



USA: DARKNESS VISIBLE IN THE SUNSHINE STATE

THE DEATH PENALTY IN FLORIDA

AMNESTY
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Cover photo: 1979. A protester outside the State Attorney General's Office in Tallahassee, Florida. On 25 May 1979, Florida carried out the USA's first 'non-consensual' execution of the post-Furman era. The New York Times reported the execution on its front page: "The state of Florida trussed John Arthur Spenklink immobile in the electric chair this morning, dropped a black leather mask over his face and electrocuted him".

Photograph courtesy of State Archives of Florida. For further photos, visit www.floridamemory.com

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EXECUTIVE SUMMARY



Pre-1975 postcard. Courtesy of State Archives of Florida

‘As I and other Justices have previously pointed out, individuals who are executed are not the ‘worst of the worst,’ but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse on the basis of race’

Sireci v. Florida, US Supreme Court, 12 December 2016, Justice Stephen Breyer dissenting

Florida promotes itself as a destination for tourists and a hub for regional and international trade. It is less well-known as a diehard proponent of a cruel policy discarded by much of the world. This Amnesty International report aims to shine a light on this dark side of The Sunshine State.

Florida has the second largest death row in the USA, and is ranked fourth among the states in the number of executions carried out since 1976 when the US Supreme Court approved new capital laws. At a time where other states have been rethinking the death penalty, Florida shows few signs of joining them. Since 2010, the states now in second and third position on this execution table, Virginia and Oklahoma, have carried out 29 executions between them. Florida has conducted 28. And in the 10 years to the end of 2017, Florida sent more people to death row than Texas, Virginia, Oklahoma, Missouri and Georgia (fifth and sixth in the execution ranking) combined.

In June 2015, US Supreme Court Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, argued that the time had come for the Court, “rather than try to patch up the death penalty’s legal wounds one at a time”, to revisit the constitutionality of the death penalty, given the evidence of error and arbitrariness

in its application. Its constitutionality, they argued, hinged on it being limited to the so-called “worst of the worst”, that is “those who commit a narrow category of the most serious crimes *and whose extreme culpability* makes them the most deserving of execution” [emphasis added]. It was not being so limited, they argued, pointing to race, geography and other factors as improper influences on capital outcomes. Florida ticked all the boxes of flaws highlighted by the Justices.

In January 2016 Florida’s legislators were presented with a golden opportunity to rethink their state’s attachment to the death penalty. In *Hurst v. Florida*, the US Supreme Court found Florida’s capital sentencing statute unconstitutional because it gave juries only an advisory role in death sentencing, which was incompatible with the Court’s 2002 ruling, *Ring v. Arizona*. The legislature, which had long been warned about Florida’s outlier status on this issue, responded not with any serious assessment of capital justice. Instead it revised the statute to allow death sentencing to resume. Its first version, promoted by Florida’s county prosecutorial community, was found unconstitutional by the Florida Supreme Court for not requiring jury unanimity on death sentencing. The law was revised again to remedy this fault.

In May 2016, Justices Breyer and Ginsburg pushed again, this time in the case of a prisoner who was 18 at the time of the crime, had an IQ of 74, and was sentenced to death in a jurisdiction in Louisiana that accounted for a disproportionate number of death sentences. Given the ban on the execution of people with intellectual disability and those under 18 at the time of the crime, this death sentence was clearly pushing up against what had been categorically unconstitutional for more than a decade. The case begged the question – can a borderline intellectually disabled teenager really be among the “worst of the worst”?

This report brings this same question to Florida’s use of the death penalty against young adults and individuals with mental or intellectual disabilities. At the time of *Hurst*, over 10% of prisoners on Florida’s death row had been sent there for crimes committed when they were 18, 19 or 20 years old. Some of them, and others from older age brackets, had mental disabilities or possible intellectual disability.

Meanwhile the Florida Supreme Court responded to *Hurst* by making it only partially retroactive, and executions of those deemed not to be entitled to *Hurst* relief began in August 2017. That same month, Florida Supreme Court Justice Barbara Pariente restated her belief that the *Hurst* ruling should have “full retroactivity” and that anything less merely added “another layer of arbitrariness” to what Justices Breyer and Ginsburg had described about the death penalty not being reserved for the “worst of the worst”.

§2. AFTER *HURST*: AN EXTRA LAYER OF ARBITRARINESS

There were hopes after the US Supreme Court remanded the *Hurst* case to the state for implementation, that the Florida Supreme Court would apply the ruling to all the nearly 400 people then on death row, either by reducing all death sentences to life, or by ordering new sentencing hearings for all under a *Hurst*-compliant statute. Such hopes were dashed in late 2016.

The majority on the Court ruled that *Hurst* applied retroactively only to about half of those on death row – those prisoners whose death sentences had not yet been ‘finalized’ (meaning affirmed on initial automatic direct appeal) by the time of the June 2002 *Ring* ruling. These ‘post-*Ring*’ cases would be entitled to resentencing if the state failed to prove that the “*Hurst* error” was “harmless”.

Prior to *Hurst*, Florida law allowed bare majority juries (7-5) to recommend the death penalty. Having ruled since *Hurst* that the constitution requires a jury to be unanimous in its death decision-making, the Florida Supreme Court has been granting *Hurst* relief in those post-*Ring* cases where juries were less than unanimous. Those deemed not to benefit from *Hurst* are: 1) defendants whose death sentences were finalized before *Ring*, even if their juries were less than unanimous for the death penalty; 2) post-*Ring* defendants who were sentenced by a judge after they waived their right to a jury at sentencing; and 3) post-*Ring* defendants whose juries were unanimous for death.

Section 2 provides case examples to illustrate the *Hurst* retroactivity framework. All 10 of the main case studies featured in this report are of individuals who fall on the wrong side of this retroactivity cut-off and thereby remain on death row. Many shorter examples of those denied *Hurst* relief are provided throughout.

By mid-July 2018, 130 prisoners had been granted relief under *Hurst* – that is, had their death sentences overturned and been remanded for resentencing, while 139 had been denied relief. At least 19 of those who benefitted from *Hurst* have since been resentenced to life (one of whom has since died) after prosecutors decided not to go for death again. However, local prosecutors have already filed notice of their intention to seek the death penalty in other cases. Two individuals whose death sentences were overturned because of *Hurst* have already been resentenced to death. One of them was 18 years old at the time of the crime, emerging from a childhood of physical, emotional and sexual abuse and may have been experiencing post-traumatic stress disorder at the time of the murder. Both were sentenced in December 2017 in Duval County, one of the leading death penalty jurisdictions in the USA.

Three case studies are provided at the end of Section 2 of prisoners who have been deemed ineligible for *Hurst* relief because their cases fall the wrong side of the retroactivity cut-off. One is of one of a prisoner whose case became central to the Florida Supreme Court's post-*Hurst* framework, another is the case of the oldest man under sentence of death in Florida (convicted of a 1966 murder), and the third is of a prisoner whose death sentence was imposed by a judge overriding the jury's unanimous vote for life, a phenomenon no longer be allowed under the post-*Hurst* capital sentencing statute. The Chief Justice of the Florida Supreme Court has described the case as a "manifest injustice" that must be remedied.

§3. WHAT LIES BENEATH: 'DEATH-QUALIFICATION' AND RACE

As Justice Pariente pointed out, concerns about arbitrariness did not begin with the *Hurst* retroactivity ruling, but form an extra layer on the already existing flaws in application of the death penalty of the sort highlighted by US Supreme Court Justices Breyer and Ginsburg. Indeed, Justice James Perry, who also dissented from the Florida Supreme Court's retroactivity decision, announced that that ruling, coupled with the continuing impact of racial discrimination on capital justice, "leads me to declare that I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner".

Study after study has shown that race – particularly race of victim – has an impact on who receives the death penalty in the USA. This report provides some brief reminders of the racial dimensions of the death penalty in the USA and provides a longer case example to illustrate how it is well-nigh impossible for capital defendants and prisoners to mount a successful claim of systemic racial discrimination. The US Supreme Court's 1987 *McCleskey v. Kemp* ruling and the subsequent failure of state legislatures, Florida's included, to act to fill the remedy void – have cemented racial injustice into the capital justice system. This racial injustice alone is reason enough to abolish this irrevocable punishment.

When one considers who ends up on death row – including young adults and individuals with mental and intellectual disabilities – a systemic component to consider beyond prosecutorial discretion and inadequate legal representation is jury selection. The 'death qualification' process tilts capital juries towards conviction and death. Section 3 provides some case examples to provide food for thought.

§4. MENTAL DISABILITY AND CAPITAL JUSTICE

International law and standards on the use of the death penalty hold that it may not be imposed or carried out on people with mental or intellectual disabilities. This applies whether the disability was relevant at the time of their alleged commission of the crime or developed after the person was sentenced to death. Protections in the USA in this regard remain inadequate.

Throughout the past 40 years, Florida has pursued the death penalty against individuals with serious mental disabilities. Again, the *Hurst* ruling has led to some individuals being taken off death row while others are being deemed ineligible for *Hurst* relief. At least two prisoners with serious mental disabilities will now serve life sentences after the prosecution declined to seek death again. In other cases, prosecutors have filed notice of their intention to seek the death penalty at resentencing. Several examples are provided in the report, along with examples of prisoners with serious mental disability who have been deemed not to be eligible for *Hurst* relief under the arbitrary retroactivity framework. The picture remains, then, of a state willing to pursue the execution of people with mental disability, and actively doing so.

Two case studies are provided in this section with a view to asking the reader to consider whether such individuals can be deemed to possess the "extreme culpability" required under US constitutional law to render them "the most deserving of execution" in a system in which relatively very few murders result in the death penalty. One of the cases is of a man who has a mental disability so severe that for the past decade and a half he has been held under sentence of death in a prison psychiatric hospital. The second case is of a man who was sentenced to death far more recently. Even though his sentencing was held more than a decade after *Ring*, he has been denied *Hurst* relief because he waived his right to jury sentencing. Of course, neither he nor his lawyer knew he was also waiving future relief. The injustice is clear.

§5. YOUNG ADULTS CONDEMNED

While death sentences against defendants who were young adults at the time of the crime do not violate a categorical prohibition under international law, unlike those who were under 18 years old, the details from such cases drain credibility from the claim that the death penalty is reserved for the most culpable offenders and the least mitigated offences. The issue came into sharper focus in February 2018 when the American Bar Association's House of Delegates passed a resolution calling upon states in the USA to prohibit the imposition of the death penalty against anyone for crimes committed when they were 21 years old or younger.

Dozens of young adults have been sentenced to death in Florida, including those who had mental

disabilities or were under the influence of alcohol or other substances at the time of the crimes, habits developed during childhoods of deprivation and abuse from which they were only just emerging. At the time of the *Hurst* ruling, for example, nearly 10% of Florida's death row were individuals who had been sent there for crimes committed when they were 18 or 19 years old. An appendix to this report provides some insights into the backgrounds of some of these young adults. In July 2018, at least nine of the prisoners from this group who have been granted *Hurst* relief, were facing resentencing at which county prosecutors were intending to seek death again. About another dozen are believed to fall the wrong side of the *Hurst* retroactivity framework. At least another dozen are on death row for crimes at 20 years old.

In its 2005 *Roper v. Simmons* ruling ending the death penalty against under 18-year-olds, the US Supreme Court recognized the immaturity, impulsiveness, poor judgment, underdeveloped sense of responsibility and vulnerability to peer pressure often seen in youth. The *Roper* decision noted that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18".

In 2006, a federal judge pointed to a Florida case to raise the "troubling" issue she said still needed to be addressed in the wake of *Roper* – namely the question of those whose chronological age was over 18, but who operated at mental or emotional age below that. The prisoner before her has since been executed for a crime when he was 18. The question raised by the judge has still not been addressed. In 2015, another federal judge noted that "several of the factors" listed in *Roper* as reasons to exclude under 18-year-olds from the death penalty, were present in the case before her, a prisoner on death row in Florida for a murder committed when he was 18 years and 25 days old. She pointed to evidence that he was "a follower, not a leader"; that his "chronological age, at the time of the crime was far greater than his emotional maturity"; and that his "immaturity" resulted in him being "easily manipulated and susceptible to the influences of his more experienced peers". He remains on death row in Florida today.

The potential for young people to change was a factor underpinning *Roper*, and the Florida Supreme Court has long held that "potential for rehabilitation" is "clearly mitigating in the sense that it might serve as a basis for a sentence less than death." Yet judges in Florida have given little mitigating weight to the potential for rehabilitation of young adult offenders, or their capacity to benefit from a structured environment after their often-chaotic backgrounds. Several illustrative cases are provided.

§6. INTELLECTUAL DISABILITY, 'A CONDITION, NOT A NUMBER'

In 2002, the Supreme Court ruled in *Atkins v. Virginia* that the execution of people with intellectual disability violates the Constitution. The Court found that Florida was part of a "national consensus" on this issue, one of six states which in 2000 and 2001 had enacted statutes prohibiting such executions. It took another 12 years before Florida's law was found constitutionally inadequate by the US Supreme Court.

It was the Florida Supreme Court's narrow interpretation of the statute which rendered it incompatible with *Atkins*. It set a rule whereby if a prisoner of defendant did not show an IQ of 70 or below, there was no need to consider the other two prongs of intellectual disability (adaptive skill deficits and manifestation before the age of 18). Intellectual disability claims were dismissed under this framework, with the Florida Supreme Court repeatedly rejecting the claim that Florida's law violated *Atkins*.

In May 2014, in *Hall v. Florida*, the US Supreme Court found Florida's law was incompatible with *Atkins*. It took issue with Florida's rigid IQ 70 cut-off, which blocked the presentation of evidence other than IQ that would demonstrate limitations in the defendant's mental faculties. The Court noted that in 41 states of the USA (including 18 abolitionist states), an individual with an IQ of 71 would "not be deemed automatically eligible for the death penalty". Once again, Florida was an outlier.

Again, some have benefitted from *Hurst*, others have not. Prosecutors may yet seek death again at resentencing for some. Despite the *Hall* ruling, the challenges faced by lawyers whose clients have claims of intellectual disability are substantial. This report presents three cases of prisoners who have been deemed not entitled to *Hurst* relief to illustrate these challenges as the state continues its lethal pursuit.

§7. FLORIDA PLUS FEDERAL, FINALITY OVER FAIRNESS

In 2014, Florida executed three prisoners whose lawyer had missed the deadline for filing of federal petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA). Each of the three inmates went to their deaths without their claims of constitutional violations being reviewed on their merits by the federal courts. At the time, a federal judge pointed out that by her reckoning there were nearly three dozen Florida prisoners in the same predicament. The AEDPA compromised fairness in pursuit of finality. In a state that is known for its errors in capital cases this should be of concern to anyone seeking fairness and justice.

NOTE: In this report, **PHOTOS** are provided to illustrate the longevity of the campaign against executions in The Sunshine State, accompanied by text to give snapshots of Florida's death penalty past and present. A synopsis of some US Supreme Court rulings, Florida Supreme Court decisions relating to *Hurst*, and a guide on how a case proceeds from indictment to execution are provided in the **APPENDIX**.

RECOMMENDATIONS

Amnesty International opposes the death penalty unconditionally as a violation of the right to life and the ultimate cruel, inhuman or degrading punishment. The organization campaigns for a world free from the death penalty, and pending that outcome, for strict adherence to international legal safeguards and standards. Beyond that, the organization does not seek to “fix” the death penalty. It is unfixable. Today, 142 countries are abolitionist in law or practice. Florida is one of the reasons why the USA has not joined them.

To the Florida legislature

- Pass legislation to end the use of the death penalty in Florida, and to endorse a moratorium on executions pending abolition.

To the Governor and Cabinet

- Publicly support ending the use of the death penalty in Florida and, pending abolition, implement a moratorium on executions by desisting from signing any new death warrants;
- Commute the death sentences of all those on death row.

To the Attorney General

- Support a moratorium on executions pending abolition of the death penalty, and represent this position in litigation on capital cases.

To State Attorneys (local prosecutors)

- When faced with potential death penalty cases, to choose not to pursue this punishment, whether the defendant in question is being tried for the first time, or has been remanded for retrial or resentencing.

To all officials

- Ensure an end to the use of the death penalty against anyone with intellectual disability or mental disability;
- Ensure that all capital case decision makers are made fully aware of the mitigating evidence surrounding youth and emotional and psychological immaturity, and the impact on young defendant of any backgrounds of abuse and deprivation they may have endured;
- Facilitate a public education campaign to raise awareness across Florida of the costs, risks and flaws associated with the state’s death penalty and the extent to which Florida is out of step with much of the rest of the world as well as many states of the USA on this basic human rights issue.

FLORIDA AND THE DEATH PENALTY

- ☒ 1ST STATE TO REINSTATE THE DEATH PENALTY AFTER US SUPREME COURT INVALIDATED USA'S CAPITAL LAWS (1972)**
- ☒ 1ST STATE TO EXECUTE A PRISONER AGAINST HIS WILL AFTER US SUPREME COURT UPHELD NEW LAWS (1976)**
- ☒ 1ST EXECUTION OF A PRISONER WHOSE JURY VOTE FOR LIFE WAS OVERRIDDEN BY JUDGE**
- ☒ HIGHEST NUMBER OF WRONGFUL CONVICTIONS IN CAPITAL CASES**
- ☒ 2ND LARGEST DEATH ROW (AFTER CALIFORNIA)**
- ☒ 2ND HIGHEST NUMBER OF DEATH SENTENCES 1973-2017 (AFTER TEXAS)**
- ☒ 4TH MOST EXECUTIONS (AFTER TEXAS, VIRGINIA AND OKLAHOMA)**
- ☒ NO EXECUTIVE CLEMENCY IN A CAPITAL CASE SINCE 1983**

A Gulf Coast beach, Florida. Undated. Photograph courtesy of State Archives of Florida

Snapshot: Connected to the modern world or separated from it?



October 1954. Unidentified delegate speaking at the Inter-American Tourism Conference at the Colony Hotel in Palm Beach, Florida.
Photographer: Johnson, Francis P. Photograph courtesy of State Archives of Florida

Today, Florida is the third most populous state in the USA, has its fourth largest economy, and promotes its connections to the world. With a dozen international airports, 14 deep water ports, hundreds of miles of beaches, and more golf courses than any other state, the Sunshine State (Florida's official nickname adopted by the legislature in 1970) emphasises its leisure and tourism industry ("Florida is the top travel destination in the World"), international trade ("40% of all US exports to Latin and South America pass through Florida"), agriculture ("Florida accounts for about 40% of the world's orange juice supply"), and health, software, and aerospace technology industries.¹

Florida's attachment to the death penalty, on the other hand, separates it from much of the modern world. The gap was illustrated on 8 November 2017 when Florida conducted its third execution of the year. A day earlier, the death penalty had been abolished in Guatemala for ordinary crimes such as murder, bringing to 142 the number of countries in the world that are abolitionist in law or practice. Guatemala is part of a region with which Florida often associates itself, Central and South America, where there has not been an execution for a decade.

The top 10 countries for visitors to Florida in 2017 (in descending order) were Canada, UK, Brazil, Argentina, Columbia, Germany, Mexico, Venezuela, France and China.² China is the only one of these countries to use the death penalty. Having abolished the death penalty for ordinary crimes in 1976, the same year that Florida's post-*Furman* capital statute was approved by the US Supreme Court, Canada became fully abolitionist abolished in 1998. So did the UK. In 1998, Florida's Constitution was amended to protect the death penalty from judicial prohibition. Florida executed four prisoners that year.

Leo Jones, an African American man convicted of the murder of a white police officer, was executed on 24 March 1998. A Florida Supreme Court Justice noted the "sheer volume of evidence... that another person committed the murder", including new evidence from a whistle-blower of "a corrupt culture that prevailed in the police force at the time of the murder, and that specifically implicated two key police officer witnesses in this case". These two "routinely engaged in illegal and brutal tactics". Eleven hours after he was taken into custody, Jones signed a four-sentence confession written by the second officer. Leo Jones said that he only signed the confession out of fear for his life. It became the "cornerstone" of the case against him.

Daniel Remeta was executed in Florida a week after Leo Jones. The trial judge found that "Remeta had a mental age of approximately thirteen years; had a deprived childhood, was raised in an unstable, poverty-stricken home by alcoholic parents and was an abused child; was of low-average to average intelligence and subject to discrimination because of his partial American Indian heritage and his speech impediment; and is a long-term substance abuser, who was institutionalized from age thirteen due to delinquent and criminal behavior." After the execution, Daniel Remeta's lawyer read from a letter written by his client before he was killed: "I have become a changed man, one who changed too late... All of you tell my story to every youth so that the worst of my life will not be repeated by them and the trust and honesty I learned too late will save them".

¹ Facts about Florida, <http://www.stateofflorida.com/facts.aspx>.

