁰⁵ *Id.* at 977.

²⁰⁶ *Id.* at 990.

²⁰⁷ *Id.* at 977.

²⁰⁸ *Id.* at 994.

²⁰⁹ *Id.* at 987–90.

²¹⁰ Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 44 (1994).

²¹¹ DEL. CODE ANN. tit. 11, § 4209(c)(3)(A) (West 2013).

more than one, or how many they found. Then the judge decides life or death without knowing anything more about what the jury thought about it—the jury is dismissed after reporting the above findings.²¹² Therefore, although Delaware may require the jury to unanimously decide whether one aggravator was proven beyond a reasonable doubt, this is all it requires of the jury. Delaware presents all of the problems discussed because the judge does not know how many aggravators the jury found or even whether a majority agreed on one. Thus, Delaware’s capital-sentencing statute is arbitrary in violation of the Eighth Amendment.

Delaware’s scheme has nonetheless been upheld by the Delaware Supreme Court, citing “meaningful consideration” by both the judge and the jury before death may be imposed.²¹³ Because there is a non-binding jury recommendation followed by a judicially imposed sentence after which the judge weighs the aggravators and mitigators, the Delaware scheme has withstood constitutional scrutiny.²¹⁴

D. Indiana

In Indiana, the jury is charged with recommending life or death to the judge after making a finding beyond a reasonable doubt regarding the presented aggravating circumstances.²¹⁵ Once the recommendation is made, the court is compelled to follow that recommendation.²¹⁶ However, if the jury cannot decide, they are dismissed and the judge decides, as if it were a bench trial all along.²¹⁷ The judge does not need to give any weight to any findings by the jury; the trial continues as if they were never there. The jury, if they reach a conclusion, must disclose the aggravators they found. In sum, all may be well in Indiana unless the jury is deadlocked. Instead of granting a mistrial, the statute instructs the judge to sentence the defendant as if there had never been a jury at all.²¹⁸ This is unmistakably an Eighth Amendment violation and in violation of *Ring*. In dealing with the death penalty, the courts cannot try to comply with the law properly one time and then simply give up and allow the judge to sentence contrary to the law when faced with a hung jury. In fact, trying it right one time and then giving up is not a suitable solution in most legal scenarios, especially when life and death are involved.

E. Montana

Montana’s capital-sentencing statute is a classic arbitrary scheme. The jury is not given an opportunity to make a recommendation.²¹⁹ Once a defendant pleads or

²¹² *Id.* § 4209(d)(1).

²¹³ *Ploof v. State*, 856 A.2d 539, 546 (Del. 2004).

²¹⁴ *See id.*

²¹⁵ IND. CODE § 35-50-2-9(d) (2013).

²¹⁶ *Id.* § 35-50-2-9(e)(2).

²¹⁷ *See State v. Barker*, 809 N.E.2d 312, 315 (Ind. 2004) (citing IND. CODE § 35-50-2-9(f)).

²¹⁸ IND. CODE § 35-50-2-9(f).

²¹⁹ MONT. CODE ANN. § 46-18-301(1) (2013).

is found guilty of an offense for which the death penalty can be imposed, a separate sentencing hearing is held with the same presiding judge who sentences the defendant.²²⁰ The judge unilaterally decides whether the relevant circumstances exist to sentence the defendant to death and then sentences accordingly. The statute states that the “[sentencing] hearing must be conducted before the court alone.”²²¹ This procedure is a clear violation of *Ring* and the Sixth and Eighth Amendments as examined.