² <http://www.visitfloridamediablog.com/home/florida-facts/research/>

1. HANGING ON TO EXECUTIONS

‘What I hope is that we become like Texas. Bring in the witnesses put them [the inmates] on a gurney, and let’s rock and roll’

Brad Thomas, Governor Jeb Bush’s Public Safety Policy Coordinator, promoting the Death Penalty Reform Act, 2000. In 2005, Governor Bush appointed Brad Thomas to be a judge on Florida’s First District Court of Appeal. He is currently Chief Justice

In *Furman v. Georgia* in June 1972, the US Supreme Court overturned the USA’s capital laws because of the arbitrary way in which death sentences were being handed down. Six months later, Florida’s legislature became the first to resuscitate the death penalty. The Florida Supreme Court upheld the new law in 1973, as did the US Supreme Court in 1976,³ and in 1979 Florida carried out the USA’s first “non-consensual” execution in the post-*Furman* era, more than three years before any other state did the same thing.⁴

Upholding Florida’s statute on 2 July 1976, the US Supreme Court noted that its sentencing procedure was “patterned in large part on the Model Penal Code.”⁵ This had been developed by the American Law Institute (ALI); Section 210.6 of the Code sought to provide legislators with rules aimed at maximizing fairness and reliability in capital sentencing. In 2009, ALI withdrew §210.6 in light of the “intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment”.⁶ That should have been enough to give Florida pause for thought. Instead, nearly a decade later, the Florida authorities continue to enable the death penalty, even as others have turned against it.⁷

In 2013, the legislature passed the Timely Justice Act (TJA), seeking to cut the time between conviction and execution. In 2015, after the US Supreme Court upheld the use in lethal injections of the controversial drug midazolam – which Florida had been the first state to adopt – Representative Matt Gaetz, sponsor of the TJA, was among those pushing for executions to resume, saying: “If you don’t have the death penalty, it’s a free murder. I’m for no free murders, and that’s why I think Florida is right for bucking the national trend of watering down the death penalty.”⁸ He was elected to the US House of Representatives in 2016. On 12 July 2018, he received a tweeted endorsement from President Trump for being “strong on crime”. In 2017, Governor Scott responded to a State Attorney’s decision not to seek the death penalty because of its demonstrable flaws by reassigning her capital murder cases to a prosecutor known for his support for executions.⁹ Also in 2017, the governor signed into law a bill allowing prosecutors to pursue the death penalty against convicted drug dealers if fentanyl or its derivatives supplied by them resulted in the death by overdose of the recipient. The Trump administration followed Florida’s lead.¹⁰

When the Florida Supreme Court upheld Florida’s new capital law in 1973, it wrote that because “death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation”, it was proper that “the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.”¹¹ This theory has failed, argued two US Supreme Court Justices in 2015, pointing to evidence that errors and arbitrariness once again riddle capital justice in the USA. Justices Stephen Breyer and Ruth Bader Ginsburg pointed to the “extensive body of evidence” that the death penalty was not being limited to “those who commit a narrow category of the most serious crimes

³ *Proffitt v. Florida* was one of five decisions issued on 2 July 1976 (*Jurek v. Texas*, *Roberts v. Louisiana*, *Woodson v. North Carolina*, and *Gregg v. Georgia*) initially defining the contours of the post-*Furman* death penalty, collectively referred to as *Gregg v. Georgia*.

⁴ The first execution was in Utah in January 1977, of a man who had refused to appeal. After three more executions of “volunteers” (in Nevada, Virginia and Indiana), Texas carried out the USA’s second “non-consensual” execution on 7 December 1982.

⁵ *Proffitt v. Florida*, 2 July 1976.

⁶ Report of the Council to the Membership of ALI on the matter of the death penalty, 15 April 2009.

⁷ While Governor Rick Scott has been signing death warrants – more than a quarter of Florida’s post-1976 executions have occurred since he took office in 2011 – his counterparts in Connecticut, Illinois and Maryland have signed into law bills abolishing the death penalty and those in Washington, Oregon and Pennsylvania have signed off on execution moratoriums. 2018 is Governor Scott’s last year as Governor.

⁸ As death penalty debate reignites, Florida carves its own path. Tampa Bay Times, 3 July 2015.

⁹ See Death in Florida, 21 August 2017, <https://www.amnesty.org/en/documents/amr51/6736/2017/en/>

¹⁰ Attorney General Sessions Delivers Remarks on the Trump Administration’s Response to the Opioid Epidemic, Tallahassee, Florida, 22 March 2018 <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-trump-administrations-response-opioid-epidemic>

¹¹ *State v. Dixon*, (1973).

and whose extreme culpability makes them the most deserving of execution” – the “worst of the worst”.¹²

The broader the range of “aggravators” – factors that make a murder death-eligible – increases the risk that prosecutors will capture in the capital net those whom the US Supreme Court has called the “average” murderer, supposedly exempt from execution under constitutional law.¹³ It certainly gives prosecutors who favour the death penalty more scope to exercise their discretionary power to seek death. In late 2014, there were eight capital cases pending in the Ninth Judicial Circuit in central Florida, which covers Orange and Osceola counties, more than at any time since the 1990s. The State Attorney alluded to prosecutorial discretion when he said of the large number of cases in which his office would pursue the death penalty that “My personal experience and attitude has something to do with it”.¹⁴ Florida’s prosecutors can select from a large number of statutory aggravating circumstances, which has grown from eight in 1976, to 16 today. At a legislative hearing in the state Senate in 2016, a retired Florida judge characterized this as “aggravator creep”, and suggested that “it is impossible to come up with a fact situation in your mind that amounts to first-degree murder without at least one aggravating factor in Florida.”¹⁵

Justices Breyer and Ginsburg dissented again in 2016, this time from the US Supreme Court’s refusal to review the case of a Louisiana prisoner who was 18 at the time of the crime, had an IQ of 74, and was sentenced in a jurisdiction that accounted for a disproportionate number of death sentences.¹⁶ Given the ban on the execution of people with intellectual disability and those under 18 at the time of the crime, that case was clearly pushing up against what was categorically unconstitutional. The case begged the question: could a borderline intellectually disabled teenager really be among the “worst of the worst”.¹⁷

The same question arises in case after case in Florida. Dozens of 18- and 19-year-old offenders have been sentenced to death there, including those who had mental disabilities or were under the influence of alcohol or other substances the time of the crimes, habits developed during childhoods of deprivation and abuse from which they were only just emerging. Others on death row outside of this age category also had histories of abuse or claims of mental or intellectual disability. Their cases tend to hole the theory that the system is selecting for execution the most egregious crimes committed by the most culpable of offenders.¹⁸

In January 2016, the US Supreme Court threw a wrench into Florida’s machinery of death. In *Hurst v. Florida*, the Court ruled Florida’s capital sentencing scheme unconstitutional because it gave juries only an advisory role. This was incompatible with the 2002 *Ring v. Arizona* decision that the Constitution requires juries rather than judges to make the factual findings necessary to sentence a defendant to death.

The Supreme Court had upheld Florida’s capital sentencing statute in 1984 and again in 1989.¹⁹ Those two decisions were “wrong”, it said in *Hurst*, with “time and subsequent cases” having “washed away their logic”. By then, more than 90 people had been executed in Florida. The irrevocability of the death penalty is difficult to ignore at such times. There can be no washing away past wrongs, whether the execution of the wrongfully convicted or of those sentenced under a law later deemed to have been unconstitutional.

Amos King and Linroy Bottoson were among the dozens of prisoners who, after *Ring* and prior to *Hurst*, argued that their death sentences were obtained under an unconstitutional sentencing scheme incompatible with *Ring*. An appeal filed a month after *Ring*, for example, argued that the ruling “squarely and indisputably outlaws the Florida sentencing procedure used to impose [Linroy] Bottoson’s death sentence”.²⁰ The Florida Supreme Court denied the appeal. Linroy Bottoson was put to death on 9 December 2002. This African American, with a long history of mental disability, had been tried before an all-white jury and sentenced under an unconstitutional statute. So too had Amos King.²¹ This African American man was executed on 26 February 2003 for the murder of a white woman. He maintained his innocence to the end.

¹² *Glossip v. Gross*, 29 June 2015, Justice Breyer, joined by Justice Ginsburg, dissenting.

¹³ The death penalty is for those with “a consciousness materially more depraved” than that of the “average” murderer (*Godfrey v. Georgia*, 1980).

¹⁴ State Attorney pushes for harsher punishments as sensational murder cases increase, 12 November 2014, <http://www.wftv.com/news/news/local/state-attorney-pushes-harsher-punishments-sensatio/nh578/>

¹⁵ Retired Circuit Judge O.A. Eaton Jr. Senate Criminal Justice Committee hearing, 27 January 2016.

¹⁶ *Tucker v. Louisiana*, 31 May 2016, Justices Breyer and Ginsburg dissenting from denial of *certiorari*.

¹⁷ *Atkins v. Virginia* (2002); *Roper v. Simmons* (2005).

¹⁸ See also, R.J. Smith, S. Cull and Z. Robinson. The Failure of Mitigation? *Hastings Law Journal*, Vol. 65: 1221, June 2014 (examining social histories of the 100 most recently executed prisoners found that “the overwhelming majority” had “intellectual impairments, were barely into adulthood, wrestled with severe mental illness, or endured profound childhood trauma”. Most “fell into two or three of these core mitigation areas... characterized by significant intellectual and psychological deficits.”).

¹⁹ *Spaziano v. Florida* (1984) and *Hildwin v. Florida* (1989).

²⁰ *Bottoson v. Moore*, Petitioner’s opening brief. Florida Supreme Court, 26 July 2002.

²¹ Amos King was granted a new sentencing on another issue. He was re-sentenced to death by a jury of 11 whites and one black.

2. AFTER *HURST*: AN EXTRA LAYER OF ARBITRARINESS

I can't imagine what one could say to Mr Hannon's loved ones to justify why it is acceptable that he falls on the wrong side of this double set of rules. Mr Hannon is set to be executed tonight. No one disputes that he was sentenced to death by a process we now recognize as unconstitutional... The Florida Supreme Court's retroactivity analysis leaves the difference between life and death to turn on either fatal or fortuitous accidents of timing

Hannon v. Secretary, US Court of Appeals for the 11th Circuit, 8 November 2017, Judge Beverly Martin concurring

In the USA, a state using capital punishment “has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty”.²² Any general rules must “ensure consistency in determining who receives a death sentence”.²³ However, hopes that the demands of consistency and fairness would mean all of the nearly 400 people on Florida's death row at the time of *Hurst* having their death sentences overturned were dashed by the Florida Supreme Court in late 2016. It ruled that *Hurst* applied retroactively only to about half of them – those whose death sentences had not yet been ‘finalized’ (affirmed by the Florida Supreme Court on automatic direct appeal) by the time of the 2002 *Ring* ruling. They would be entitled to resentencing if the state failed to prove that the “*Hurst* error” – stemming from the jury's role being limited to advisory – was “harmless”.

The UN Safeguards guaranteeing protection of the rights of those facing the death penalty state that a person charged or convicted of a capital offence must benefit when a change of law following charge or conviction imposes a lighter penalty for that crime.²⁴ This is a principle well-established in international law.²⁵

Having ruled since *Hurst* that the constitution requires a jury to be unanimous in its death decision-making (until *Hurst*, Florida allowed bare majority juries of 7-5 to recommend death), the Florida Supreme Court has adopted an approach of granting *Hurst* relief in those post-*Ring* cases where juries were less than unanimous. Those whose death sentences were finalized before *Ring* are deemed not to benefit from *Hurst*, even if their juries were less than unanimous for the death penalty; likewise for those post-*Ring* defendants who waived jury sentencing or whose jury was unanimous for death.²⁶

2.1 PARTIAL RETROACTIVITY, FEAR OF TOO MUCH JUSTICE

Finality won out over fairness when the Florida Supreme Court decided the *Hurst* retroactivity issue. In determining that *Hurst* would only be partially retroactive – applying only to those whose death sentences

²² *Godfrey v. Georgia*, 1980.

²³ *Kennedy v. Louisiana*, 2008.

²⁴ Safeguard no. 2 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984 and endorsed by the UN General Assembly in the same year.

²⁵ The principle is known as “lex mitior” and dates back to Roman times. See for instance Article 15(1) of the International Covenant on Civil and Political Rights; Rome Statute of the International Criminal Court, Article 24(2), *Case of Scoppola v. Italy* No. 2 (Application no. 10249/03)), European Court of Human Rights, Grand Chamber judgment of 17 September 2009, para. 108.

²⁶ *Asay v. State*, Florida Supreme Court, 22 December 2016. And also *Davis v. State*, 10 November 2016 (and Justice Perry dissent). Even those whose death sentences became final before *Ring*, but who challenged the constitutionality of the sentencing scheme after *Ring* but before *Hurst*, would not get relief. For example, David Miller (7-5 jury); Donald Bradley (10-2); Kayle Bates (9-3); and Joe Nixon (10-2).

were not yet final at the time of the *Ring* ruling in 2002, the Court considered the “justice system’s goals of fairness and finality”. It reasoned that the administration of justice would not be served by reversing a large number of death sentences, noting there were 386 prisoners on death row at the time of *Hurst*: “Penalty phase resentencing is a time-intensive proceeding”, adding that it was important to consider “the impact a new sentencing proceeding would have on the victims’ families and their need for finality”.²⁷

Justice Pariente dissented, arguing that to avoid arbitrariness *Hurst* should be applied across the board. Justice James Perry also dissented, accusing the majority of “arbitrarily draw[ing] a line between June 23 and June 24, 2002 – the day before and the day after *Ring* was decided”, but without providing “a convincing rationale as to why 173 death sentenced persons should be treated differently than those whose sentences became final post-*Ring*”. The majority’s application of *Hurst v. Florida*, he asserted, “makes constitutional protection depend on little more than a roll of the dice.”

In August 2017, the Florida Supreme Court cemented this situation. It ruled against James Hitchcock, whose death sentence for a crime committed when he was 20, based on a 10-2 jury vote, became final in 2000. The Court upheld the sentence, dismissing various arguments, including that the partial retroactivity rule would result in arbitrariness. Justice Fred Lewis noted that the ruling could mean similarly situated prisoners being treated differently due to “the simple reason of one defendant’s docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.”²⁸

An example of timing determining *Hurst* outcomes can be seen in the cases of Gary Bowles and James Card. Their unrelated death sentences were affirmed by the Florida Supreme Court in separate opinions issued on 11 October 2001. Both prisoners appealed to the US Supreme Court; both were unsuccessful. James Card’s death sentence became final on 28 June 2002 when the Court said that it would not take his case. This was *four days after Ring* was decided. This put him just on the right side of the Florida Supreme Court’s retroactivity cut-off, and in 2017, the Court granted him *Hurst* relief overturning his death sentence and remanding for new sentencing. In contrast, the US Supreme Court denied Gary Bowles’s petition on 17 June 2002, and his death sentence became final on that date, *seven days before Ring* was decided. This left Gary Bowles on the wrong side of the *Hurst* retroactivity cut-off, and in January 2018, his *Hurst* claim was summarily denied by the Florida Supreme Court.

Steven Evans was sentenced to death in 1999 after an 11-1 jury vote. The Florida Supreme Court affirmed this sentence in October 2001. The US Supreme Court received the appeal petition on 20 March 2002 but returned it because it did not comply with its rules. The Court gave Evans’s lawyer 60 days – until 22 June 2002 – to submit a revised petition. For some reason, no such petition was submitted. In 2018, the state Supreme Court ruled that the death sentence had become final in March 2002, and so *Hurst* did not apply. If a petition had been filed on or around 22 June 2002, the US Supreme Court’s denial (it denies the majority of petitions at this stage) and finalization of the death sentence would have come after *Ring* (24 June) and Steven Evans would today have been entitled to *Hurst* relief.

As *Hurst* applicability depends on when a death sentence becomes “final”, whether a prisoner is granted *Hurst* relief or not will depend on how the case has proceeded through the system. Arthur Barnhill was sentenced to death in 2000 for a crime committed in 1995 when he was 20. More than four years passed between his indictment and his sentence. His death sentence became final on 8 April 2003, so by less than a year avoided the 2002 cut-off. In February 2017, Arthur Barnhill’s death sentence was overturned pursuant to *Hurst*. He was later resentenced to life after the prosecution chose not to seek death again.

Kevin Foster was sentenced to death in 1998 for a crime committed when he was 18 years old. The jury voted 9-3 for death, the same as occurred at Arthur Barnhill’s trial. The murder for which Kevin Foster was sent to Florida’s death row was committed a year *after* the one for which Arthur Barnhill was charged. Kevin Foster’s case came to trial more quickly, however. As a result, his death sentence became final in 2001, the year *before* the *Hurst* cut-off. In January 2018, the Florida Supreme Court deemed him ineligible for *Hurst* relief. He is still on course for execution, while Arthur Barnhill is serving a life sentence.

“Finalization” is recalibrated if a death sentence is overturned for some reason and then re-imposed at a resentencing. This brings into the mix the inconsistency in capital cases whereby some prisoners win new sentencings, and others do not, even if the merits of their claims show no clear and qualitative difference.

Roderick Orme was sent to death row in 1993 for a 1992 murder. His death sentence – on a 7-5 jury vote – became “final” in 1996. If this is where things had remained at the time of *Hurst*, he would not have benefited. However, in 2005 the Florida Supreme Court ordered a new sentencing because although the trial lawyer “knew his client had been diagnosed with a major mental illness” (bipolar disorder), he had failed to investigate it. In 2007, Roderick Orme was again sentenced to death, this time on an 11-1 jury

²⁷ *Asay v. State*, 22 December 2016. For updates on *Hurst* relief granted and denied, see https://deathpenaltyinfo.org/Hurst_Cases_Reviewed

²⁸ *Hitchcock v. State*, 10 August 2017, Justice Lewis concurring in result.

vote. This death sentence became final in 2010, 18 years after the crime, and eight years after *Ring*. This death sentence was overturned in 2017 by the Florida Supreme Court because now *Hurst* was applicable.²⁹

Eight months later, Patrick Hannon was executed in Florida for a crime committed a year before the murder that put Roderick Orme on death row. Patrick Hannon's sentence became final in 1995, so *Hurst* was deemed not to apply to him. Yet his case involved at least as egregious failures of trial representation, but unlike in Orme's case the Florida Supreme Court upheld the death sentence. At a post-conviction hearing in 2002, appeal lawyers showed that Hannon had a history of serious substance abuse from a young age – including with alcohol, LSD, crystal methamphetamine, hallucinogenic mushrooms and crack cocaine – as well as possible neurological impairments resulting in poor impulse control. The jury never heard this because the defence lawyer had not investigated it. Two Florida Supreme Court Justices described it as “a classic case of ineffectiveness of counsel” leading to a “breakdown of our adversarial system” and a jury that was given “no meaningful choice in its penalty phase deliberations”.³⁰ When the federal US Court of Appeals refused to stay Patrick Hannon's execution in November 2017, one of the three judges voiced her concern about the Florida Supreme Court's *Hurst* retroactivity rule: “[I]t is arbitrary in the extreme to make this distinction between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred.”³¹

Patrick Hannon was executed on 8 November 2017, the third execution of a prisoner deemed not to benefit from *Hurst*. The first such execution came on 24 August 2017. Mark Asay had been sentenced to death on a 9-3 jury vote, but because his death sentence became final in 1991, *Hurst* was deemed not to apply. Justice Pariente pointed out that it was unknown why three jurors voted against death – “whether they did not find that sufficient aggravating factors existed or did not find that sufficient aggravating factors outweighed the mitigating circumstances, or whether three jurors otherwise determined that death for this twenty-three-year-old was not the appropriate punishment”. Thus, she wrote “it cannot be said that the lack of unanimity was harmless beyond a reasonable doubt.”³² Michael Lambrix was executed six weeks later for two murders committed in 1983 when he was 22. At a 1984 retrial, the jury voted for death 10 to two for one murder and eight to four for the other. However, because his death sentence became final in 1986, the Florida Supreme Court ruled that he was not entitled to *Hurst* relief.

2.2 JURY WAIVED OR JURY UNANIMOUS, NO RELIEF

Those who waived jury sentencing have been deemed not eligible for *Hurst* relief, even though they were waiving *advisory* jury sentencing under an unconstitutional law and could have had no idea that they were waiving their entitlement to future relief. In March 2018, for example, the Florida Supreme Court ruled that Jeffrey Hutchinson was not entitled to *Hurst* relief even though his death sentence – handed down by a judge after the defendant waived jury sentencing – became final two years after the *Ring* decision. The lawyer who represented Jeffrey Hutchinson at trial has made clear that her client waived the jury solely on her advice, that this advice had been grounded entirely on the pre-*Hurst* (unconstitutional) sentencing scheme, that she would not have given such advice in a post-*Hurst* proceeding, and that the defendant would not have waived jury sentencing without her advice.³³

Those who waived jury sentencing *and* whose death sentences were final before *Ring* lose on both grounds, even if the defendant doing the waiving had, at best, borderline intellectual functioning. Lawyers for such a prisoner, Kenneth Quince, who pled guilty and waived jury sentencing, have argued both are unfair: “experts have determined that Quince has deficient intellectual functioning, a fact that certainly calls into question his understanding of the plea colloquy and the consequences of waiving a jury”; and on retroactivity: “In light of fundamental fairness, due process, equal protection, and the evolving standards of decency, partial retroactivity that sets a point in time as to whether a person lives or dies can never be constitutional.”³⁴ The Florida Supreme Court disagreed, ruling that Kenneth Quince was not entitled to *Hurst* relief. Aged 20 at the time of the crime, and 21 when he arrived on death row, he is now 59.

Those whose juries were unanimous for the death penalty are deemed ineligible for *Hurst* relief – the Florida Supreme Court “rubber stamps the harmless error finding based on that unanimity”.³⁵ It is

²⁹ As of August 2018, Bay County prosecution was intending to seek the death penalty again at resentencing.

³⁰ *Hannon v. State*, Florida Supreme Court, 31 August 2006, Justices Anstead and Pariente dissenting.

³¹ *Hannon v. Secretary*, US Court of Appeals for the 11th Circuit, 8 November 2017, Judge Beverly Martin concurring.

³² *Asay v. Florida*, 22 December 2016, Justice Pariente concurring in part, dissenting in part.

³³ *Hutchinson v. State*, Motion for rehearing/clarification, In Florida Supreme Court, 28 March 2018. Declaration, Kimberly Ward, 10 February 2017.

³⁴ *Quince v. Florida*, Initial brief of the Appellant, In the Florida Supreme Court, 19 July 2017. Also *Quince v. Florida*, Florida Supreme Court, 12 April 2018 (“we affirm the trial court's order denying Quince's renewed motion for a determination of intellectual disability as a bar to execution”).

³⁵ *Foster v. Florida*, Appellant's Reply Brief, 8 May 2018.

important to note then that while research shows that juries not required to reach unanimity “tend to take less time deliberating and cease deliberating when the required majority vote is achieved”,³⁶ unanimity can offer no guarantees of reliability or consistency. Seth Penalver was convicted and sentenced to death on unanimous jury votes. At a retrial in 2012, he was acquitted. Frank Smith was sentenced to death in 1986 on the unanimous vote of the jury which had unanimously convicted him. He died in January 2000 on Florida’s death row shortly before being exonerated by DNA testing.

That unanimity for death can be achieved despite compelling mitigation is shown by cases such as that of Christopher Offord, who pled guilty in 2005 to the murder of his wife. After the crime, he gave police a full confession, explaining he had schizophrenia, had run out of medication, and had been hearing voices telling him to kill his wife. After the murder, he had tried to commit suicide. The jury heard that he had suffered from mental disability since the age of five and that as an adult he had been diagnosed with schizoaffective disorder and had a history of auditory hallucinations. The jury was unanimous in voting for the death penalty. In 2007, the Florida Supreme Court found that Christopher Offord’s “lifelong history of severe mental illness” rendered the death sentence disproportionate.³⁷ The fact remains, however, that a prosecutor sought, 12 jurors approved, and a judge imposed, the death penalty.

Michael Reynolds was sent to Florida’s death row in 2003 – over a year *after Ring* – but has been deemed not to benefit from *Hurst* because the jury was unanimous for death.³⁸ The Florida Supreme Court found the *Hurst* error harmless, even though no mitigating evidence was presented to the jury after Reynolds waived his right to do so. His trial lawyer said this was because Reynolds “did not think there was any chance of convincing six jurors to vote for life”. Yet that calculation was made in the face of an unconstitutional sentencing statute. Today, the calculation would be very different, namely whether he could convince a single juror to vote for life. It was not as if there was no mitigating evidence available. The jury could have been presented evidence of Michael Reynolds’s childhood of psychological and physical abuse, including at the hands of his “drunken father”, a “chronic alcoholic”; the fact that his mother died when Michael was 17 years old after being “chronically ill” and frequently hospitalized throughout his childhood, leaving the boy to care for “his disabled, wheelchair-bound sister because his mother was unable to”. He himself began abusing alcohol when he was 14, left school around the age of 15, and “had essentially no adult supervision as a child”.³⁹ The judge gave this mitigation “little” weight.

James Dailey’s jury had also been unanimous for death, but in 1991, the Florida Supreme Court reversed this sentence, finding that two of the aggravating factors had not been supported by the evidence and that the judge had given no weight to certain mitigating factors. On remand, the judge, with no jury, resentenced James Dailey to death. This sentence became final in 1996 and on 26 June 2018, the Florida Supreme Court ruled that *Hurst* did not apply because of this timing. Justice Pariente took issue with the decision; “relying on its arbitrary retroactivity framework”, she wrote, “this Court again turns a blind eye to the quintessential *Hurst* error – a defendant, without waiver, sentenced to death by a trial judge alone without a jury’s reliable, unanimous recommendation for death”. In this case, she continued, “it is clear that Dailey’s penalty phase jury considered invalid aggravating factors in recommending a sentence of death... Even more, when this Court remanded for resentencing, Dailey’s sentence of death was reviewed by a single trial judge alone. Thus, as a result of this Court’s arbitrary framework for determining the retroactivity of *Hurst*, Dailey remains under an unconstitutionally unreliable sentence of death”.⁴⁰

On the same day, the state Supreme Court ruled that *Hurst* did not apply to Daniel Doyle’s death sentence. At his trial, the jury voted for death by eight to four. Upholding the death sentence, the Florida Supreme Court found that one of the three aggravating factors had not been proved and struck it. Two of the Justices found that the trial court had erred when it failed to find any mental mitigation in the case. They noted: “The record reflects that Doyle was 21 years old; that he had an IQ of between 70 and 80, and was borderline retarded; that he was suffering from organic brain defects, which caused dyslexia, and had emotional problems; that he had been enrolled in handicapped classes; and that his mental condition was chronic”.⁴¹ Four jurors concluded that the death penalty was not appropriate in Daniel Doyle’s case, Justice Pariente noted in June 2018. Given that one of the aggravating factors the jury considered was now struck down, and given the substantial mitigation, this was a case which “cries out for a resentencing by a jury in light of *Hurst*”.⁴² Once again, however, she was in the minority.

³⁶ *Hurst v. Florida*, Florida Supreme Court, 14 October 2016.

³⁷ *Offord v. State*, Florida Supreme Court, 24 May 2007. The Court remanded the case for imposition of a life sentence.

³⁸ *Reynolds v. Florida*, Florida Supreme Court, 5 April 2018.

³⁹ *Reynolds v. Florida*, *op. cit.*, Justice Pariente, dissenting.

⁴⁰ *Dailey v. State*, 26 June 2018, Justice Pariente concurring in result.

⁴¹ *Doyle v. State*, 1984, Justice Overton (joined by Justice McDonald), concurring in part and dissenting in part.

⁴² *Doyle v. State*, 26 June 2018, Justice Pariente concurring in result.

2.3. CALDWELL IN THE MIX

Gary Whitton arrived on Florida's death row on 1992. He is still there. At his trial, the judge found several mitigating factors, including that the defendant "is a human being".⁴³ She then accepted the unanimous jury vote for the death penalty. That same judge, now retired, has concluded that this death sentence should be overturned, as the product of the sort of "unconstitutional penalty-phase proceeding" recognized in *Hurst*. In January 2018, the Florida Supreme Court ruled that Gary Whitton would not get *Hurst* relief.

THE QUESTION OF CALDWELL

In the pre-*Hurst* Florida system, judge and jury could look to the other as the final decision-maker, leaving neither taking ultimate responsibility for the life-or-death decision. Long before *Hurst*, it had been argued that Florida's capital sentencing scheme was incompatible with the US Supreme Court's 1985 *Caldwell v. Mississippi* ruling which held: "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe... that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Prosecutorial comments during trials routinely heightened *Caldwell* concerns. At the 1994 trial of William Thomas, for example, the jury voted 11 to one for the death penalty. During jury selection, the prosecutor emphasized that "it is the Judge who makes the final decision as to what the sentence will finally be" and repeated that in closing argument at the sentencing.

On several occasions since *Hurst*, three US Supreme Court Justices have dissented from the Court's refusal to address the *Caldwell* issue. They note that although the Florida Supreme Court has denied the *Caldwell* claim in the past, it did so in the context of its prior sentencing scheme, now ruled unconstitutional precisely because it gave jurors only an advisory role. Since then, numerous prisoners have asserted that their death sentences were unconstitutional because the jury instructions "repeatedly emphasized the nonbinding, advisory nature of the jurors' role and that the judge was the final decision-maker." How could this possibly be compatible with *Caldwell*? The Supreme Court has declined to act.

On 25 January 2018, the Florida Supreme Court ruled that because William Thomas's death sentence became "final" in 1997, *Hurst* did not apply. He remains on death row.

Judge Laura Melvin is one of several retired Florida judges who have argued that the partial retroactivity rule is unconstitutional.⁴⁴ In her intervention on the Whitton case, she also pointed to the apparent incompatibility with *Caldwell v. Mississippi* of Florida's pre-*Hurst* sentencing scheme (see box):

"Obviously, the level of responsibility required of the jury by *Hurst* is completely different than the one placed upon Mr Whitton's jury. The Whitton jury had the luxury, in effect, of hiding behind my Robe. They had the luxury of recommending the death penalty without having to make findings of fact regarding the aggravators beyond a reasonable doubt and, much more importantly, they were not required to assume responsibility for the decision to kill Mr Whitton. If the jury had evaluated the evidence with knowledge of the gravity and consequence of their decision, they could have been greater swayed by the mitigation in Mr Whitton's case, which was extensive."

Judge Melvin said that she had reviewed the federal petition filed on Gary Whitton's behalf which laid out "extensive" mitigating evidence that had not been presented at the trial. She said this evidence showed "a particularly horrific childhood and includes a variety of witnesses" who said "in various ways that the Whitton family situation was

the worst they had ever seen." Gary Whitton's "life experiences include fetal alcohol syndrome and forensic consequences of his brain impairment as well as post-traumatic stress disorder stemming from what [a psychiatrist] describes as abuse by Mr Whitton's parents at the level of 'documented depravity'." Judge Melvin's own experience as a juvenile court judge, she said, had led her to conclude that Gary Whitton's childhood, as described in the federal petition, was "as violent, abusive, and neglectful as any I've seen".

As Judge Melvin herself admits, she does not know whether the result would have been different if the jury had been instructed that it was their decision and that they would have to be unanimous in their death decision. She suggests, however, that it might have been different and also that the defence lawyer's "approach to the mitigation may have differed had he known that the jury must unanimously render the findings regarding the relative weight of the aggravation and mitigation." Applying the principles required by *Hurst*, she concluded, "the decision-making by everyone involved in the case – the judge, prosecutor and defense, the defendant, and the jury – may have been different."⁴⁵

This is what the Florida Supreme Court failed to recognize when it came up with its "arbitrary retroactivity framework", as Justice Barbara Pariente has described it, rather than overturning all death sentences in force at the time. The *Caldwell* issue should have further prompted it to do the right thing.

⁴³ That a condemned inmate is a human being is what the death penalty effectively denies. "A prisoner remains a member of the human family... An executed person has indeed lost the right to have rights." *Furman v. Georgia*, 1972, Justice Brennan concurring.

⁴⁴ *Branch v Secretary*, Brief of amici curiae retired Florida judges and jurists, In the US Supreme Court, 15 February 2018.

⁴⁵ *Whitton v. Florida*, Motion for rehearing/clarification. Florida Supreme Court, Declaration of Circuit Judge Laura Melvin, retired. 2 February 2018.

2.4 THE CASE OF JAMES HITCHCOCK

‘Mr Hitchcock remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar’

Hitchcock v. Florida, Initial brief of the appellant, In the Supreme Court of Florida, 22 May 2017

The State of Florida has been trying to get James Hitchcock to the execution chamber for over four decades. He was 20 years old at the time of the crime. He is now 62, having spent two thirds of his life on death row. Today his case is deemed one of those to whom the US Supreme Court’s 2016 *Hurst v. Florida* ruling does not apply, and illustrates how the interpretation of *Hurst* by the Florida Supreme Court has added “another layer of arbitrariness” to the death penalty.

James Hitchcock was sentenced to death on 11 February 1977 for the murder on 31 July 1976 of 13-year-old Cynthia Driggers, his brother’s stepdaughter. In 1987, the Supreme Court overturned the death sentence, because the jury had been ordered by the judge not to consider, and the judge had refused to consider, mitigating evidence not specifically itemised in Florida’s capital statute.⁴⁶ All they considered was the defendant’s youth at the time of the crime, not a range of other mitigating evidence that had been presented by the defence lawyer.

COMPELLING MITIGATION, DIVIDED JURY, NO RELIEF UNDER *HURST*

In his October 1996 sentencing order, the trial judge found that James Hitchcock’s young age (20) at the time of the crime was a mitigating factor. He also found that a number of non-statutory mitigating circumstances had been established, including that James Hitchcock came from a background of extreme poverty; had experienced the lingering death of his father, who because of the family’s poverty, was unable to afford treatment for cancer; was unable to pursue a formal education; had developed disorders characterized by insecurity, instability, rejection, abandonment and an inability to trust others; had witnessed and experienced emotional and physical abuse by his alcoholic stepfather; left home at an early age to escape his circumstances. The judge also found that since the murder, James Hitchcock had learned to read and write, had taken steps towards rehabilitation, and among other things had “acted as a mediator or peacemaker perhaps saving a corrections officer and another inmate from death or serious injury”. The judge sentenced James Hitchcock to death, accepting the jury’s 10 to two recommendation for the death penalty.

At a resentencing hearing in February 1988, James Hitchcock was again sentenced to death. In 1992, the US Supreme Court again intervened, this time on the grounds of an unconstitutional instruction given to the jury. It remanded the case to the Florida Supreme Court which overturned the death sentence.

The prosecution decided to go for the death penalty again, and at a third sentencing in August 1993, James Hitchcock was again condemned to death. The Florida Supreme Court overturned this sentence in March 1996. At yet another resentencing in September 1996, the prosecution obtained the death penalty again. This fourth death sentence has survived the appeals process.

What threatens to the final lethal blow for James Hitchcock is that this 1996 death sentence became final in 2000 when the Florida Supreme Court upheld it on direct appeal and the US Supreme Court declined to intervene. This was two years before the latter court decided *Ring v. Arizona*, which led 14 years later to *Hurst v. Florida*. On 22 December 2016, the Florida Supreme Court ruled that *Hurst* would not apply to those capital defendants whose death sentences were final by the time of the *Ring* decision on 24 June 2002.⁴⁷

In an order issued on 14 February 2017, a trial level judge in Orange County ruled that because of this timeline, James Hitchcock could not benefit from *Hurst*. His lawyers appealed to the Florida Supreme Court, highlighting the fact that the death sentence was based on a 10-2 jury recommendation, and the state Supreme Court had repeatedly held that non-unanimous death votes rendered

“*Hurst* error” not harmless in post-*Ring* cases. Moreover, they argued, the Florida Supreme Court’s “parsing of relief based on the date of *Ring* was not based on the strengths of the evidence favouring death, the lack of mitigation supporting life, or on any meaningful criteria”.⁴⁸ They continued: “No meaningful

⁴⁶ *Hitchcock v. Dugger*, 1987.

⁴⁷ *Asay v. State*.

⁴⁸ *Hitchcock v. Florida*, Initial brief of the appellant, In the Supreme Court of Florida, 22 May 2017.

distinction based on the facts of Mr Hitchcock's case supports a denial of relief. The denial of a remedy based on the date of *Ring* renders the errors unconstitutional beyond what should be tolerated." They urged the Florida Supreme Court to overturn the death sentence. In an opinion issued on 10 August 2017, the Court refused.

Justice Pariente dissented, arguing that "a death sentence imposed without a unanimous jury is inherently unreliable". The statute under which James Hitchcock was sentenced was unconstitutional and to deny him relief "when other similarly situated defendants have been granted relief amounts to a denial of due process". She restated her belief that the *Hurst* ruling required "full retroactivity" and "any line drawing in the retroactive application of *Hurst*" merely added "another layer of arbitrariness" to that already described by US Supreme Court Justices Breyer and Ginsburg in 2015 when they pointed to the "extensive body of evidence" showing that the death penalty was not being reserved for the "worst of the worst" crimes and offenders.

The case of James Hitchcock, Justice Pariente argued, was further evidence of this. Not only was he only 20 years old at the time of the crime, there was a range of other mitigation evidence in the case. In 1982, two other Justices had argued that James Hitchcock's "actions fall far short of showing a reasoned planning or reasoned knowledge of what he was doing when he strangled the victim."⁴⁹ In 1983, the same two Justices made clear their "continuing belief that the death penalty is inappropriate for Hitchcock".⁵⁰ In 1990, two more Justices argued that his death sentence was disproportionate and should have been reduced to a life sentence.⁵¹ James Hitchcock's death sentence is "anything but reliable", wrote Justice Pariente. And, because of the "significant mitigating evidence" presented, and because it was unclear why two jurors voted against death, she would conclude that the *Hurst* error in his case was not harmless beyond a reasonable doubt.⁵² She was in the minority, however, and James Hitchcock remains on death row today, 41 years after he was first sent there.

2.5 THE CASE OF WILLIAM KELLEY

'By denying relief to Kelley and the other prisoners whose sentences became final before *Ring*, the novel, unprecedented rule of partial retroactivity adopted by the Florida Supreme Court is cruel and unusual in the same way that being struck by lightning is cruel and unusual'

Petition to US Supreme Court, *Kelley v. Florida*, 25 May 2018

Over half a century ago, wealthy citrus grower Charles von Maxcy was murdered in Highlands County, Florida. Today, William Kelley faces execution for that October 1966 crime. He has consistently maintained his innocence. Twenty-three years old when Charles von Maxcy was killed, he turned 76 on 12 August 2018.⁵³ His health is poor; he has cataracts, back problems, and is in a wheelchair.

At least five people were involved in the Maxcy murder. The man who organized it was granted immunity for prosecution in exchange for accusations that put William Kelley on death row. His co-conspirator, the victim's wife, received immunity too. Two others, including the organizer's contact point and the lead hitman, were never prosecuted and were dead by the time William Kelley was brought to trial. The judge said he was "troubled" by the "disparity of punishment" but sentenced William Kelley to death anyway. A federal appeals court would later note that "the State's key witness... literally got away with murder".⁵⁴

This key witness was John Sweet, a real estate agent who had an affair with Irene Maxcy, the victim's wife, and planned the murder so that they could live on her husband's inheritance. He used his criminal

⁴⁹ *Hitchcock v. State* (1982), Justices McDonald and Overton, concurring in part and dissenting in part.

⁵⁰ *Hitchcock v. State* (1983), Justices McDonald and Overton, concurring.

⁵¹ *Hitchcock v. State* (1990), Justices Kogan and Barkett, dissenting.

⁵² *Hitchcock v. State*, 10 August 2017, Justice Pariente dissenting.

⁵³ The oldest person under sentence of death in Florida. Nelson Serrano (80 in September 2018) was granted *Hurst* relief in 2017.

⁵⁴ *Kelley v. Secretary*, US Court of Appeals for the 11th Circuit (2004). See also, *Kelley v. State* (1986), Justice Overton concurring.

connections in Massachusetts to arrange a contract killing – \$5,000 up front, \$15,000 on completion. On 1 October 1966, he met with the lead hitman and on 3 October drove him and his partner to the Maxcy estate. Later that day, Charles von Maxcy was murdered.

John Sweet's trial ended in a mistrial. His conviction and life sentence from the retrial was overturned on appeal in 1970.⁵⁵ The state decided against another trial, and in 1976, a court allowed most of the physical evidence from the crime, including a bullet, a bloody bedsheet, and a shred of the victim's shirt, to be destroyed. The case lay dormant until 1981, by which time John Sweet was facing charges in Massachusetts for prostitution, narcotics, arson, bribery, counterfeiting, and hijacking. "With authorities closing in on him, Sweet went to them first", wrote a federal judge in 2002; "His plan was to win immunity in exchange for information he had on the murder of Charles von Maxcy. William Kelley was the target, as Sweet implicated him as one of the murderers. The Massachusetts authorities brought Sweet to Florida where Sweet gave authorities there his confession. The next day Sweet was awarded immunity in Massachusetts."⁵⁶ He also won immunity in the Florida case and for perjury at his two trials.

William Kelley's indictment and prosecution for the Maxcy murder was based on John Sweet's testimony. William Kelley was brought to trial in 1984. His first trial ended in a hung jury. At his retrial, the jury deadlocked, but the judge insisted they continue, asserting that there was no more evidence. The jury asked if John Sweet "received immunity in Florida... and if he had anything to gain by his testimony". The judge declined to answer. The jury voted to convict. The sentencing was held on 2 April 1984. Before it began, one of the jurors suffered a death in the family and was excused. Of the 11 remaining, three voted for life, eight for death. The defence lawyer then told the judge he wanted to present the victim's daughter. Charles von Maxcy's daughter then took the stand and urged the judge to "take into consideration Mr Kelley's life. I don't believe he's guilty". The judge thanked her and sentenced William Kelley to death.