F. Nebraska

In Nebraska, the jury only considers aggravators and not mitigators. The jury reports to the judge only whether they found that at least one aggravator was proven beyond a reasonable doubt.²²² If the jury so finds, then a three judge panel convenes to assess whether any mitigation outweighs the aggravators.²²³ Hence, the jury does not provide an opinion whatsoever regarding the sentence and it never hears about mitigation.²²⁴ *Nebraska v. Gales*²²⁵ found this scheme to comport with *Ring*. *Gales* interpreted *Ring* to hold that the determination of “death eligibility . . . exposes the defendant to greater punishment.”²²⁶ According to *Gales*, because a jury finding of the existence of one aggravator beyond a reasonable doubt makes the defendant “death eligible,” then no further factual findings by the jury are necessary under *Ring*.²²⁷

However, aggravators are not mutually exclusive from mitigators; one affects the other. A person who only hears aggravation is likely to see the defendant in a negative light or as a bad person. This occurs because the jury has not heard any of the defendant’s mitigating circumstances. Again, humans are not drones and if they view the defendant as a monster, they will be more likely to find that the aggravators exist. The jury instructions do not indicate that the jury must disclose which aggravators they found to exist, raising concerns of arbitrariness and a random, if not biased, decision.

VI. FURTHER OVERVIEW OF NATIONAL DEATH-PENALTY SENTENCING SCHEMES

The states that do not require a unanimous jury verdict are Alabama, Delaware, Florida, Montana, and Nebraska (the last being in a hybrid sort of way).²²⁸ In Utah and Virginia, the jury does not have to reveal aggravators found beyond a reasonable

²²⁰ See *State v. Turner*, 864 P.2d 235, 243 (Mont. 1993).

²²¹ MONT. CODE ANN. § 46-18-301(1).

²²² NEB. SUPREME COURT COMM. ON PRACTICE & PROCEDURE, NEBRASKA PRACTICE SERIES ch. 10.0(A) (2010).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ 658 N.W.2d 604 (Neb. 2003).

²²⁶ *Id.* at 626.

²²⁷ *Id.*

²²⁸ See *supra* note 184 and accompanying text.

doubt.²²⁹ The jury decides the sentence, not the judge.²³⁰ Thus, the issue of not revealing the aggravators may present problems only when the appeals court does not know which aggravators on which the jury relied.

As described, the fewer jurors who must agree, the more convoluted the decision-making becomes for the judge, which increases the arbitrary nature of the procedure. Further, jurors in nonunanimous decision schemes and hybrid schemes tend to minimize deliberation and discussion: “[J]urors in hybrid states are significantly more likely than others to deny responsibility for the defendant’s punishment, to misunderstand sentencing instructions, and to rush to judgment, all signs of the jury’s lack of conscientiousness in its role as sentencer.”²³¹

This is likely due, in part, to the ability of the jury to deflect responsibility for the defendant’s life onto the judge. Schemes that leave the ultimate sentencing decision to the judge and permit a judicial override allow the jury to morally and emotionally reject responsibility for the decisionmaking. This influences the jury to lean toward death recommendations thinking that the judge will override that recommendation if death is not appropriate.²³²

Furthermore, the argument that *Ring* and its progeny do not apply to many death-penalty jurisdictions on the grounds that death is already the statutory maximum sentence for first-degree murder and therefore may be judicially determined also fails. Only by the finding of aggravators beyond a reasonable doubt may a defendant convicted of first-degree murder receive the death penalty. Otherwise, the maximum penalty, with no additional factual findings, is life in prison. A maximum penalty is defined by the maximum sentence a defendant may receive without additional factual findings upon which any enhancement is contingent. *Cunningham v. California*²³³ stated: “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”²³⁴

Florida’s and other states’ fears that change of their outmoded capital schemes will trigger disrespect or lack of confidence in the judicial system are unwarranted. Not only are such fears of change needless; the judges’ and the legislatures’ inaction in fact causes community apprehension over a justice system refusing to evolve with modern standards of decency and technology. In fact, “[a]n unprecedented federal review of old criminal cases has uncovered as many as 27 death penalty convictions in which FBI forensic experts may have mistakenly linked defendants to crimes with

²²⁹ See *supra* note 185 and accompanying text.

²³⁰ See *supra* note 185 and accompanying text.

²³¹ William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 1003–04 (2006).

²³² See *id.* at 962–63.

²³³ 549 U.S. 270 (2007).

²³⁴ *Id.* at 283 (quoting *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004)).

exaggerated scientific testimony . . . ”²³⁵ The report stems, in part, from the long held practice of FBI examiners’ and courts’ continued use of forensic hair comparison analysis in defendants’ prosecution despite their knowledge that the work was flawed. These forensic testimonies “may have led to convictions of . . . innocent people.”²³⁶ As technology evolves as it did when the world of forensic testing moved from fingerprinting to DNA, it also must be recognized when other long held techniques or procedures have become obsolete and unjust.

VII. PROPOSED IMPROVEMENTS TO CAPITAL-SENTENCING SCHEMES

When a death penalty is inevitable, the most fair and constitutional structure would be a death-penalty scheme with jury instructions that requires the jury to render a verdict, not an advisory opinion or recommendation, and understand that their vote must be unanimous as to the aggravators proven beyond a reasonable doubt and to their verdict of death. This system would require clear and unambiguous jury instructions. The need for such instructions is beyond the scope of this Article.

A unanimous jury verdict would improve the constitutional issues raised herein but may in turn raise other problems not discussed such as the ability of the jury to understand the aggravators and mitigators, the task of weighing them and the rules of doing so. Regardless of the other problems a jury verdict may raise, including an increase in death sentences, both the Sixth and Eighth Amendments require it as the law currently stands. Without further research into each jurisdiction’s death-penalty sentencing jury instructions, it remains unknown whether the instructions are clear and explicit enough for jurors to follow properly. Such an analysis likely requires empirical research. Nevertheless, history and common sense dictate that following the law, restricting judicial discretion, and comporting with the Sixth and Eighth Amendments will result in increased impartial outcomes.

Short of requiring a jury verdict that the judge may not override, if the jury is rendering only a recommendation, it is advisable that the jury disclose to the judge in the verdict form what aggravators it determined were proven beyond a reasonable doubt. However, requiring the jury to disclose details of their jury deliberations has problems of its own. The jury instruction in Florida is similar to most jurisdictions on the issue as to whether the jury may speak to anyone about their deliberations after the conclusion of the case. Standard Florida Jury Instruction in Criminal Trials 4.2 states that: “We have recognized for hundreds of years that a jury’s deliberations, discussions, and votes should remain their private affair as long as they wish it.”²³⁷

The jury room is recognized as a private place where jurors can speak their mind, free of any fear of reprimand for their opinions, no matter how unpopular.²³⁸ Any

²³⁵ Spencer S. Hsu, *At Least 27 Death Penalty Convictions May Be Faulty*, WASH. POST, July 18, 2013, at A1.

²³⁶ *Id.* at A11.

²³⁷ FLA. STANDARD JURY INSTRUCTIONS, *supra* note 22, ch. 4.2.

²³⁸ See *United States v. Olano*, 507 U.S. 725, 737–38 (1993).

judicial reporting requirements as to the jurors' findings other than their verdict runs the risk of impeding the inviolability of their deliberations. This is a "catch twenty-two." In other words, if a jury must divulge their specific factual findings because the judge cannot legally make any factual findings or must avoid arbitrary guesswork, many jurors otherwise inclined to vote for life for legitimate reasons like simple mercy or forgiveness may find themselves in a more difficult spot in the jury room. This is because if the jury has to report to the judge, then they also must be specific with one another in the jury room. Jurors are specifically not required to articulate their reasons for voting for life because such decisions may involve highly intimate and personal feelings. Reasons to vote for life may legally include mercy, forgiveness, redemption, or anything that compels an individual juror to believe life is appropriate. The decisionmaking in the jury room is not, and should not be, a competing list of aggravators and mitigators. Jurors may give whatever weight they feel is appropriate to the aggravators and any mitigation. A forced disclosure of aggravators risks diminishing the power and validity of mercy and forgiveness.