In 1986, the Florida Supreme Court dismissed the claim that William Kelley should not have been tried given the state's destruction of evidence in 1976. The Court acknowledged that "the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness". The destruction of the evidence was "unfortunate", but it found "no negligence". It added that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different."

There was more than a hint of such transgression, according to the above federal judge in 2002. This was a case with "many instances of prosecutorial misconduct" and this prosecutor had "a habit of failing to turn over exculpatory and impeachment evidence", in at least one case putting an innocent man on death row.⁵⁷ The judge ordered a new trial for William Kelley after finding that the prosecutor had withheld such evidence. However, the state appealed and the Court of Appeals ruled that the federal judge had been wrong to hold evidentiary hearings and that Kelley had not been prejudiced by the prosecutor's misconduct.

If William Kelley had been sentenced to death between October 1966 and June 1972, his sentence would have been overturned because of the *Furman* ruling. However, he was not indicted until 1981 under Florida's post-*Furman* statute. The sentencing scheme under that law – much challenged because it gave juries only an advisory role in sentencing and allowed for bare majority votes for the death penalty – was not found unconstitutional until January 2016 in *Hurst v. Florida*. Today, William Kelley is one of those prisoners who falls on the wrong side of an arbitrary partial retroactivity framework – sentenced under an unconstitutional law but deemed ineligible for relief. In 2003 William Kelley had challenged Florida's capital sentencing statute on precisely the same grounds that the US Supreme Court would find it unconstitutional in 2016. The challenge was dismissed. In 2018 the Florida Supreme Court ruled that William Kelley was not eligible for *Hurst* relief because his death sentence was final before June 2002.

William Kelley was one of nearly 300 people sentenced to death in the USA in 1984. In 2016, there were just over 30 death sentences passed. The 1980s and 1990s were decades of particularly ugly death penalty politics in the USA.⁵⁸ William Kelley's case is one that is pending before the US Supreme Court to ask it to recognize the extra layer of arbitrariness laid over Florida's death row since *Hurst*. A petition filed in May 2018 specifically argues that those who are being deemed not to benefit from *Hurst* may be even more likely than their *Hurst*-entitled counterparts "to have been sentenced under standards and practices in death penalty cases that would not support a capital sentence today".⁵⁹ William Kelley's is a case in point.

⁵⁵ Irene Maxcy was convicted of perjury in 1971. She was sentenced to life and released on parole after four and a half years.

⁵⁶ *Kelley v. Singletary*, US District Court for the Southern District of Florida, 19 September 2002.

⁵⁷ Withholding evidence, this prosecutor obtained a death sentence against Juan Melendez in the same year as he did against Kelley. Melendez spent 18 years on death row before being exonerated in 2002. In another case, the same prosecutor's misconduct "tainted the State's case at every stage... and irremediably compromised the integrity of the entire 1988 penalty phase proceeding." *Johnson v. State*, 14 January 2010.

⁵⁸ See for example, Killing for Votes, Death Penalty Information Center (1996), <https://deathpenaltyinfo.org/killing-for-votes>

⁵⁹ *Kelley v. Florida*, Petition for a writ of *certiorari*, In the US Supreme Court, 25 May 2018.

2.6 THE CASE OF MATTHEW MARSHALL

‘Marshall’s death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied’

Marshall v. Jones, Florida Supreme Court, 4 May 2017, Chief Justice Labarga dissenting

The US Supreme Court’s 2016 *Hurst* ruling led to the official end of Florida’s law allowing trial judges to override jury votes for life and impose death (with no such overrides since 1999 the practice appeared to have ceased anyway). Florida’s post-*Hurst* capital sentencing statute prohibits life-to-death overrides. Yet Matthew Marshall, whose jury unanimously voted for life, has been deemed ineligible for *Hurst* relief.

At Matthew Marshall’s sentencing, his lawyer argued that the death penalty was supposed to be reserved for the “worst of the worst”, and that neither his client nor the crime deserved that label. Matthew Marshall was sentenced to death in December 1989. Twenty-four years old at the time of the crime, he is now 54.

Matthew Marshall was charged with the first-degree murder of fellow prisoner Jeffrey Henry who had been beaten to death in his cell in the Martin Correctional Institution on 1 November 1988. The jury rejected the claim that Marshall had been acting in self-defence, but voted unanimously that he be sentenced to life imprisonment. The judge overrode the recommendation. In 1992 the Florida Supreme Court upheld the death sentence, ruling that the trial judge had not abused his discretion “in finding the facts supporting the death sentence to be so clear and convincing that no reasonable person could differ.”

That decision-makers could differ on this was clear when the state Supreme Court itself divided four votes to three. The Chief Justice and two fellow judges noted that, while the jury had rejected the self-defence claim, there was evidence that Matthew Marshall had no prior plan to kill and had entered the cell unarmed, the two prisoners had no prior problems with each other, and Henry had offensive wounds on his hands:

“[the jury] could have reasonably inferred from the evidence that a fight erupted between Marshall and Henry and that Marshall killed Henry in a fit of rage. It is also likely that the jury rejected some of the aggravators found by the judge or assigned them minimal weight... Although some may not view the mitigation as compelling in this case, I cannot say that no reasonable person could have recommended a life sentence for Matthew Marshall.”

There had been mitigation evidence available but not presented at trial. According to the appeal lawyers:

“Marshall experienced a traumatic and impoverished childhood in the Miami ghetto of Liberty City in the last 60s through the 70s. In Liberty City, Marshall lived in very poor conditions and suffered the brutality of a violent, crime-ridden neighborhood. Even more violent than the ghetto in which Marshall was raised was the extreme brutality inflicted on Marshall by his abusive, alcoholic father....

Marshall’s father would tie Matthew to a gate in front of their house, with Marshall wearing only his underwear, in front of a mocking neighborhood, and severely beat him with an electrical cord while Marshall was bound to the gate. Marshall was not allowed to sleep in the house nor eat with the rest of the family. Marshall was forced to stay in the dog house in the backyard. Other family members were forced to sneak food to Marshall without his father’s knowledge.

Marshall would suffer lashes from electrical cords, belts, and punches to the face. The beatings Marshall endured were not punishment for misbehaviour. Matthew’s father hated Matthew because he would try to protect his mother from similar violence aimed at her... As Marshall grew older his father would take him through the streets of their ghetto and force him to fight strangers...”

At an evidentiary hearing in 1999, three of the condemned man’s brothers and five cousins testified about the abuse to which Matthew Marshall, his brothers and his mother were subjected. Each testified that he or she had not been contacted by the defence lawyer before the trial. In 2003, however, the Florida Supreme Court ruled that Matthew Marshall’s legal representation at trial had not been deficient.

Troubling allegations also emerged in relation to jury deliberations at the 1989 trial. After the trial, a Florida lawyer signed an affidavit stating that he had received a phone call from a woman regarding a client of his and that during the call the woman had become upset. She said that she had served as a juror at Matthew Marshall’s trial and that as a result said that she never wanted to serve on another jury. According to the affidavit, the caller had alleged that some of the jurors had decided the defendant’s guilt before the

end of the trial, but had also said that they were going to vote for a guilty verdict and a life sentence so that Matthew Marshall would go back to prison “and kill more black inmates”.⁶⁰ She claimed that some of the jurors, contrary to the judge’s instruction, had read newspaper articles about the trial during the proceedings and had discussed them with each other. In his affidavit, the lawyer said that he was unable to recall the caller’s name. However, two of the former jurors signed affidavits alleging that Matthew Marshall’s conviction had emerged as part of a deal among jurors. One of the two stated:

“During the course of the guilt phase deliberations, there were jurors who did not want to vote for first degree murder... A unanimous verdict of first-degree murder was obtained when it was agreed upon that the jury would vote unanimously for guilty of first degree murder and unanimously for a life sentence.”

The other former juror asserted that:

“I was not sure Mr. Marshall was guilty as charged. I also made it clear to other jurors that I would not vote for death in this case. I only compromised my true feelings regarding the case because the other jurors did not want a hung jury to result. I voted for first degree murder only when it was agreed that there would be a vote for life recommendation and it would be unanimous. At least I was relieved of the worry that Mr. Marshall would be executed”.

The Florida Supreme Court ordered a limited evidentiary hearing, which was held in 2004 and at which six of the original jurors appeared. Each denied they were the person who had called the lawyer. Two of the other six jurors had died since the trial, and four others had moved away from the area and could not be served with subpoenas. Matthew Marshall’s lawyers later located the ex-wife of one of those four. In an affidavit, she recalled that at the time of the trial her husband had been “very excited to be involved in what was a very high-profile case”:

“From day one he talked to me and others in my presence about the case... He discussed the case with the employees of our printing business during business hours within earshot of any customers there at our shop... He also followed the case in the newspapers, reading everything and cutting the articles out placing them in his briefcase. The first thing in the morning he looked forward to getting the paper and reading the latest coverage of the case... My ex-husband... also made it clear to me and others that... Matthew Marshall, was guilty from the getgo...”

She also recalled that when she had read a newspaper article in 2003 reporting that juror misconduct had been alleged in the case, the allegations about “racial jokes and the sharing of information from newspaper articles brought my ex-husband’s face immediately to mind”. Before another hearing could be held, however, this witness died. Her former husband appeared at a hearing in 2005, at which he denied having talked about the Marshall case with anyone during the trial and having read any news articles about the case during the trial. Three months later, the judge issued an order denying the juror misconduct claims. On appeal, a federal judge ruled that although “the trial court’s questioning of the jurors may have been somewhat restrictive”, the jurors still could have identified “any misconduct of which they were aware”.⁶¹

Although trial judges were meant to give “great weight” to jury recommendations, they took to using their override power to turn jury life votes into death sentences more often than they overrode death to life. Five years before Matthew Marshall was sentenced to death, US Supreme Court Justice John Paul Stevens, joined by two other Justices, noted that in Florida, “in a practical sense the accused confronts the jeopardy of a death sentence twice. If the jury recommends death, an elected Florida judge sensitive to community sentiment would have an additional reason to follow that recommendation... On the other hand, the fact that more persons identify with victims of crime than with capital defendants inevitably encourages judges who must face election to reject a recommendation of leniency... [A]s a practical matter the prosecution is given two chances to obtain a death sentence” under Florida’s statute.⁶² By the time of Matthew Marshall’s trial, one in five death sentences in Florida had been imposed by judges overriding jury life votes.

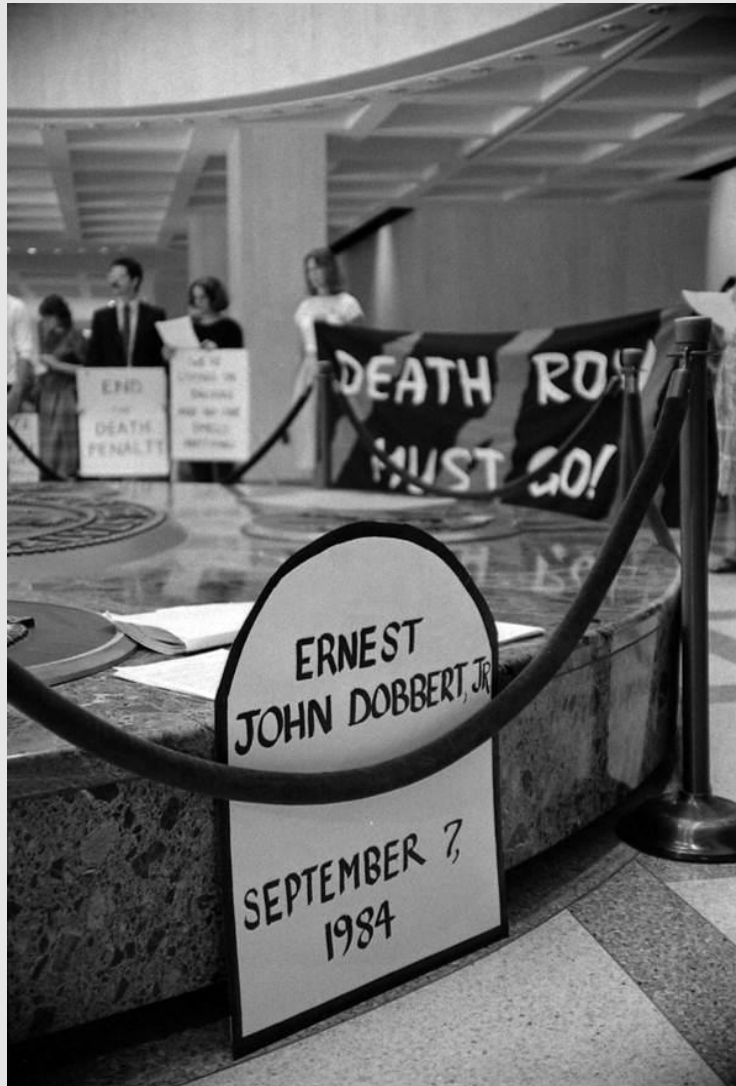
On 4 May 2017, the Florida Supreme Court issued a single paragraph dismissing Matthew Marshall’s *Hurst* claim. It said that “Because Marshall’s sentence became final before *Ring v. Arizona* (2002) was decided, he is not entitled to relief.” Chief Justice Jorge Labarga, joined by Justice Barbara Pariente, dissented, arguing that “this Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice... Marshall’s death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied.”

⁶⁰ Henry was African American, as is Matthew Marshall. The jury pool had only one black potential juror in it.

⁶¹ *Marshall v. McNeil*, Order. US District Court for the Southern District of Florida, 22 September 2009.

⁶² *Spaziano v. Florida*, 2 July 1984, Justice Stevens, joined by Justices Brennan and Marshall, concurring in part, dissenting in part.

Snapshot: Life-to-death override. A thing of the past?



Close-up view of Ernest John Dobbert Jr. sign – State Capitol, Tallahassee, Florida. Photographer: Thomas, Deborah. Courtesy of State Archives of Florida

On 7 September 1984, Florida became the first state in the USA to execute a prisoner whose jury had voted for life but which had been overridden by the trial judge. The jury had voted 10-2 that Ernest Dobbert should be sentenced to life imprisonment. He went to his death over the dissent of two US Supreme Court Justices who expressed deep disquiet that the execution would go ahead despite new witness evidence indicating that the murder in question may not have been a capital offence.

Three more override sentences have resulted in execution since Ernest Dobbert was put to death. Beauford White was executed in 1987, again over the dissent of two US Supreme Court Justices: "The State of Florida will execute Beauford White tomorrow morning without so much as a determination by its own courts that his death sentence is currently legal". During the crime in question, White had opposed his companions when they discussed killing the victims, and had not participated in the subsequent shootings. In his case, a 12-0 jury vote for life was overridden by the trial judge.

Bobby Francis became the next such prisoner to be executed. He was twice sentenced to death by juries, which the trial judges imposed. He was twice granted retrials. At his third trial, the jury recommended a life sentence, which the judge overrode. Bobby Francis was executed in 1991. In 1995, Bernard Bolender became the last Florida prisoner whose death sentence had been imposed by a judge overriding a jury life vote to be executed. His lawyer had presented no mitigation at the sentencing, arguing instead only that a death sentence would be disproportionate given that one of the co-defendants had been sentenced to life and the other had been found incompetent to stand trial. A Florida judge ruled on post-conviction in 1985 that Bernard Bolender should be resentenced to life imprisonment, but the Florida Supreme Court reversed that ruling in 1987.

Even before *Hurst*, the practice of life-to-death overrides appeared to have ended, with none since 1999. It is now prohibited under the post-*Hurst* capital sentencing statute. The fact that the State of Florida continues to pursue Matthew Marshall's execution speaks volumes about its diehard attachment to the death penalty.

3. WHAT LIES BENEATH: ‘DEATH QUALIFICATION’ AND RACE

‘The bitter reality [is] that the death penalty is applied in a biased and discriminatory fashion, even today’

Asay v. Florida, Florida Supreme Court, 22 December 2016, Justice James Perry dissenting

Prior to being appointed to the Florida Supreme Court in 2009, Justice James Perry was the first African American on the 18th Judicial Circuit in Florida. After eight years on the state Supreme Court, it was the combination of “Florida’s troubled history in applying the death penalty in a discriminatory manner” and the Court’s “arbitrary” *Hurst* retroactivity framework, which led him to conclude that the death penalty in Florida was unconstitutional.⁶³ The following year, Florida’s first-ever elected African American State Attorney cited discrimination as reason for abandoning the death penalty. Governor Scott responded by reassigning her capital murder cases to a (white) prosecutor known for supporting this lethal pursuit.⁶⁴

While recognizing the extra layer of arbitrariness laid upon Florida’s death row after *Hurst*, it is important not to forget the underlying strata of the death penalty in the USA. Race, especially race of victim, remains a major factor in who receives a death sentence. And when considering how individuals end up on death row despite mitigating evidence of say, mental or intellectual disability, a factor to reflect upon is who gets to sit on a capital jury. Because not everyone can. And those who do may be less favourably disposed towards mitigation evidence than their excludable counterparts. Race may have an impact there too.

3.1 ‘DEATH-QUALIFICATION’ OF CAPITAL JURORS

In 2015, Justice Breyer noted that “no one can serve on a capital jury who is not willing to impose the death penalty,” with the effect of “skew[ing] juries toward guilt and death”.⁶⁵ So-called “death-qualification” in capital cases occurs at jury selection, when the defence and prosecution question prospective jurors and can exclude certain of them, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded for cause by the prosecution. In 1985, in a Florida case, the Court relaxed the standard, thereby expanding the class of potential jurors who could be dismissed for cause.⁶⁶

Two African American women were peremptorily dismissed by the prosecutor at jury selection for Michael Zack’s 1997 trial. Challenged, the prosecutor gave “race-neutral” reasons for dismissing them. Each of the women were employed at an institution in Pensacola which, noted the prosecutor, “administers psychological support, therapy, counselling, over a wide array... of psychological needs within the community”. One of the women, the prosecutor said, has “some knowledge concerning post-traumatic stress syndrome”. Because there was “going to be a great deal of psychological evidence coming in during the penalty phase and perhaps on guilt-innocence, I’m not comfortable with [having the women in question sitting on the jury]”. The judge expressed concern at this explanation, but allowed the dismissals.

Michael Zack was born prematurely after his mother was in a car accident. During the pregnancy, she had routinely consumed large amounts of alcohol. His stepfather abused Michael Zack and his sisters. When the boy wet the bed, as he did nightly from about the age of eight to 12, the stepfather’s punitive actions

⁶³ He noted that Mark Asay would be “the first white person executed for the murder of a black person in this State.” In an 11th hour twist in August 2017, the Florida Supreme Court admitted to wrongly describing, for years, the second of the two of Asay’s victims as a black man. The US Supreme Court did not intervene and Mark Asay was executed.

⁶⁴ Amnesty International, *Death in Florida*, August 2017, www.amnesty.org/en/documents/amr51/6736/2017/en/

⁶⁵ *Glossip v. Gross*, *op. cit.* Also, *Baze v. Rees*, 2008, Justice Stevens concurring. (‘death qualifying’ a jury is “really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction.”)

⁶⁶ *Wainwright v. Witt*, (1985).

included punching the boy, using an electric blanket to electrocute him, making him wear the wet sheet around his neck, and heating a spoon until it was red hot and holding it against the boy's penis. He also "threw him against the wall, and kicked him with boots that had spurs on them"; tried to "drown him", to "run over him with a car", and to "poison him". When the boy was three, he was hospitalized after he drank a bottle of vodka; he "overdosed on drugs [his stepfather] had given him"; and the stepfather "threatened to shoot and stab him". The stepfather also allegedly sexually abused Michael and raped his sisters. When Michael was 11, his mother was killed with an axe, allegedly by his sister. By then, Michael himself was in psychiatric hospital. Later in foster care, he was allegedly subjected to further sexual abuse.

Four experts testified at the trial that in their opinion he had post-traumatic stress disorder, chronic depression, foetal alcohol syndrome, addiction, and possible brain damage, and that he had the mental and emotional age of a 10 or 11-year-old child.⁶⁷ The jury voted 11-1 for a death sentence which the judge imposed in November 1997. He remains on death row for a murder committed in 1996 in Pensacola.

3.2 GIVING SHORT SHRIFT TO MITIGATION?

In 1986, the Supreme Court noted multiple studies finding that death-qualification "produces juries somewhat more conviction-prone than non-death-qualified juries".⁶⁸ Three Justices noted that "death-qualified jurors are more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions". Prosecutorial disparaging of mitigation evidence may exacerbate this problem.

Seeking a death sentence against Alvin Morton in 1999 for a crime committed when he was 19, the Pasco County prosecutor chose to denigrate the mitigating evidence about his abusive childhood presented by a social worker: "She opposes capital punishment... She doesn't believe in it, so she has got to make this somehow a mitigation. Right? There's got to be a mitigation factor... We know why she opined the way she did. She's opposed to capital punishment." The defence lawyer did not object. Morton's death sentence (after an 11-1 jury vote) became final in 2001, a year before *Hurst* retroactivity is deemed to kick in.