Consequently, reporting the aggravators found beyond a reasonable doubt may actually tip the scales towards a death recommendation. It most surely would influence the judge to impose death. An exaggerated example illustrates: If a jury is presented with ten aggravators in their jury instructions, and even if the state requires a unanimous jury recommendation, the disclosure of the aggravators could influence a jury override. This can happen if the jurors all unanimously found that all ten aggravators were proven beyond a reasonable doubt yet recommended life. In this instance, the jury would have found that the mitigators outweigh all ten aggravators. In the instant example, a legal sentence would be life if the jury found one mitigator outweighed all of the ten aggravators. A compelling desire to provide life and forgiveness is legal and can outweigh any number of aggravators. As seen in *Ring* and *Alleyne*, these are enhancements to be determined by the jury.²³⁹ Thus, in this example, the judge would receive a verdict form noting that ten aggravators were proven and a life recommendation. She would not know what or how the mitigators outweighed the aggravators. Then the judge would do her own sentencing and be likely to overturn this jury decision. This system risks removing faith and respect for jury recommendations and the jury system generally.

CONCLUSION

The more judges and juries base their decisions on assuming facts and incomplete evidence, the greater the probability that their decisions will be based on personal preference and prejudice. If a judge must speculate and make presumptions about a jury's decision in order to render a sentence, then that sentence is arbitrary. When juries deliver advisory opinions or recommendations that judges have the power to override, and those juries do not disclose which aggravators they believed were proven

²³⁹ See *supra* Parts I, III.

beyond a reasonable doubt, if any, the judge's sentence is necessarily arbitrary and in violation of the Eighth Amendment. *Apprendi*, *Ring*, and now *Alleyne* make it clear that any fact that enhances a defendant's sentence is an element of the offense and, as such, must be found to be proven beyond a reasonable doubt by the jury before the defendant's sentence may be enhanced.

Capital-sentencing guidelines that require a unanimous sentencing verdict, mandate that the jury disclose all aggravators they believe proven beyond a reasonable doubt, and do not allow for a judicial override, go a long way in meeting constitutional principles. Nonetheless, many philosophers, judges, attorneys, and the community agree that there can be no "right way" to decide if an individual lives or dies.²⁴⁰

In fact, on February 11, 2014, Governor Jay Inslee denounced the death penalty for the duration of his tenure as Governor of the State of Washington. Inslee stated: "There have been too many doubts raised about capital punishment, there are too many flaws in the system today There is too much at stake to accept an imperfect system."²⁴¹

With the community's increasing awareness of wrongful convictions and exonerations, there is emerging a national shift away from the use of the death penalty. As of March 31, 2014, there have been 314 DNA exonerations.²⁴² Only ten percent of felony convictions have biological evidence in which to test.²⁴³ This leaves ninety percent of the felony convictions with no scientifically reliable method to prove their innocence. The remainder of the inmates who may be innocent must rely on the discovery of new evidence years after their convictions. It is no wonder that the community and lawmakers are beginning to question felony convictions in general. This trend away from executions can be seen in several states. In 2011, Oregon's Governor issued a similar moratorium as Inslee in Washington State.²⁴⁴ In 2013, Maryland abolished the death penalty.²⁴⁵ Maryland was the eighteenth state to abolish the death

²⁴⁰ See John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1926–27, 1937 (2012).

²⁴¹ Rachel La Corte, *Washington Gov. Jay Inslee Suspends Death Penalty*, ASSOCIATED PRESS (Feb. 11, 2014, 8:03 PM), <http://bigstory.ap.org/article/washington-gov-jay-inslee-suspends-death-penalty>.

²⁴² See *DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Apr. 15, 2014).

²⁴³ See INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 3 (2009), available at http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (citing *Department of Justice Oversight: Funding Forensic Sciences—DNA and Beyond: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 23 (2003) (statement of Michael M. Baden, M.D., Dir., Medicolegal Investigations Unit, N.Y. State Police).

²⁴⁴ See La Corte, *supra* note 241.

²⁴⁵ See Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013, 5:15 PM), <http://www.reuters.com/article/2013/05/02/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502>.

penalty and the sixth state to do so in six years.²⁴⁶ Illinois also abolished the death penalty recently, in 2011.²⁴⁷ An unmistakable movement is rising as lawmakers and the community alike are becoming more conscious and informed.