Failures of trial lawyers to present mitigating evidence has been a frequent issue. Passing a death sentence in 1995 against Michael Shellito, a Duval County judge described his age at the time of the crime – wrongly stating it was 19 rather than 18 – as a "marginal mitigating circumstance". "Although young in years", the judge wrote, "the defendant is old in the ways of the world and vastly experienced in crime", adding that his "criminal record started at age 13" and that "outlawry" had been his "chosen vocation". The teenager before him, the judge said, was "6' 4" tall [and] weighed 176 pounds... He was and is a physically mature adult male". The judge's simplistic portrayal of the defendant was at least in part the result of the fact that defence counsel had failed to provide the information to fill in the gaps.

At a post-conviction hearing in 2004, appeal lawyers presented mitigating evidence that had been missing from the trial. The experts presented evidence of mental disability, including brain damage and bipolar disorder, and evidence that Michael Shellito had had a mental age of 14 or 15 at the time of the crime and an emotional age even younger than that. Other witnesses testified about his childhood physical and other abuse, his behavioural and emotional problems, and his alcohol and drug abuse from a young age. The judge upheld the death sentence, but in 2013 the Florida Supreme Court overturned it.⁶⁹ Until late 2016, the Duval County prosecution was intending to seek death at resentencing, but in 2017, under a new State Attorney, Michael Shellito was sentenced to life pursuant to a plea agreement.

Some trial judges have betrayed a degree of antipathy towards mitigation. For example in 2014, rejecting the claim that death row inmate Thomas Bevel had received inadequate legal representation at his 2005 sentencing, the judge wrote: "This Court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be 'mitigation experts' and demand exorbitant fees from the judicial system for doing work that any competent paralegal or investigator could do for one-third of the cost".⁷⁰

This effectively dismissed the American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases which state that a mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists

⁶⁷ In June 2018, an appeal was pending in the US Supreme Court on the FSC's denial of Zack's claim of intellectual disability.

⁶⁸ *Lockhart v. McCree* (1986). In 1998, a review of existing research indicated that a "favorable attitude towards the death penalty translates into a 44 per cent increase in the probability of a juror favoring conviction". M. Allen, E. Mabry and D. McKelton, Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: A meta-analysis. *Law and Human Behaviour*, Volume 22, No. 6, 1998, pages 715 to 731.

⁶⁹ *Shellito v. State; Shellito v. Crews*, 3 July 2013.

⁷⁰ *Florida v. Bevel*. Order denying amended motion for post-conviction relief. Circuit Court, Fourth Judicial Circuit, Duval County, 24 March 2014.

possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed....Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.”

The trial judge had given no mitigating weight to Thomas Bevel’s age at the time of the crime (22), rejecting expert evidence that he had a mental age of 14 or 15. He also gave “little weight” to his IQ score of 65. Thomas Bevel was sentenced to death for each of two murders – one based on a 12 to zero jury vote and one based on an eight to four recommendation. In 2017, the Florida Supreme Court overturned both death sentences, which had become final in 2008. It overturned the 8-4 death sentence pursuant to *Hurst*, but deemed there was no *Hurst* relief available for the other one because of the jury unanimity.

During a postconviction hearing, the trial lawyer testified that he had worked on only one prior capital case before representing Thomas Bevel, and that he did not begin his mitigation investigation until 12 days before the trial began, spending less than 17 hours in total on this effort. The “quality and depth” of the post-conviction evidence – a history of traumatic brain injury, post-traumatic stress disorder, and childhood sexual abuse – “painted a more complete and troubling picture of Bevel’s background” than that presented at trial, the Florida Supreme Court found. It noted that the post-conviction lawyer had been able to uncover this evidence “primarily due to the extensive investigation undertaken by [a] mitigation specialist”, and also cited the US Supreme Court’s endorsement of the ABA Guidelines. It overturned Bevel’s second death sentence.⁷¹ As of August 2018, Duval County was intending to seek the death penalty at the resentencing.

3.3. RACE AND CAPITAL JUSTICE

In December 2016, citing the racially disproportionate impact of the death penalty and discrimination in capital cases, the National Black Caucus of State Legislators called for abolition of the death penalty in the USA. It was the first time in its history that it had done so.⁷² A few months earlier, the National Hispanic Caucus of State Legislators cited evidence of the discriminatory treatment of Hispanics and Latinos as it passed a resolution calling for abolition of the death penalty across the USA.⁷³

The impact of race was a central issue from the outset of the USA’s post-*Furman* death penalty. In a Florida case in 1978, the US Court of Appeals rejected the claim that race of murder victim was impacting death sentencing.⁷⁴ A decade after that, a study of Florida’s death penalty found that after taking all variables into account a death sentence was over three times more likely in a case with a white victim than one with a black victim. It also found that a black defendant accused of killing a white woman was 15 times more likely to be sentenced to death than a black suspected of killing a black woman.⁷⁵ Today, according to a 2015 review of the use of the death penalty in the USA, race of murder victim remains “the single most reliable predictor of whether a defendant in the USA will be executed”.⁷⁶

In the USA, African Americans and whites are the victims of murder in approximately equal numbers, meaning that blacks are disproportionately the victims of murder, given that white people constitute 64% of the population. From 2002 to 2011, “the homicide rate for blacks was 6.3 times higher than the rate for whites”.⁷⁷ Since 1976, 78% of those put to death were convicted of killing white victims, while fewer than 15% had been convicted of killing black victims. In Florida, the totals are 86% and 13% respectively.

Most murders in the USA are intra-racial. From 1980 to 2008, 84% of white victims were killed by whites and 93% of black victims were killed by blacks.⁷⁸ Across the USA, 21% of those executed since 1977 were black defendants convicted of killing white victims; 12% were for black-on-black murders and two per cent were of whites convicted of killing black persons. Florida broadly mirrors this picture. Its population is 78% white, 17% black, and 24% Hispanic or Latino/a. In August 2018, whites made up 59% of death row, while blacks made up 38%.

⁷¹ *Bevel v. Florida*, 15 June 2017.

⁷² See Equal Justice USA, <http://ejusa.org/black-lawmakers-call-for-repeal-of-death-penalty/>. Black Lives Matter has called for abolition of the death penalty. See Michael Cholbi and Alex Madwa. Black Lives Matter and the call for death penalty abolition. *Ethics*, April 2018, pp. 517-544.

⁷³ Resolution supporting repeal of the death penalty. National Hispanic Caucus of State Legislators, 11 August 2016, <http://www.nhcsl.org/130/resolution/resolution-supporting-repeal-of-the-death-penalty/>

⁷⁴ *Spunkelink v. Wainwright*, US Court of Appeals for the Fifth Circuit, 21 August 1978.

⁷⁵ Radelet and Pierce. Choosing those who will die: Race and the death penalty in Florida, 43 Fla. L. Rev. 1 (1991).

⁷⁶ Baumgartner, F.R., et al. #BlackLivesDon’tMatter: race of victim effects in US executions, 1976-2013, *Politics, Groups, and Identities*, 2015.

⁷⁷ Homicide in the US known to law enforcement, 2011. Bureau of Justice Statistics, US Department of Justice, December 2013, p 4.

⁷⁸ Homicide trends in the United States, 1980-2008, Bureau of Justice Statistics, November 2011, p. 13.

Twenty of the 96 executions in Florida since 1976 were of black defendants convicted of killing white victims. No white has been executed for killing solely a black person in Florida. A study of Florida's death penalty published in 1981 noted that when William Middleton, a white man, was sentenced to death in late 1980 for the murder of an elderly black woman, "he became the first white offender in memory to enter Florida's death row for the crime of killing solely a black victim".⁷⁹ His death sentence was overturned because of his trial lawyer's failure to investigate evidence of his abusive childhood and mental disability.⁸⁰

Linroy Bottoson, like Middleton, had mental disability and a trial lawyer who failed him. At the start of the sentencing, the lawyer admitted to the judge that he felt incompetent to proceed and that he had no mitigation witnesses. Three state Supreme Court Justices argued that Bottoson's death sentence should not stand because his lawyer made "no meaningful preparation whatsoever" for the sentencing. He "made little effort to learn about Bottoson's psychiatric problems or other mitigating evidence."⁸¹ James Middleton was resentenced to life; Linroy Bottoson was executed in 2002.

Bottoson had been tried before an all-white jury. So too were Meryl McDonald and Robert Gordon, black Jamaican nationals, were tried together and sentenced to death in Pinellas County in 1995 for a murder committed in 1994. The jury voted 9-3 for the death penalty for both men. The jury was selected from a pool of 50 people, all of whom were white, in a county with a population that was eight per cent African American at the time. When the defence objected, the judge replied that there was nothing he could do because the juror pool was randomly selected by computer and that there was therefore no discrimination. Both men remain on death row.⁸²

Studies point to all-white juries spending less time in their deliberations, making more errors, and considering fewer perspectives.⁸³ The results of another study of 445 jury eligible citizens in six of the most active US death penalty states – including Florida – were presented in 2013. The focus was "implicit racial bias" (individuals' "automatic attitudes and stereotypes"). The central findings included that:

"jury-eligible citizens implicitly associate Whites with 'worth' and Blacks with 'worthless', that death-qualified jurors hold stronger implicit and self-reported biases than do jury-eligible citizens generally, that the exclusion of non-White jurors accounts for the differing level of implicit racial bias between death-qualified and non-death qualified jurors, and that implicit racial bias predicts race-of-defendant effects and explicit racial bias predicts race-of-victim effects. These findings strongly suggest that implicit racial bias does have an impact on the administration of the death penalty in America".⁸⁴

Lenard Philmore, an African American man, remains on Florida's death row after being sent there on the unanimous recommendation of an all-white jury in Martin County in 2000 for a murder committed when he was 21. Two of the three black people originally in the jury pool were excused for medical and pre-trial publicity reasons. The third was peremptorily dismissed by the prosecutor. The jurors heard evidence that Lenard Philmore had been both victim and witness to verbal and physical abuse by his alcoholic father; had been raped at the age of seven; had been classified as severely emotionally disabled; and was diagnosed with post-traumatic stress disorder (PTSD) from an incident when he was 13 when his three-year-old niece was shot dead in front of him by a gunshot meant for him. A psychologist testified for the defence that Lenard Philmore had left posterior brain abnormality, consistent with brain injury, possibly sustained around the age of eight, and that he showed signs of depression, mania, hallucinations and delusional paranoid thinking. For the prosecution, a psychologist agreed that Lenard Philmore had a history of substance abuse, PTSD, and had suffered physical abuse at the hands of his alcoholic father. Because the jury voted unanimously for death, *Hurst* has been deemed not to apply to Lenard Philmore's death sentence, even though it did not become final until three months after the 2002 *Ring* ruling.⁸⁵

When South Africa's Constitutional Court ruled the death penalty unconstitutional in that country in 1995, it said that "race and class are factors that run deep in our society", and that it could not be denied that "poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die".⁸⁶ The history of the US death penalty is also one of racist use, and race continues today to play a role in who lives and who dies under the capital justice system.

⁷⁹ Hans Zeisel, Race bias in the administration of the death penalty: The Florida experience. 95 Harvard Law Review 457 1981-2.

⁸⁰ *Middleton v. Dugger*, US Court of Appeals for the 11th Circuit, 22 June 1988.

⁸¹ *Bottoson v. Florida*, Florida Supreme Court, 8 January 1996, Justice Kogan concurring in part, dissenting in part.

⁸² The Florida Supreme Court ruled on 31 January 2018 that *Hurst* did not apply to Robert Gordon's death sentence.

⁸³ Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation, 90 J. Personality and Soc. Psychol. 597, 600 (2006).

⁸⁴ Justin D. Levinson, Robert J. Smith and Danielle M. Young, Devaluing death: An empirical study of implicit racial bias on jury-eligible citizens in six death penalty states. New York University Law Review, Vol. 89:513, May 2014.

⁸⁵ *Philmore v. State*, Florida Supreme Court, 25 January 2018.

⁸⁶ *State v. Makwanyane*, 6 June 1995.

3.4 THE CASE OF JOE NIXON

‘It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined... [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.’

McCleskey v. Kemp, US Supreme Court (1987), Justice Brennan dissenting, joined by Justices Marshall, Blackmun and Stevens.

Joe Elton Nixon has been on death row in Florida for more than three decades. Twenty-two years old at the time of the crime, he will turn 57 on 23 August 2018. He was sentenced to death in July 1985 on the advisory recommendation of a divided jury. He has been deemed not to be entitled to relief under *Hurst* because the timing of his case leaves him on the wrong side of the Florida Supreme Court’s arbitrary *Hurst* retroactivity framework. Among other things, there is compelling evidence that mental disability rendered him incompetent to stand trial, that intellectual disability renders his death sentence unconstitutional, and that the prosecution withheld impeachment evidence about two of its key witnesses.

Joe Nixon is African American. He was sentenced to death for the 1984 murder of Jeanne Bickner, a white woman. He was tried in Leon County, one of six counties in northern Florida constituting the Second Judicial Circuit. Between 1976 and 1987, there were 97 murder cases in Leon County. Forty involved white victims, 57 involved black victims. In six of the white victim cases, the death penalty was imposed. It was imposed in one black victim case – and that after a judge overrode a jury vote for life (overturned on appeal). So, in 15% of cases where the victim was white, a death sentence resulted, compared to 1.8% of the cases with a black victim. The statistics within the full Second Judicial Circuit from the same period are also telling: 41.2% of cases of blacks convicted of the murder of white victims resulted in a death sentence, compared to 6.3% of cases involving white defendants and white victims and 0.9% of the cases involving black defendants and black victims. The claim raised in Joe Nixon’s case that racial discrimination influences decision-making in Florida’s capital justice system has fallen on deaf ears.

Two years after Joe Nixon was sent to death row, the US Supreme Court was presented with similar evidence of systemic racial bias (in a case from Georgia) – that defendants who killed whites were more than four times more likely to be sentenced to death than those who killed non-whites, a probability that was even higher if the defendant was black and the victim white. In *McCleskey v. Kemp* – a ruling which, coupled with legislative inaction, left the USA in breach of its international obligations to end direct *and* indirect discrimination – the majority held that “apparent disparities in sentencing are an inevitable part of our criminal justice system”.⁸⁷ For a successful challenge, the individual would have to prove that the decision-makers in their specific case had acted with discriminatory intent. A four-Justice dissent accused the majority of having “a fear of too much justice”, of opening the door to “widespread challenges”.

In 1992, Florida Supreme Court Justice Rosemary Barkett wrote that the *McCleskey* standard “requires showing something that is virtually impossible to show: purposeful discrimination”. Until the US Supreme Court recognized this, she said, defendants would “have no chance of proving that application of the death penalty in a particular jurisdiction is racially discriminatory, no matter how convincing their evidence.”⁸⁸ A quarter of a century later, the *McCleskey* ruling and remains the “insurmountable” obstacle articulated by Justice Barkett. As in other cases tried in other Florida jurisdictions,⁸⁹ the Florida Supreme Court dismissed the race statistics put to them by Joe Nixon’s lawyers, reiterating the *McCleskey* standard that the defendant must prove that “the State acted with purposeful discrimination” in his specific case.⁹⁰

⁸⁷ *McCleskey v. Kemp*, 1987. The Court said that the issue of death penalty bias was a matter “best presented to the legislative bodies”, but most state legislatures, including Florida’s, have failed to take the necessary action. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions suggested in 1998 that the ruling was incompatible with the Convention on the Elimination of All Forms of Racial Discrimination, “which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination.” UN Doc: E/CN.4/1998/68/Add.3, ¶ 65.

⁸⁸ *Foster v. State*, 22 October 1992, Chief Justice Barkett, concurring in part, dissenting in part.

⁸⁹ *Foster v. State* (1992), *Robinson v. State* (2000).

⁹⁰ *Nixon v. State*, 20 April 2006. In 2003, the Florida Supreme Court ordered a new trial on the grounds that his lawyer conceded guilt without his consent. However, the US Supreme Court reversed the decision. *Florida v. Nixon*, 13 December 2004.

Questions beyond race abound in Joe Nixon's case. There is compelling evidence that he was incompetent to stand trial. His lawyer pointed out during the pre-trial period that he was effectively "operating without a client", and Joe Nixon would routinely refuse to come out of his cell. Even when noting that the defendant was "in the holding cell in a considerable state of self-inflicted disarray; clothing, nudity and the like", the judge did not conduct an inquiry into Joe Nixon's competence to stand trial. In the end, Joe Nixon attended one day of the trial, the first day of jury selection, and was absent from the remainder. In his absence, he was found guilty, and on 25 July 1985 the jury voted 10-2 for the death penalty which the judge imposed on 30 July. Since the trial, several mental health experts have concluded that Joe Nixon had neither been competent to stand trial nor to waive his right to attend his own trial.

In its review of the USA's compliance with the International Covenant on Civil and Political Rights, the UN Human Rights Committee expressed concern "about the continuing use of the death penalty and, in particular, racial disparities in its imposition that disproportionately affects African Americans, exacerbated by the rule that discrimination has to be proven on a case-by-case basis."⁹¹

Discrimination in the criminal justice system – direct or indirect – is prohibited under international human rights law.⁹² In proving discrimination, intent is not a decisive factor; the effects, and more particularly the disproportionate impact of discrimination, are sufficient.⁹³

In an affidavit filed in federal court in 2010, a psychiatrist concluded that "Joe Nixon was not competent at the time of trial... Joe Nixon was mentally retarded at the time of the offense and remains so... Joe Nixon has neurologically-derived mental illness... A full description of Mr Nixon's mental state could have been presented to the judicial system in 1985. But due to mutually reinforcing errors by a number of actors – errors

and actors outside of Joe's control – it was not. The result was that, as he huddled almost naked under his blanket in his cell, Joe Nixon's execution was ordered after a process in which decision-making proceeded in the absence of information material to the most fundamental factual and legal questions in this case." The psychiatrist wrote that, "from conception to early adulthood", Joe Nixon's environment had put him at "severe risk for future neurocognitive psychopathology and brain dysfunction".⁹⁴ He was born into extreme poverty in 1961 to parents who were sharecroppers (tenant farmers) on a tobacco farm in the 'panhandle' area of northern Florida. They lived in a tiny house with more than 10 people in it, without electricity or plumbing. Food and medical care was inadequate. Racism was rife in the sharecropping system. By the age of seven or eight, children worked in the tobacco fields for full days like adults. From infancy, Joe Nixon was exposed to toxic pesticides.

There was alcoholism on both sides of Joe Nixon's family, and his mother "drank excessive amounts of alcohol during her pregnancy" with him. Several of his relatives had "serious mental illnesses, including some of those who cared for him in childhood". The boy suffered from "severe parental neglect", emotional abuse and physical abuse. His father used to "beat him with anything he could put his hands on: switches, sticks, boards, belts, rope, fan belts, extension cords, and his fists". Beginning when he was seven or eight years old, and continuing until he was in his teens, he was subjected to rape and sexual abuse by an uncle. Joe Nixon was subjected to alcohol and drugs from an early age, and in his teen years began inhaling aerosol sprays. During his early 20s, he suffered serious head injuries, including in 1982 when he received severe trauma to his head when he was attacked with a lead pipe and knocked unconscious. In the months and weeks leading up to the crime for which he is on death row, Joe Nixon displayed suicidal conduct and a progressively deteriorating mental condition, fuelled by alcohol and drug abuse.

Several experts have concluded that Joe Nixon has intellectual disability. In 2009, the Florida Supreme Court upheld a lower court's rejection of this claim. This was before the US Supreme Court found Florida's law for making such determinations constitutionally inadequate (*Hall v. Florida*, 2014, see Section 6). At the time of writing, an evidentiary hearing employing the proper legal standard was pending.

Under US constitutional law, state promises to and deals with witnesses must be disclosed to the defence. The prosecution did not disclose that Joe Nixon's own brother, who turned him in to the authorities and who himself was a suspect in the murder of Jeanne Bickner, was a paid informant for local law enforcement. He was allegedly threatened with murder charges if he did not cooperate, and was promised assistance with other serious criminal charges if he did. It is also alleged that he and another witness received money in exchange for information on Joe Nixon. This issue is pending in federal court.

⁹¹ Human Rights Committee, Concluding observations on the fourth periodic report of the USA, UN Doc. CCPR/C/USA/CO/4, 23 April 2014.

⁹² Among other instruments, Article 2 of the Universal Declaration of Human Rights; Article 26 of the International Covenant on Civil and Political Rights; Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

⁹³ UN Economic and Social Council, Discrimination in the criminal justice system Progress report by Ms. Leïla Zerrougui, Special Rapporteur, E/CN.4/Sub.2/2005/7, 14 July 2005, para.41.

⁹⁴ *Nixon v. McNeil*, Expert affidavit of George W. Woods, M.D., In the US District Court, Northern District of Florida, January 2010. See also Joe Nixon's memorandum of law in support of his motion for summary judgment, October 2012.

Snapshot: Evolving standards of Justice(s)



11 MARCH 2009. NEWLY APPOINTED FLORIDA SUPREME COURT JUSTICE JAMES PERRY SPEAKING AT A NEWS CONFERENCE AS GOVERNOR AND LT. GOVERNOR LISTEN ON THE PORCH OF THE GOVERNOR'S MANSION, TALLAHASSEE. PHOTOGRAPHER: COTTERELL, BILL. COURTESY OF THE STATE ARCHIVES OF FLORIDA

In 1958, in *Trop v. Dulles*, the US Supreme Court ruled that the Eighth Amendment ban on “cruel and unusual punishments” draws its meaning from the “evolving standards of decency that mark the progress of a maturing society”. In *Gregg v. Georgia* on 2 July 1976, using this test, the Court asserted that “the most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*”. It found that 35 states had enacted new death penalty statutes after the 1972 *Furman* ruling. The first to do so had been Florida.

Justices Thurgood Marshall and William Brennan dissented from the *Gregg* majority (and the accompanying *Proffitt v. Florida* ruling), and continued to dissent in all death penalty cases after that. Later, Justice Lewis Powell said after he retired that he had come to think that the death penalty should be abolished.⁹⁵ He had voted to approve the post-*Furman* laws in Florida and elsewhere. So did Justice Harry Blackmun. He gave up on this “death penalty experiment” in 1994 after concluding that “the basic question – does the system accurately and consistently determine which defendants ‘deserve’ to die? – cannot be answered in the affirmative”. He said that he “would no longer tinker with the machinery of death.”⁹⁶ In 2008, the then most senior Justice on the Court, John Paul Stevens, revealed that he too had concluded that “the imposition of the death penalty represents the pointless and needless extinction of life”.⁹⁷ If Justices Blackmun, Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA’s experiment with the death penalty would turn out, judicial killing would not have been resumed in the USA in 1977, if at all.

On 22 December 2016, on the eve of his retirement, dissenting from the Florida Supreme Court’s approach to *Hurst* retroactivity, Florida Supreme Court Justice James Perry pointed to “the bitter reality” that “the death penalty is applied in a biased and discriminatory fashion, even today. Indeed, as my retirement approaches, I feel compelled to follow other justices who, in the twilight of their judicial careers, determined to no longer ‘tinker with the machinery of death.’ The majority’s decision today leads me to declare that I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner.”⁹⁸

⁹⁵ See J. Jeffries, Justice Lewis F. Powell, Jr., page 451 (Scribners 1994).

⁹⁶ *Callins v. Collins*, 22 February 1994, Justice Blackmun, dissenting from denial of *certiorari*.

⁹⁷ *Baze v. Rees*, 16 April 2008, Justice Stevens, concurring in the judgment.

⁹⁸ *Asay v. State*, 22 December 2016, Justice Perry dissenting.

4. MENTAL DISABILITY AND CAPITAL JUSTICE

‘It is the poor, the sick, the ignorant, the powerless and the hated who are executed’

Former US Attorney General Ramsey Clark, quoted in *Furman v. Georgia*, US Supreme Court (1972)

In 2009, Bill Marquardt was transferred from a psychiatric facility in Wisconsin to face capital murder charges in Florida. Six years earlier, in 2003, a Wisconsin jury had found him guilty of aggravated burglary, a firearms offence, and cruelty to animals. However, the judge found him “not guilty by reason of mental disease or defect” and ordered him committed to a psychiatric facility for up to 75 years. The state did not challenge this order.

The charges against him in Wisconsin, which included that he had murdered his own mother, and those filed against him in Florida in 2006, stemmed from separate events that occurred in March 2000. That Bill Marquardt had a serious mental disability was clear from the outset. In the Wisconsin murder case in 2001, the judge ordered that he be committed to a mental hospital for up to a year to determine if he was competent to stand trial, and ruled that he could be forcibly medicated if necessary. He was eventually found competent to stand trial in the animal cruelty case, but not competent to represent himself.

The Wisconsin state authorities acknowledged “compelling evidence in the record of Marquardt’s mental illness”, including a psychiatric assessment that he was “so delusional” that he could neither appreciate the charges against him nor plan a “realistic” defence strategy. A psychologist had concluded that Bill Marquardt had paranoid schizophrenia, the symptoms of which included command hallucinations and Marquardt’s claim that he was a prophet foretold by Nostradamus who would “provide the gift that will save the world”.⁹⁹ The Wisconsin Supreme Court upheld the trial judge’s decision to find Marquardt not competent to represent himself.¹⁰⁰

After the animal cruelty case, Bill Marquardt was held incompetent to stand trial on the charges that he had killed his mother. That case eventually came to trial in 2006, and he was acquitted. After DNA and other evidence emerged identifying him as a suspect in the murder of two women committed in Tarrytown, west of Orlando in March 2000, he was transferred to Florida in 2009.

Bill Marquardt was found competent to stand trial and, unlike in Wisconsin, competent to represent himself. On 12 October 2011, the jury convicted him of the first-degree murders of the two women. He then waived his right to jury sentencing (thereby making the future *Hurst* ruling inapplicable to him), elected to defend himself and to present no mitigating evidence. While maintaining his innocence, he asked the judge to give him the death penalty. A reporter noted: “Bill Paul Marquardt, a paranoid schizophrenic... smiled so frequently during his Sumter County capital murder trial this week on charges of stabbing and shooting to death two Sumter County women, it was almost as if he couldn’t help himself”.¹⁰¹

The judge was presented with some mitigating evidence by the standby lawyer appointed by the court to assist in the case. The judge found and gave “some weight” to the mitigating factor that Bill Marquardt’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been “substantially impaired”. This was based entirely on the fact that he had been committed to the psychiatric facility in Wisconsin. No other mental health evidence was presented as the defendant had

⁹⁹ *State v. Marquardt*, Supreme Court of Wisconsin, 23 November 2005.

¹⁰⁰ *Ibid.*

¹⁰¹ Marquardt tells judge he wants death penalty. The Chippewa Herald, 12 October 2011.

refused to sign the necessary authorizations. On 28 February 2012, the judge sentenced Bill Marquardt to death for the Tarrytown murders.¹⁰²

International law and standards on the use of the death penalty hold that it may not be imposed or carried out on people with mental (psychosocial) or intellectual disabilities.¹⁰³ This applies whether the disability was relevant at the time of their alleged commission of the crime or developed after the person was sentenced to death.¹⁰⁴ Protections in the USA in this regard remain inadequate.

A year after Bill Marquardt was sent to Florida's death row, 66-year-old Gary Alvord died there. He had been convicted in 1974 of three murders committed after he escaped from a mental hospital in Michigan in 1973. His life to that point had been defined by his mental disability. He spent 12 of the 14 years before the 1973 murders in psychiatric hospitals, diagnosed with paranoid schizophrenia and other mental disabilities. He was scheduled to be executed on 29 October 1984, but was found incompetent by three psychiatrists, and transferred to a state mental hospital. In 1987, after nearly three years there, he was taken back to death row where he remained until his death of natural causes on 19 May 2013. In the four decades that Gary Alvord was under sentence of death, several Florida death row prisoners who had histories of serious mental disability were executed. This century, they include:¹⁰⁵

- Thomas Provenzano, executed in 2000. He had been diagnosed with paranoid schizophrenia long before the murder of a courthouse bailiff in Orlando in 1984. Defence and prosecution experts agreed that he had serious mental disability, and that his paranoid fears included the fixed delusional belief that he was being persecuted by the legal system and that these fears had contributed to his crime. On death row, he engaged in behaviour such as stuffing rags into his mouth to keep out the demons which he believed were attempting to enter his body.
- Dan Hauser, executed in 2000. He had bipolar disorder since late adolescence, and displayed suicidal tendencies. During manic phases he was irrational and delusional. A psychiatrist stated he was likely experiencing a manic episode at the time of the 1995 murder. After dropping his appeals, a petition argued his decision was a suicide bid, and that he had made up gruesome details of the crime to ensure he would be sentenced to death. He had also lied at trial when he said he had never been treated for mental disability, when in fact he had received psychiatric treatment at several facilities.
- Linroy Bottoson, executed in 2002. An expert concluded that "because of his fixed psychotic delusions he has no current capacity to come to grips with his own conscience, with the crime, with mortality, with his sentence, or with reality. He understands himself to be locked in the middle of a battle between Jesus and Satan, a battle that he is certain, as one of God's prophets, Jesus will win. Mr Bottoson believes that he will not be executed because humankind needs him."
- Newton Slawson, executed in 2003. After his direct appeal, he waived his appeals. The lawyers presented an expert diagnosis that he had paranoid schizophrenia, and was "unable to consult with his lawyer with a reasonable degree of rational understanding and lacks a rational and factual understanding of his post-conviction proceedings."¹⁰⁶
- Glen Ocha, executed in 2005. A Florida Supreme Court Justice pointed to substantial evidence that Glen Ocha had mental disabilities, including bipolar disorder. He had "a history of attempted suicide, two prior severe head injuries" and when he "was arrested for his prior crime, he unsuccessfully tried to have police officers shoot him". She added that there were indications that Glen Ocha had been treated for mental disability, contrary to his assertion at trial – when waiving presentation of mitigation – that he had not been.¹⁰⁷ He was allowed to waive his appeals and was put to death.

It was a Florida case in which the US Supreme Court affirmed in 1986 that the execution of an "insane" person violates the Constitution.¹⁰⁸ However, the majority in the *Ford v. Wainwright* ruling neither defined competence for execution, nor mandated specific procedures to be followed by states to determine whether a prisoner was incompetent. The result was different standards in different states and minimal protection for prisoners with serious mental disabilities. Two decades passed before the Supreme Court moved to clarify its *Ford* ruling. In *Panetti v. Quarterman* in 2007 (a Texas case), the majority said that: "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it... Gross delusions stemming from

¹⁰² On 22 January 2015, the Florida Supreme Court upheld the death sentence. In June 2018, proceedings on his mental competency were ongoing.

¹⁰³ UN Safeguard No.3 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council resolution 1984/50 of 25 May 1984; UN Commission on Human Rights, Resolution 2005/59, para.7(c); UN General Assembly resolution 71/187 of 19 December 2016, para. 7(d); Human Rights Committee: Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1, 2006, para. 7; Concluding Observations: Japan, UN Doc. CCPR/C/JPN/CO/5, 2008, para.16; Sahadath v Trinidad and Tobago, UN Doc.CCPR/C/78/D/684/1996, 2002, para.7.2. Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the second periodic report of Japan, UN doc. CAT/C/JPN/CO/2, 28 June 2013, para. 15.

¹⁰⁴ Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, UN document A/HRC/14/24/Add.1, 18 June 2010, para. 131.

¹⁰⁵ Executed prior to 2000 include Arthur Goode, 1984 (mental disability and intellectual disability). David Funchess, 1986 (severe PTSD); Anthony Bertolotti, 1990 (chronic schizophrenia); Nollie Martin, 1992 (serious childhood head injuries, and a history of psychosis, and suicidal depression; Pedro Medina, 1997 (paranoid schizophrenia or major depressive disorder with psychosis).

¹⁰⁶ *Slawson v. Florida*, Florida Supreme Court, 5 July 2001.

¹⁰⁷ *Ocha v. Florida*, Florida Supreme Court, 2002, Pariente J, concurring as to conviction, concurring in result only as to sentence.

¹⁰⁸ *Ford v. Wainwright*, US Supreme Court, 26 June 1986

a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.” *Panetti*, of course, has not ended the problem of people with serious mental disabilities in the USA facing execution.¹⁰⁹

- John Ferguson, executed in 2013. He first reported having visual hallucinations in 1965 at the age of 17 and was first diagnosed with paranoid schizophrenia in 1971, a diagnosis that would be repeated dozens of times. In 1991, the prison authorities assessed him as having “chronic schizophrenia, paranoid type” and that he had “suffered from this disease for many years.” According to his lawyers, he believed that his body would not remain in his grave, that he would come back to life after execution, that he would “sit at the right hand of God” and save the USA from a communist plot. In his final statement, he called himself the “Prince of God” and said he would “rise again”.
- Askari Abdullah Muhammad, formerly known as Thomas Knight, executed in 2014. He was hospitalized in 1971 and treated for the early stages of schizophrenia, then diagnosed with paranoid schizophrenia. In 1980, a doctor diagnosed him as “paranoid schizophrenic” and “clearly a man with a major psychiatric problem in need of appropriate medication and treatment responses”. In the early 1980s, two separate judges refused to allow him to represent himself due to serious questions about his mental competency, including that he “exhibits symptoms consistent with extreme paranoia”. A doctor reported that “Mr Askari has been suffering for many years from a schizophreniform illness.” A third judge allowed Askari Abdullah Muhammad to represent himself.¹¹⁰

4.1 PROSECUTORS CONTINUE TO PURSUE DEATH

Prosecutors have continued to seek death sentences against individuals who have histories of serious mental disability. Some of them have had their death sentences overturned by the Florida Supreme Court on proportionality review.¹¹¹ Others have benefitted from the *Hurst* ruling. Those who have not include:

- Pressley Alston. His jury voted nine to three for the death penalty in 1996. Prior to the trial, court-appointed experts found he had bipolar disorder, mixed with psychotic features. His IQ was assessed as falling in the range 75-81 and his mental age between 13 and 15. Evidence was presented of childhood abuse, including beatings by his mother using sticks, extension cords and other objects. Prior to the crime, committed when he was 23 years old, Pressley Alston was seen for depression, suicidal ideation and anger control. On death row, he sought to represent himself, but was initially found incompetent to do so, after expert assessments pointed to psychotic disturbance, mood disorder, delusional paranoid beliefs, and auditory and visual hallucinations. In 2009, a federal judge agreed that Pressley Alston “was suffering from a mental illness at the time of the trial”, and pointed to the “rambling and virtually incoherent” petitions he had filed with the court, and expert opinion that his delusions had “worsened over time”.¹¹² Pressley Alston’s death sentence became final in 1999. On 17 May 2018, the Florida Supreme Court ruled that *Hurst* did not apply.
- Ricardo Gill. He was sentenced to death in 2006 for the murder of his prison cellmate in 2001. He represented himself at trial, pled guilty, waived a sentencing jury and presentation of any mitigation. He called on the judge to give him the death penalty. The judge noted that Ricardo Gill “is a deeply troubled individual with a long history of mental health problems, mental disturbances, suicidal impulses”.¹¹³ The murder had occurred shortly after he began serving a life sentence for another murder. He had requested the death penalty for that prior murder, and threatened that if this did not happen he would kill again in order to get the death penalty. Upholding the death sentence in 2009, the Florida Supreme Court noted that “the record clearly established that Gill is mentally ill and the State does not contest this fact”; he “is mentally ill and has a long history of mental illness and behavioral difficulties”. It also pointed to the fact that Ricardo Gill has “a brain anomaly referred to as arteriovenous malformation, which describes a brain lesion made up of

¹⁰⁹ Amnesty International outlines how the protections for people with mental disabilities facing capital charges or death warrants are inadequate in the USA, whether in relation to competence to stand trial, competence to waive appeals, competence to represent oneself, competence to proceed with appeals, or competence for execution in *USA: The execution of mentally ill offenders*, January 2006, <http://www.amnesty.org/en/library/info/AMR51/003/2006/en>

¹¹⁰ See Amnesty International Urgent Action, 27 November 2013, <https://www.amnesty.org/en/documents/amr51/080/2013/en/>

¹¹¹ In 2015, for example, the Florida Supreme Court found that Humberto Delgado’s death sentence was disproportionate, and he is now serving a life sentence. He was convicted in 2011 of the murder in 2009 of a Tampa police officer. When questioned on the street, Humberto Delgado ran from the officer, who fired his taser. A confrontation followed during which the officer was fatally shot. At the trial, five mental health experts testified for the defence that Delgado had “long-standing, well-documented” and severe mental disability, for which he was not taking medication at the time of the crime. They agreed that his disability – variously diagnosed as bipolar disorder with delusional, paranoid, or psychotic features – had been exacerbated by a number of stressors at the time including homelessness and unemployment. A psychiatrist at the jail testified that shortly after arrest, Delgado was delusional and paranoid. Another doctor testified that (about two weeks after the crime) the defendant had been “in a psychotic state, agitated, distracted, illogical, suffering from psychomotor agitation, and unable to maintain a reasonably and consistently coherent stream of speech”. The state’s expert acknowledged that Humberto Delgado had a major mental disorder, and had previously been hospitalized because of severe mental disability, but opined that at the time of the crime he had only had “mild symptoms of mental illness”.

¹¹² *Alston v. McNeil*, Order, US District Court, Middle District of Florida, 4 August 2009.

¹¹³ Gill was first institutionalized in a psychiatric facility in 1979 at the age of 10, and diagnosed with childhood-type schizophrenia. From the age of 12 to 13, he was again committed to a psychiatric hospital. At the age of 17 or 18, he was sentenced to seven years in prison for burglary and other offences. In prison, he made numerous suicide attempts.

an overgrowth of veins and arteries that can hemorrhage". This condition can cause temporal lobe seizures and personality changes, according to a neuropsychologist who testified at a pre-sentencing hearing. Another expert found that Ricardo Gill had a major depressive disorder and a major mood disorder.

- Edward Covington likewise has been deemed not to benefit from *Hurst* on the grounds that he waived his right to jury sentencing at his trial in 2015. He had a long history of mental health issues, including repeated diagnoses of bipolar disorder and a number of hospitalizations over the years. He was involuntarily committed to hospital in April 2008, a few weeks before the murders for which he was sentenced to death, and had stopped taking his medication about a week before the crime. The judge gave "great" mitigating weight to his bipolar disorder and substance abuse disorder and found that his capacity to conform his conduct to the requirements of the law had been diminished due to his mental disability and his use of cocaine and alcohol. The judge also gave moderate mitigating weight to the fact that Edward Covington had pleaded guilty and acknowledged responsibility for the crimes".¹¹⁴
- Something similar happened at the 2007 trial of Charles Brant, a man diagnosed with pronounced brain damage and severe depression. He pled guilty to first degree murder, at which point his attorneys attempted to pick a jury for the sentencing phase. According to his current lawyer, a number of jurors expressed open hostility towards the defendant and laughed after a juror said that he would put Charles Brant to death himself. The judge dismissed the panel, but the defendant, who had stopped taking his medication for depression, then waived his right to jury sentencing and the hearing was held before the trial judge who sentenced him to death. The judge found the waiver of a sentencing phase jury to be a mitigating factor with moderate weight, along with the defendant's cooperation with law enforcement officers, his confession, and his guilty plea. Today, however, the jury waiver has effectively become an aggravating factor, in that it has meant he stays on death row despite the *Hurst* ruling.

Others have had their death sentences overturned as a result of *Hurst*. Thus, it has led to welcome results in some individual cases.¹¹⁵ However, prosecutors may yet pursue the death penalty again against some of those with histories of mental disability. They include:

- Justin Heyne, sentenced to death in 2009, was granted *Hurst* relief in April 2017. At trial, the judge found that the defendant had mental disability – including possible bipolar disorder – and brain damage and deficits. Justin Heyne had been recommended for in-patient psychiatric care when he was five, but had not received such treatment, and he had a history of suicide attempts. As of 21 May 2018, the Brevard County prosecutor was intending to seek the death penalty at a resentencing.
- Thomas Brown was granted *Hurst* relief in 2016. He was sentenced to death in 2011 following a 7-5 jury vote. For the defence, a psychologist testified that he had been in therapy since he was six or seven years old. He had been diagnosed with a number of disorders, including ADHD, bipolar disorder, manic with psychotic features, and a psychotic disorder. The psychologist testified that Brown had an IQ of 67, was extremely immature with a mental age significantly lower than his chronological age, had paranoid distrust, poor impulse control, and reported hearing voices. For the prosecution, another psychologist disagreed that the defendant had any psychotic symptoms at the time of the crime. At the time of writing, a challenge relating to the guilt/innocence phase of his 2011 trial was pending before the Florida Supreme Court, which meant that the resentencing issue was on hold.
- Ghengis Kocaker's death sentence was vacated under *Hurst* in 2017. He was sentenced to death in Pinellas County in 2009 for the murder of a taxi driver in 2004. At his sentencing, the jury heard testimony from a neuropsychologist that he had a physical abnormality in the right-hemisphere of his brain. A psychologist testified that he had reported having auditory hallucinations instructing him to harm himself, diagnosed paranoid schizophrenia, and concluded that he had a serious mental disability at the time of the crime. Another expert for the defence made the same diagnosis. Kocaker had a history of suicide attempts and was hospitalized in 1982 for swallowing razor blades. Hospitalized in pre-trial custody in 2006, he was diagnosed with depressive and psychotic disorder and in early 2007 was diagnosed with schizoaffective disorder. Kocaker's IQ was assessed at 70. An expert for the prosecution testified that in his opinion he had neither mental nor intellectual disability. Ghengis Kocaker had an MRI & PET Scan performed in 2006 and 2015. The results showed several white spots in both hemispheres of the brain which were diagnosed as a small vessel brain disease. The scans also showed that the disease was progressing and doctors have testified that there is no known treatment which could stop the disease from progressing further. In December 2017, the judge found Ghengis Kocaker competent to proceed for resentencing. As of July 2018, the prosecution was intending to seek the death penalty again.