Nevertheless, the death penalty remains in the majority of U.S. jurisdictions. If life and death decisions must be made, there can be a more objective and less prejudicial way to make such a decision. Notably, Justice Brennan always opposed the death penalty as a violation of the Eighth Amendment and condemned it as defying human dignity and the sanctity of life.²⁴⁸ Supreme Court Justices in particular often recanted their views on the death penalty or opposed any death-penalty scheme entirely. Memorably, Justice Blackmun renounced his views on the death penalty shortly before his retirement in 1994 stating, "I feel morally and intellectually obligated simply to concede that the death-penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies."²⁴⁹

In addition, Justice Stevens voiced his regret that in 1976 he voted to uphold the constitutionality of a Texas law that authorized many subsequent death sentences.²⁵⁰ Justice Ginsberg is known to question the death-penalty process and lack of quality representation death row inmates receive.²⁵¹ Moreover, Justice Powell admitted that he felt he voted the wrong way in *McCleskey v. Kemp*.²⁵² Had Justice Powell recognized his mistake sooner, Warren McCleskey would still be alive. Such regret and changes of heart are unmistakable indicators that judicial decisions or any decision made by a human being regarding the issue of life and death can be arbitrary and based on factors other than the law.

The community is becoming less and less inclined to support the death penalty,²⁵³ and the death penalty is reserved for only the most extreme and cruel murders. The purpose of aggravators is to limit the pool of individuals eligible for the death penalty.²⁵⁴ Therefore, to continue to widen judicial discretion regarding death-penalty sentencing is contrary to community principles.

²⁴⁶ *Id.*

²⁴⁷ See Ariane de Vogue & Barbara Pinto, *Illinois Abolishes Death Penalty; 16th State to End Executions*, ABC NEWS (Mar. 9, 2011), <http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912>.

²⁴⁸ See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

²⁴⁹ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

²⁵⁰ See *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring); Interview by George Stephanopoulos with Justice John Paul Stevens (Sept. 29, 2011), available at <http://www.abcnews.go.com/blogs/politics/2011/09/transcript-my-interview-with-justice-john-paul-stevens/>.

²⁵¹ *Statements on the Death Penalty by Supreme Court Justices*, Justice Ginsburg, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/statements-death-penalty-supreme-court-justices#ginsburg> (last visited Apr. 15, 2014).

²⁵² JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

²⁵³ See *supra* note 31 and accompanying text.

²⁵⁴ See *Zant v. Stephens*, 462 U.S. 862, 872 (1983).

Each individual, including the judge, possesses private and intimate views and partialities integral to their sense of self and personality. No lawyer can purge the judge or jury of their internal and personal predispositions. There can be no doubt that death is different. Humans are the only living creatures who recognize their own mortality. Religious worship in the United States demonstrates that individuals cope with their mortality in vastly different ways. America is defined in part by how its citizens view their mortality—from Atheists, Muslims, and Buddhists to Catholics and Protestants. Churchgoing or not, views of life, death, salvation, and redemption are delicate and personal to each individual. These views are central to the core of one's person and not easily put aside in the jury room; in fact it is not likely possible. As stated by Chief Justice Earl Warren, "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁵⁵

When facing the finality and severity of the punishment of death, can there be room for personal prejudices and preconceptions? While the improvements discussed would drastically mend the arbitrary nature of death sentencing, these procedures are not a complete solution because human bias and prejudice will always be a part of the judicial system, regardless of the number of rules or guidelines the legislature imposes. The question remains: How much potential for bias is the community willing to tolerate when the outcome can end a human life? Can the legal community maintain confidence in the jury system under the current capital-sentencing systems? The U.S. Supreme Court's refusal to address these issues only further compounds these problems. Justice John Harlan proposed that a nonarbitrary sentencing system cannot be established, "calling the task of articulating the characteristics of who should live and who should die beyond human ability."²⁵⁶ The community will not be satisfied with the status quo. Judges or legislatures who do eventually strike down death-penalty statutes in Florida and states similar to Florida will be applauded by the community and the nation with renewed faith and trust in the jury system.

²⁵⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁵⁶ EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 303 (2013).