Officials in Florida should reflect on the US Supreme Court's concept of "evolving standards of decency that mark the progress of a maturing society". Florida has long pursued death sentences against people with serious mental disability. It is time to stop.

¹¹⁴ *Covington v. Florida*, Florida Supreme Court, 31 August 2017.

¹¹⁵ Ray Jackson is serving a life sentence after his death sentence was overturned in April 2017 in the wake of *Hurst*. At the 2007 trial, the judge found that he had serious mental disabilities, including bipolar disorder and schizophrenia. Mexican national Pedro Hernandez-Alberto's death sentence was overturned in May 2017 pursuant to *Hurst*. At the 2001 trial, the judge found he had brain injury. In 2005 a psychiatrist diagnosed him with paranoid schizophrenia. In February 2018, the Hillsborough County prosecutor took the death penalty off the table as a resentencing option, apparently because of the mental disability issues.

4.2 THE CASE OF TONY WATTS

'Inmate reported that the 'unseen' continue to stand outside his door and won't allow him to color. Even when inmate tells them he is not going to let them control him anymore. He also stated his father is trying to end time.'

Observation notes of prison personnel re: Tony Watts, 18 July 2014

Tony Randall Watts has a serious mental disability. He is under sentence of death in Florida, but is not physically held on death row. He has been housed in prison mental health facilities for over a decade. He was convicted in Duval County in 1989 of a murder committed in Jacksonville when he was 22 years old. He will turn 52 on 23 August 2018.

The crime occurred on 18 February 1988 at the home of Glenda and Simon Jurado, who were confronted at gunpoint by a young African American man, later identified as Tony Watts, who demanded money. During the crime, the assailant told the couple to undress, and when Simon Jurado saw that the attacker was attempting to rape Glenda Jurado, he threw a chair at him. The two men struggled, Glenda Jurado ran from the house, and a shot was fired. The assailant emerged and fled down the street. Simon Jurado himself then ran out of the house and collapsed outside. He died soon afterwards from a gunshot wound.

Tony Watts was charged with first-degree murder. His competence to stand trial was an issue, although at this stage the focus was intellectual disability rather than mental disability which, it seems, had yet to fully emerge. A psychiatrist reported to the defence that Tony Watts was illiterate and "functioning in the borderline to mildly defective intellectual range", according to an assessment conducted when Watts was about 12 years old as well as a current examination. Another expert for the defence found that Tony Watts was "functionally illiterate", had been in special education as a youngster, quit school at the age of 14, and "is of borderline intellectual abilities". She concluded that Tony Watts was competent to stand trial if "appropriate accommodations were made for his intellectual and cognitive limitations, his illiteracy and his need for simple language to explain trial proceedings".

Another psychologist concluded that Tony Watts was not competent to stand trial, suggesting that because he had an "age equivalent of 7 years and one month", the proceedings would have to be adjusted to be appropriate for "a first or second grade child". She concluded in her 30 June 1989 report to the judge that Tony Watts had intellectual disability and an IQ of 65. Among other things, she noted: "He has never lived on his own. In general he has always lived in situations where other people are essentially in charge. He cannot do grocery shopping because he cannot read labels, he cannot read his own mail and does not have a driver's licence. According to the woman with whom he lived, it was similar to having another child."

She found that Tony Watts had "poor memory skills", "deep suspicions" of his attorneys, and an inability to "distinguish between what is relevant and what is not". She wrote:

"He knows that he has been charged with murder, but does not seem to understand the notion that it is first degree murder.... Although he understands that the state would like to impose the death penalty he treats this as a rather remote possibility and is more concerned that he will be found incompetent and thus go to a hospital and cause a delay in his plans to marry his girlfriend. He does not seem to understand that spending life in prison or getting a death sentence would affect his marriage plans".

The psychiatrist also found that when he was about eight years old, the defendant's mother had been diagnosed with chronic schizophrenia, placed on psychotropic medications and hospitalized. The "family history of schizophrenia", the psychologist noted "may predispose Mr. Watts to problems of this nature".

The judge found Tony Watts competent to stand trial. The judge accepted the jury's seven to five vote for the death penalty, while finding in mitigation Tony Watts' young age at the time of the crime and that his low IQ "somewhat reduces his judgmental abilities".

In 1992, the Florida Supreme Court affirmed the conviction and death sentence. Two of the Justices argued that the death sentence was disproportionate. In this case, they said, "there is more than mere low intelligence which militates against imposition of the death penalty". There was also evidence that "Watts shot the victim during a struggle that ensued immediately after the victim hit Watts with a chair", a fact which, "the majority totally discounts". This, the dissent argued, was not "one of the most aggravated, the

most indefensible of crimes for which the death penalty is reserved”.¹¹⁶

On death row, Tony Watts came to the attention of mental health personnel at Union Correctional Institution (UCI). In October 1993, he was admitted to the “crisis stabilization unit” for the first of what would be a number of such admissions. During 1994, “he was observed at times yelling to himself, pacing, throwing food at security and claiming his food was being poisoned”. He was diagnosed with schizophrenia in 1995, with symptoms including auditory hallucinations, his judgment “impaired by a paranoid delusional state”. During 1995 and 1996, he variously claimed that he was “John the Baptist sent to represent Jesus Christ and judge others”, or that “Satan” was controlling security or telling him he was homosexual; he was observed “baptizing security officers with toilet water”, talking to himself, and repeatedly flushing the toilet to “rid my cell of demons”. By June 1996 he had become:

“well-known for long standing paranoid and religious delusions, associated hallucinations, denial of illness and non-compliance with mental health treatment. Inmate reports daily experiences of ‘God’ and ‘the Devil’ talking to him and that he is now receiving explicit instructions to assault and harm non-security staff which he has now acted upon. Inmate refuses all mental health treatment.”

The diagnosis included schizophrenia, chronic paranoid type.¹¹⁷ The trial judge ordered expert evaluations to determine the prisoner’s competence to proceed with his appeals. The psychologist who had earlier concluded that Tony Watts was competent to stand trial if proceedings were conducted in a manner he could understand, concluded in a March 1999 report to the judge that in her opinion, Tony Watts was not competent to proceed because he lacked the capacity to “maintain sufficient sustained attention” in order to help his lawyers, would likely be “passively inattentive” during proceedings, and would unlikely be able to testify relevantly due to his delusional thinking.

A psychiatrist concluded that Tony Watts “has a mental disorder Schizophrenia Paranoid Type, along with traits of Antisocial Personality Disorder and is of limited intelligence with an IQ reported to be in the borderline level of intelligence”, and that “as a result of his mental disorder he is not presently competent to proceed”, lacking the capacity “to disclose to counsel facts pertinent to the proceeding at issue and to testify relevantly”. The psychiatrist concluded that Watts “meets the criteria for involuntary commitment” and that he should be transferred to a mental health facility and treated with antipsychotic medication.

In May 1999, the trial judge ruled that Tony Watts was incompetent to proceed with his appeals and ordered that he be committed to the Department of Corrections Mental Health Institution (CMHI) at Florida State Hospital. Two months later, the Florida Department of Corrections (DOC) filed a motion to terminate the involuntary hospitalization, but this was denied. In January 2000, the judge held a hearing on another DOC motion to authorize it to transfer the prisoner to another facility for outpatient treatment. A CMHI psychiatrist testified that Tony Watts was diagnosed with schizophrenia and paranoia, reported hearing voices and having hallucinations, believed one of the security guards was Jesus Christ, and had delusional ideation. The judge denied the motion, ordering that Tony Watts remain held at CMHI until the DOC could show that he “is voluntarily taking his medication, is stable and can be returned to UCI.” The Florida Supreme Court ruled that the judge had acted within his authority.¹¹⁸

Since 27 May 2005, Tony Watts has been held at Lake Correctional Institution. His records there show his serious mental disability. The Circuit Court of the Fifth Judicial Circuit in Lake County repeatedly found “by clear and convincing evidence” that he has mental disability as defined under Section 945.42(9) of the Florida Statutes. This defines “mental illness” as: “an impairment of the mental or emotional processes that exercise conscious control of one’s actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person’s ability to meet the ordinary demands of living.”

On 28 April 2017, a judge on the Fourth Judicial Circuit in Duval County, Florida, who a year earlier had ordered an updated competency evaluation, issued an order finding that Tony Watts “remains incompetent, is resistant to any treatment and is very likely never to be restored to competency”. The judge added that “given the unique circumstances of Defendant’s case, this Court finds that the regular six-month review would serve no purpose and that a review in one-year would be the most appropriate course of action”.¹¹⁹

In June 2018, the judge ordered an updated competency evaluation. On 1 August, the judge found Tony Watts incompetent to proceed and continuing to meet the criteria for involuntary hospitalization.

The governor should commute Tony Watts’s death sentence, and end this cruel absurdity.

¹¹⁶ *Watts v. State*, 2 January 1992, Justices Kogan and Barkett concurring in part and dissenting in part.

¹¹⁷ Union Correctional Institution. Mental health status report, psychiatric evaluation, 20 June 1996.

¹¹⁸ *Watts v. State*, 8 November 2001.

¹¹⁹ *State v. Watts*, Order on January 21, 2016 hearing (29 January 2016); and Order on March 21, 2017 status conference (28 April 2017), In the Circuit Court, Fourth Judicial Circuit, in and for Duval County (Circuit Court Judge Waddell Wallace).



Outside Florida State Prison, 25 April 1986. Reverend Ernie Brunelle protesting the execution of Daniel Thomas. Photographer, Routh, Shay. Photo courtesy of State Archives of Florida

When Henry Sireci was first sentenced to death in Florida in 1976, “the Berlin Wall stood firmly in place. Saigon had just fallen. Few Americans knew of the personal computer or the Internet. And over half of all Americans now alive had not yet been born.”¹²⁰ Twenty-seven years old at the time of the crime, Henry Sireci turned 70 in July 2018. He is still on death row today, sent there following an 11-1 jury vote for death. His death sentence became “final” in 1992, and so the Florida Supreme Court in 2018 deemed him ineligible for *Hurst* relief.

On 7 October 1975, the Soviet Union and East Germany signed a new treaty of friendship. On the same day, Charles Foster arrived on Florida’s death row. The Soviet Union ceased to exist over a quarter of a century ago. Charles Foster is still on death row, sent there on an 8-4 jury vote for death. He too was deemed ineligible for *Hurst* relief in 2018 because his sentence became “final” in 1995. He was 28 years old in July 1975 at the time of the murder for

which he was sentenced to death: “Death row’s inevitable anxieties and uncertainties have been sharpened by the issuance of two death warrants and three judicial reprieves. If executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row’s twilight. It is fairly asked whether such punishment is both unusual and cruel.”¹²¹ Justice Breyer wrote that 16 years ago. Charles Foster is now 71 years old.

In his *Glossip* dissent in 2015 Justice Breyer suggested that it was unsurprising that many death row inmates “consider, or commit, suicide”. He cited a 1983 study which pointed to 35 per cent of death row inmates in Florida having attempted suicide. According to the Florida Department of Corrections, four death row inmates committed suicide between 2000 and mid-2015. The fourth was Gregory Larkin who hanged himself in his cell at Florida State Prison on 27 May 2015. He had represented himself at his 2012 trial for killing his parents. A psychologist had concluded that Larkin suffered from a delusional disorder, but two other experts opined that he was competent to proceed with the trial. The stand-by defence lawyer characterized his would-be client as delusional and the trial judge’s decision to allow him to represent himself as “state-assisted suicide”. The Florida Attorney General’s Office informed the courts in 2016 that “on the 28th day of May, 2015, Gregory David Larkin passed away before he could be executed”.¹²²

¹²⁰ *Sireci v. Florida*, Justice Breyer dissenting from denial of *certiorari*, 12 December 2016.

¹²¹ *Foster v. Florida*, Justice Breyer, dissenting from denial of *certiorari*, 21 October 2002.

¹²² *State v. Larkin*, Notice by Attorney General to Records Repository of completion of capital sentence, 12 April 2016. In the Circuit Court of the Fourth Judicial Circuit, in and for Nassau County, Florida.

4.3 THE CASE OF KHADAFY KAREEM MULLENS

‘Mr Mullens was raised in a culture of extreme poverty, violence, mental illness and drug abuse’

State v. Mullens, motion filed in Pinellas County Court, May 2018.¹²³

Khadafy Mullens, a man with a history of serious mental disability and a childhood marked by severe poverty, deprivation and abuse, was sentenced to death on 23 August 2013 in Pinellas County, Florida for the murder of two people who were shot during a robbery of a store in St Petersburg on 17 August 2008.

Eleven days before the crime, Khadafy Mullens had gone to a mental health clinic to seek help. He was diagnosed with bipolar disorder and given anti-psychotic medication. Five days later, less than a week before the crime, his stepfather was killed in a train accident. This was a man who had joined the household when Khadafy Mullens was a young boy and after his father was sent to prison. This man is alleged to have physically and sexually abused the young boy repeatedly. After the train accident, his mother told her now 24-year old son that she expected him to go to the funeral, to be held on 18 August 2008. On the eve of the funeral, Khadafy Mullens is said to have smoked crack and drunk 18 beers. That evening, he and Spencer Peebles, armed with the latter’s gun, entered the Central Food Mart in St Petersburg to rob it. The crime was captured on seven surveillance cameras at the store. This was hardly a sophisticated or well-planned crime, and the two murders, it is argued, “resulted from a robbery gone awry”.¹²⁴

On 6 February 2013, Khadafy Mullens’ trial lawyers sent the prosecution a letter outlining their mitigation case and requesting a deal of life imprisonment in return for a guilty plea. The lawyers asked the judge for a delay in the trial pending resolution of any plea negotiations. They noted that a few days earlier, on 4 February 2013, Khadafy Mullens’ sister had died of a drug overdose, that “this unexpected death is emotionally devastating to the Defendant”, and he “is not emotionally able to engage in necessary preparations for trial while he mourns the death of his younger sister with whom he has had a very close relationship”. In late April 2013, Khadafy Mullens was placed on psychiatric observation at the jail after he said he was going to “hurt” himself. He was returned to general population the next day, at which point he signed a typed defence memorandum stating that “upon the advice of counsel, I am electing to plead guilty as charged waiving both my right to jury trial and my right to jury recommendation of sentence”.

Three days later, on 29 April 2013, Khadafy Mullens pled guilty to two counts of first-degree murder and waived his right to a jury at the sentencing phase. The state objected to the waiver, but the judge accepted it. Asked by the judge whether he felt that it was in his “best interest” to proceed in this way, the defendant responded “Sir, I don’t know what I feel”.

At the time of writing, Khadafy Mullens’ appeal lawyers were challenging the guilty plea and jury waiver, arguing that his trial counsel had inadequately advised him on his rights, and that “Mr Mullens, a man with an exceptionally low intelligence, who has been alternatively diagnosed as bi-polar, psychotic, schizophrenic, was incapable of making a knowing, intelligent and voluntary plea”. They pointed to jail records from around the time of the plea hearing that trial counsel had not obtained. If they had, the appeal lawyers asserted, “they would have learned that Mr Mullens was prescribed perphenazine on February 5, 2013 through May 8, 2013. Perphenazine is an anti-psychotic drug with heavy side effects, causing sedation, depression, indifference and effects one’s rational thinking skills.” This, combined with the death of his sister, and his being placed on suicide watch just before the plea hearing, “point to a severe mental health crisis and potential incompetence”.

The sentencing phase was held from 13 to 15 May 2013 in front of the judge. He found in mitigation that at the time of the crime, Khadafy Mullens was under the influence of “extreme mental or emotional disturbance”, that he had “substantially impaired” capacity to “conform his conduct to the requirements of the law”, had a low IQ, was immature, impulsive and easily manipulated. He then passed a death sentence. The judge also found that at the time of the crime, Khadafy Mullens had been acting under the domination and control of Spencer Peebles. The latter was convicted on two counts of first-degree murder and sentenced to life imprisonment shortly after Khadafy Mullens was sent to death row.

The crime was undoubtedly serious and had terrible consequences. Yet the case again begs the question

¹²³ *State v. Mullens*, Amended motion to vacate judgment and sentence, In the Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida, 15 May 2018.

¹²⁴ *Mullens v. State*, Florida Supreme Court, 16 June 2016.

of whether a person with a childhood such as Khadafy Mullens' endured and his serious mental disabilities possesses the "extreme culpability" for whom the death penalty is supposedly reserved under US constitutional law. The judge's order sentencing Khadafy Mullens to death in part reads:

"Defendant's father was incarcerated in prison for the majority of the Defendant's life. However, during the periods of his release, his father admitted to brutally beating the Defendant's mother in front of the Defendant and his siblings, and to also viciously beating the children themselves. Like his father, the Defendant's brother also took to inflicting violence on the Defendant, horribly beating him on several occasions... The Defendant was no older than five when his father taught him how to shoplift in order to supply the family with food and other items they needed. Similarly, the Defendant's mother was an alcoholic who abused both alcohol and marijuana in the presence of the Defendant..."

The testimony from the Defendant's family members made clear that throughout his formative years, the Defendant was exposed to severe physical and emotional abuse, rampant alcohol and drug abuse and lessons on how to commit crimes.... Additionally, when the Defendant was sixteen years old he was sentenced to prison. The Defendant's mother testified that when he returned from prison, the Defendant was 'very different,' and that he had become 'angry' and 'paranoid'..."

It is well-established that the Defendant's lineage is saturated with individuals who suffered not only from psychiatric disorders, but also severely abused drugs and alcohol... Given the Defendant's mental health and substance abuse history, family upbringing and lack of protective factors, it is evident that the Defendant lacks the ability to conform his conduct to the requirements of law."

While the judge's order shows that the defence lawyers presented mitigating evidence of their client's mental disability and background, the appeal lawyers assert that they failed to present a fully cohesive mitigation narrative to counter the state's arguments for the death penalty:

"defense counsel never argued the cohesive narrative of Mr Mullens' attempts to numb the memory of childhood sexual abuse with alcohol and drugs, brought to the forefront of his mind by [his stepfather's] death and impending memorial. Counsel never created the critical link between the mitigating facts and Mr Mullens' severely decompensated mental state at the time of the crime. The whole mitigating story, including childhood physical and sexual abuse, the resulting PTSD, the threat of facing his rapist's funeral and the timeline of the crime, was never told. Defense counsel also never discovered that Mr Mullens' mother heavily imbibed while pregnant, leaving Mr Mullens with telltale symptoms of Fetal Alcohol Spectrum Disorder".

Khadafy Mullens' trial lawyers had information two years before the sentencing from their experts that their client might have brain damage due to head injuries and exposure to toxic substances, but did not follow this up. In October 2017, a psychologist retained by the appeal lawyers conducted neuropsychological testing on Khadafy Mullens and found "numerous, severe deficits that indicated frontal lobe damage to Mr Mullens' brain". The defence experts retained by the trial lawyers had also indicated to them their opinion that Khadafy Mullens had PTSD as a result of the physical and sexual abuse he had endured as a child. However, defence counsel presented no testimony about PTSD at the 2013 sentencing.

The psychologist who examined Khadafy Mullens in October 2017 also concluded that he might have intellectual disability. He assessed his IQ at 73, within the range of significantly sub-average intellectual functioning. At the sentencing, there was evidence presented of his adaptive deficits. His cousin had testified that he was gullible, easily manipulated and slow. Other witnesses testified how he never managed to learn to drive a car, to operate a bank account, to keep a job longer than a few weeks, or to prepare meals for himself.

Khadafy Mullens' death sentence became final on 9 January 2017, fifteen years after the *Ring* decision and a year after the US Supreme Court issued its *Hurst* decision finding Florida's sentencing statute unconstitutional. Because he waived jury sentencing, however, the Florida Supreme Court has decided that Khadafy Mullens should not benefit from *Hurst*, and he remains on death row. His waiver, of course, was made without either he or his lawyers knowing that less than three years later, Florida's sentencing statute would be deemed unconstitutional.

In their motion filed in the Pinellas County Court in May 2018, Khadafy Mullens' appeal lawyers assert that his "trial attorneys will testify that had they known that *Hurst v. Florida* would be granted favorable to defendants, they would not have advised Mr Mullens to waive a jury at all." The motion points out that "in this case, there could be no waiver of a constitutionally valid penalty phase jury because a constitutional penalty phase jury did not exist at the time... All Mr Mullens and his counsel thought was being waived was an advisory proceeding which would be of benefit to the defense only if at least half of the jurors recommended a life sentence. Now, under *Hurst*, Mr Mullens would receive a life sentence even if only one juror decided to vote for life based on mercy alone."

Snapshot: History, geography and prosecutorial discretion in the Sunshine State



19 JANUARY 1912. CROWDS GATHER FOR THE HANGING OF EDDIE BROOME AT KISSIMMEE, OSCEOLA COUNTY, FLORIDA. Photo courtesy of State Archives of Florida

Lynching and judicial executions overlapped in Florida. In the 19th century, Florida led the southern states in lynching per capita, and in the 1930s it led the country in the actual number of such killings.¹²⁵ Until 1924, judicial executions in Florida were carried out in the county of conviction, usually by hanging. In 1923, the legislature changed the execution method to electrocution, and required all executions to be conducted in a permanent death chamber in the state prison. In 2000, it made lethal injection the primary method, after several “botched” executions by electrocution. In 2013, Florida was the first state to adopt the controversial drug midazolam as part of its three-drug lethal injection protocol. In 2017, it replaced this with etomidate, and has since used it in four executions. The fifth – of a man sentenced to death in Miami-Dade County in 1994 – was stayed by the Florida Supreme Court four days before it was due on 14 August 2018. Among the issues put before the court, lawyers arguing for a stay recalled accounts that at the most recent execution in February 2018, the condemned man had “let out a blood-curdling scream and thrashed about on the gurney after the first injection of etomidate”.

Geography “plays an important role in determining who is sentenced to death”, wrote Justice Breyer in his dissent from the 2015 ruling upholding midazolam (*Glossip v. Gross*), and “the imposition of the death penalty heavily depends on the county in which a defendant is tried”. At the time of *Hurst* in 2016, 58 of the approximately 380 people on Florida’s death row had been sent there from Duval County. Ten months after *Hurst*, a Duval County jury voted that Randall Deviney should be executed for a murder committed in 2008 when he was 18. He was first tried in 2010, when the jury voted 10-2 for death, and then in 2015 when the vote was 8-4. Each was overturned on appeal, the second time because of *Hurst*. Having twice obtained death sentences under an unconstitutional law, Duval County got a third go. This time, it obtained a 12-0 vote for death. It was the same prosecutor who tried the case each time. He retired in 2018, having obtained 31 death sentences in all. One of the 31 has been executed – the prosecutor witnessed it in August 2017 – and 15 others remain on death row.¹²⁶

In April 2016, Darlene Farah spoke with an Amnesty International researcher in Jacksonville (Duval County) about the murder of her 20-year-old daughter Shelby, who was shot in 2013 during the robbery of the phone shop in which she worked. James Rhodes, then 21, was charged with the murder, and was being prosecuted by the above prosecutor. Darlene Farah said of the defendant: “You can look at him and tell he has a lot of anger in him. Well I learned why he has a lot of anger in him... The state made him what he is. They never taught him the values of life. He was in the boys’ home from the age of four to 15. The state raised him. So you want to kill something you created? That’s not right. I don’t feel the consequences should be death. Like I said, I never believed in the death penalty, but even if I would have believed in the death penalty, I would still fight for him because I feel like he has never ever been given a fair chance at life.” Darlene Farah campaigned tirelessly for four years to have the death penalty removed from the case. Under a newly elected State Attorney, in March 2017, that finally was the outcome. The prosecution agreed to drop the death penalty and James Rhodes pleaded guilty in return for a life sentence.

¹²⁵ See Amnesty International, Death in Florida, 21 August 2017, <https://www.amnesty.org/en/documents/amr51/6736/2017/en/>

¹²⁶ With Jacksonville courtroom days over, tough prosecutor never shied from death penalty, 1 May 2018, <http://www.jacksonville.com/news/20180501/with-jacksonville-courtroom-days-over-tough-prosecutor-never-shied-from-death-penalty>

5. YOUNG ADULTS CONDEMNED

‘At the time of the murder, Tucker was 18 years, 5 months, and 6 days old, and he had an IQ of 74...’

Tucker v. Louisiana, US Supreme Court, 31 May 2016, Justices Breyer and Ginsburg dissenting

On 11 December 2017, a judge in Jacksonville, Duval County, Florida sentenced the defendant before him to death for the murder of his elderly neighbour committed when he was 18 years old. The judge acknowledged that the defendant's "childhood was traumatic", and "it would be difficult to conclude" that his experiences "did not influence the decisions he has made throughout his life". The defence had presented a forensic psychologist and a trauma psychologist who testified that at the time of the murder, the defendant, Randall Deviney, was experiencing post-traumatic stress disorder, which related to the physical, sexual and verbal abuse he endured as a child at the hands of his parents. Both judge and jury found that he was under the influence of extreme mental or emotional disturbance at the time of the crime. The judge also accepted that "adolescent brains are not fully developed at the age of eighteen".¹²⁷

With more than 100 countries having abolished the use of the death penalty *against anyone*, a question for Florida to consider is how far standards have evolved.¹²⁸ For today in Florida, children are being sentenced in violation of international law to die in prison (life imprisonment without the possibility of parole, LWOP),¹²⁹ while dozens of other individuals have been sentenced to death for crimes committed when they were barely out of their (frequently abusive) childhoods.

The prospect of death in prison one way or another for adult teenagers convicted of first-degree murder in Florida was articulated in 2003 by a Brevard County judge. The defendant before him, Randy Schoenwetter, had elected to plead guilty (against the advice of his lawyer) to two charges of first-degree murder committed in 2000 when he was 18 years old. The judge explained that the maximum sentence was the death penalty and the minimum was life without the possibility of parole, adding: "In essence, sir, the only time you would ever leave prison is if you died in prison, do you understand that sir?"

The plea and the sentencing went ahead. The jury recommended the death penalty, which the judge accepted, giving "little" mitigating weight to the defendant's age. The judge also gave short shrift to expert evidence of his mental disabilities, including Asperger's Syndrome (AS) and Attention Deficit Hyperactivity Disorder (ADHD), or to his lack of prior criminal history.¹³⁰ Expert testimony that Randy Schoenwetter had a developmental and emotional age of 12 to 13 at the time of the crime was all but dismissed by the judge who said he appeared "mature beyond his years" from his behaviour in court (he was 21 by then).

In similar vein, in 2008 Alan Wade was sentenced to death in Duval County for a crime committed when he was 18. At the sentencing, the prosecutor argued against LWOP and for the death penalty: "You might hear an argument about life is enough. Life is however many years he's got left and leaves that prison only when he dies. What I suggest to you is that argument tells you that this defendant should not be held fully accountable for his actions. The argument in essence says let's take the easy way out." According to this

¹²⁷ *Florida v. Deviney*, Sentencing Order, In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, 11 December 2017.

¹²⁸ See also, *Dorsie Lee Johnson v. State of Texas*, US Supreme Court, 24 June 1993, quoting trial testimony of defendant's father (son was 19 at the time of the crime). "'Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built up, trying to step into manhood'.... '[A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not – I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be – well, he just don't – he just don't evaluate what is worth – what's worth and what's isn't like he should like a thirty or thirty five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't.'")

¹²⁹ Florida has been a leading contributor to the USA's use of life imprisonment without the possibility of parole (LWOP) for crimes by under 18-year-olds. In 2010, banning LWOP for non-homicide crimes by this age group, the US Supreme Court noted that of 123 LWOP sentences for non-homicides committed by children nationwide, 77 were in Florida, while the remaining 46 were in 10 states (*Graham v. Florida*). In 2012, the Court ended mandatory LWOP for crimes by under 18-year-olds (*Miller v. Alabama*). Florida accounted for some 200, or around 10 per cent, of the national total of mandatory LWOP sentences imposed on child offenders. For more on the international prohibition on LWOP for children, See, Amnesty International, 'This is where I'm going to be when I die', November 2011, <https://www.amnesty.org/en/documents/amr51/081/2011/en/>

¹³⁰ The defence had tried to have the judge, a former prosecutor, disqualified from the case because of his alleged bias against evidence of mental impairment of the sort that they would be presenting.

prosecutor, for an 18-year-old offender to die of old age in prison is not punishment enough, for justice to be served state employees must strap him down and kill him.¹³¹

While death sentences against young adults do not violate a categorical provision of international law, the details from their cases further drain credibility from the claim that the death penalty is reserved for the most culpable offenders and the least mitigated offences. This is even more so when one considers the backgrounds of the young adults who end up on death row.



1942. Courtesy of The State Archives of Florida

This postcard was produced not long after a particularly dark episode in Florida. Amid allegations that their confessions had been extracted under police beatings, three African American teenagers were sentenced to death in Jacksonville for the murder of a shopkeeper there in August 1938 when they were 14 and 15 years old. Upholding the death sentences in 1940, the Florida Supreme Court said their ages presented “a very serious question”, but that this was best left to “the discretion of the Board of Pardons” to answer.¹³² Clemency was not forthcoming. The three teenagers were killed in the electric chair on 29 December 1941.¹³³

Sixty-nine years and a day after the Universal Declaration of Human Rights was adopted, on 11 December 2017 a judge in Jacksonville sentenced the defendant in front of him to death, concluding: “Randall Deviney, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all”. Randall Deviney was 18 years old at the time of the crime.

On 5 February 2018, the American Bar Association’s House of Delegates passed a resolution calling upon states in the USA to prohibit the imposition of the death penalty against anyone for crimes committed when they were 21 years old or younger. Two weeks later, a judge in Polk County, Florida, sentenced Benjamin Smiley to death for a murder committed when he was 20, accepting the jury’s unanimous recommendation for death under Florida’s post-*Hurst* capital sentencing statute. Five months before the murder, the defendant had been hospitalized when he suffered two brain aneurysms and had been in a coma. The judge accepted that he “did suffer from severe brain trauma” and that his behaviour and personality had changed after it. The judge also afforded “moderate” mitigating weight to the defendant’s lack of prior criminal record.¹³⁴

The day before Benjamin Smiley was sentenced to death, Eric Branch was executed in Florida for a murder committed when he was 21. His death sentence – based upon a 10-2 jury vote – became final in 1997, and *Hurst* was deemed not to apply. A brief filed by psychiatrists and psychologists in the US Supreme Court as his execution approached asserted that “an individual in his young twenties who has experienced lifelong trauma, been subjected to extensive abuse and neglect, and engaged in substance abuse is likely to bear many of the same cognitive and emotional characteristics”

as those who are under 18.¹³⁵ Appealing for a stay, backed up with excruciating detail, his lawyers wrote: “From running barefoot through a blizzard covered in blood to get away from his abusive father at the age of five, to becoming the victim of a gang-rape in prison as a teenager, Eric’s upbringing was riddled with physical and emotional abuse, neglect and abandonment.”¹³⁶

The prisoner whose case led to the *Hurst* ruling, Timothy Hurst, was himself 19 at the time of the crime for which he was sentenced to death in 2000 on an 11-1 jury vote. The defence lawyer’s had failed to investigate evidence of his client’s borderline intellectual functioning and possible organic brain damage, and the judge chose to take a less than scientific approach on the age issue (which he mistakenly said was 18): “The defendant was legally an adult and he owned his own car and was employed. Under these circumstances, the Defendant’s age should not be considered as a mitigating factor and to this the Court will give very little weight”. Timothy Hurst’s death sentence was overturned because of the inadequate legal representation, but he was resentenced to death, on a 7-5 jury vote. This was overturned in 2016 pursuant to *Hurst*. In November 2017, Escambia County filed notice of its intent to seek the death penalty at the resentencing due in early 2019. In August 2018, Timothy Hurst was one of at least nine prisoners

¹³¹ The Florida Supreme Court upheld the death sentence in *Wade v. State*, 6 May 2010. Six years later, the death sentence was overturned pursuant to *Hurst* (the jury had voted 11-1 for death at the 2008 trial).

¹³² *Clay v. State*, 24 May 1940.

¹³³ Nathaniel Walker, Edward Powell and Willie Clay.

¹³⁴ *Florida v. Smiley*, Sentencing Order, In the Circuit Court of the 10th Judicial Circuit in and for Polk County, Florida, 23 February 2018.

¹³⁵ *Branch v. Florida*, Brief of amici curiae concerned psychiatrists, psychologists and neuropsychologists. In US Supreme Court, 20 February 2018.

¹³⁶ *Florida v. Branch*, Application for stay of execution and motion to vacate judgment and sentence with special request for leave to amend. In the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida, 29 January 2018.

convicted of murders committed when they were 18 or 19 years old against whom county prosecutors were intending to seek death again at post-*Hurst* resentencing proceedings (see appendix).

Although the last execution in Florida for a crime committed by someone under 18 was in 1954, it was not for want of trying. From 1973 to 2005 more death sentences were passed in the Sunshine State against this age group than any other state except Texas.¹³⁷ Florida remained squarely on the wrong side of the emerging “national consensus” finally recognized by the US Supreme Court in 2005 in *Roper v. Simmons* when it banned the execution of those who were under 18 at the time of the crime.

Dozens of other defendants who were 18, 19 or 20 at the time of the crime have been sentenced to death in Florida, including those who had mental disabilities or were under the influence of alcohol or other substances at the time of the crimes, habits developed during childhoods of deprivation and abuse from which they were only just emerging.¹³⁸ At the time of *Hurst*, more than 12% of Florida’s death row had been sent there for crimes committed when they were aged 18, 19 or 20.

5.1 MENTAL AGE, A ‘TROUBLING’ ISSUE UNADDRESSED

William Davis was sent to Florida’s death row in 2006 for a crime committed when he was 20. At his trial, a psychologist testified that Davis had a mental age of 16, had a learning disability, attention deficit disorder and significant frontal lobe deficits. A psychiatrist similarly testified that at 20, William Davis was functioning at best at the level of a 15 or 16-year-old and had “severe cognitive deficits” and a combination of disorders that constituted an “extreme and significant psychiatric condition”.¹³⁹ Another testified as to his low IQ. In December 2011, after five years on death row, William Davis was found dead in his cell.¹⁴⁰

In its 2005 *Roper* ruling prohibiting the death penalty against individuals for crimes committed when they were under 18 years old, the US Supreme Court recognized the immaturity, impulsiveness, poor judgment, underdeveloped sense of responsibility and vulnerability to peer pressure often seen in youth. The following year, when the US Court of Appeals upheld Florida prisoner Richard Henyard’s death sentence for a crime committed at 18, one of the three judges raised what she saw as a “troubling” issue lingering since *Roper*:

“There is no dispute that Henyard committed a horrifying and heinous crime. There is also no dispute that, notwithstanding Henyard’s eighteen years of chronological age, he functions at the emotional level, or has the ‘mental age’, of a thirteen year old.... The characteristics identified by the [US Supreme] Court as those which diminish culpability and thus militate against the imposition of the death penalty for children under the chronological age of 18 as well as the mentally retarded appear equally present in those with a mental age of less than eighteen years... The mere fact of a defendant’s chronological age should not qualify a defendant for death where the measures of capacity render him lacking in culpability. Although it may not be directly before us, at some juncture this issue must be addressed”.¹⁴¹

Richard Henyard was executed in 2008, and a decade later, the lingering issue referenced by Judge Barkett has not been addressed. Indeed, in 2015, a federal judge noted that “several of the factors” the Supreme Court had listed in *Roper* as reasons to exclude under 18-year-olds from the death penalty, were present in the case of Antonio Melton, on death row in Florida for a murder committed in 1991 when he was 18 years and 25 days old (his older co-defendant received a prison sentence). Court of Appeals Judge Beverly Martin pointed to evidence that Antonio Melton was “a follower, not a leader”; that his “chronological age, at the time of the crime was far greater than his emotional maturity”; and that his “immaturity resulted in Melton being easily manipulated and susceptible to the influences of his more experienced peers”.¹⁴²

At a post-conviction hearing in 2002, a psychologist testified that Antonio Melton had been a “strikingly immature boy for 18”, who could be “easily manipulated”. At high school he went “from being isolated” to being “in with a group of youth that I suppose we could say had some criminal sophistication, at least from his point of view they did and he immediately fell in with them”. Prior to the age of 16 he had

¹³⁷ Texas, Florida and Alabama accounted for half of all such death sentences. Victor Streib, *The Juvenile Death Penalty Today: Death sentences and executions for juvenile crimes, January 1, 1973 to February 28, 2005*. Issue 77, <http://www.deathpenaltyinfo.org/documents/StreibJuvDP2005.pdf>. See also, for example, Amnesty International, ‘He could have been a good kid’. Texas set to execute third young offender in two months, May 2014, <https://www.amnesty.org/en/documents/amr51/027/2014/en/>

¹³⁸ See also Youthful binge drinking changes the brain – for the worse – into adulthood. *Science Now*, 27 April 2015, citing Risher et al, *Adolescent Intermittent Alcohol Exposure: Persistence of structural and functional hippocampal abnormalities into adulthood*. In *Alcoholism: Clinical and Experimental Research*, 2015, pp 1-9.

¹³⁹ *Davis v. State*, Florida Supreme Court, 18 December 2008.

¹⁴⁰ Jacksonville death row inmate found dead in his cell. *Florida Times-Union*, 7 December 2011.

¹⁴¹ *Henyard v. McDonough*, US Court of Appeals for the 11th Circuit, 21 August 2006, Judge Barkett concurring.

¹⁴² *Melton v. Secretary*, US Court of Appeals for the Eleventh Circuit, 3 March 2015, Judge Martin dissenting.

witnessed the physical abuse of his mother by his stepfather, who was a heroin addict.

The *Roper* ruling noted that the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18”. A decade and a half earlier, when the Supreme Court ruled that the execution of individuals who were 16 or 17 at the time of the crime could continue (Florida was one of the states which urged the Court not to prohibit such executions), four of the nine Justices dissented, noting that:

“the development of cognitive and reasoning abilities and of empathy, the acquisition of experience upon which these abilities operate and upon which the capacity to make sound value judgments depends, and in general the process of maturation into a self-directed individual fully responsible for his or her actions, occur by degrees... Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person’s maturity and responsibility, given the different developmental rates of individuals, it is, in fact, a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.”¹⁴³

Scientific research has continued to show that development of the brain and psychological and emotional maturation continues at least into a person’s early 20s and even into their late 20s.¹⁴⁴ An independent expert paper issued in 2015 by the National Institute of Justice at the US Department of Justice on young adults and the criminal justice system said:

“Young adults are developmentally distinct from older adults. Recent scientific work suggests that the human brain continues to develop well into the 20s, particularly in the prefrontal cortex region, which regulates impulse control and reasoning. Several studies suggest that people do not develop adult-quality decision-making until the early 20s, and others have shown that psychosocial capacities continue to mature even further into adulthood... Because of [the ‘maturity gap’], young adults are more likely to engage in risk-seeking behaviour, have difficulty moderating their responses in emotionally charged situations, or have not fully developed a future-oriented method of decision-making.”¹⁴⁵

In the US Supreme Court’s 2002 decision prohibiting the death penalty against individuals with intellectual disability, among its reasons was that such offenders could be poor witnesses on their own behalf.¹⁴⁶ Young adults may be poor witnesses too.

In December 2011, a Jacksonville jury convicted David Sparre of capital murder. Just before the jury was called for the sentencing, the defence lawyers informed the judge that although they were ready to present a substantial case in mitigation, including mental health evidence, the defendant had told them that he did not want any mitigation presented. Sparre was allowed to make the waiver despite telling the court that he was prescribed Thorazine but generally flushed it down the toilet. The jury voted 12 to zero for the death penalty. The judge found one statutory mitigating circumstance – David Sparre’s age of 19 at the time of the 2010 crime, to which she assigned “moderate weight” having found “no evidence of emotional immaturity”. She sentenced Sparre to death, which the Florida Supreme Court upheld, over a dissent:

“Sparre was only nineteen years old at the time of the crime and had a history of mental illness and physical and emotional abuse. Four mental health experts were prepared to testify as to the nature of his illness and that he had diagnoses of Attention Deficit Hyperactivity Disorder (ADHD), Posttraumatic Stress Disorder (PTSD), substance abuse, Intermittent Explosive Disorder, and Bipolar Schizoaffective Disorder – and that his PTSD dated back to his childhood when he was in a boy’s school in South Carolina. Defense counsel also informed the trial court that they were prepared to present testimony that Sparre’s continued use of drugs, such as hydrocone and cocaine, could cause blackouts and memory loss, and that he had a dysfunctional family and personal history”.¹⁴⁷

David Sparre’s death sentence became final on 2 November 2015, when the US Supreme Court declined to take his case. His lawyers continue to challenge the validity of his waiver.

¹⁴³ *Stanford v. Kentucky* (1989), Justice Brennan dissenting (& Justices Marshall, Blackmun, Stevens).

¹⁴⁴ For example, see Debra Bradley Ruder, *The Teen Brain*. Harvard Magazine, September-October 2008, <http://harvardmag.com/pdf/2008/09-pdfs/0908-8.pdf>. See also *State v. Bargo*, Defendant’s motion to exclude the death penalty. Circuit Court of the Fifth Judicial Circuit, Marion County, Florida, 8 May 2018 (“That young adults ages 18, 19, and 20 are categorically not as responsible and mature as those over 21 years is further confirmed by state and federal laws that impose minimum age requirements (e.g. consumption of alcohol, obtaining a concealed carry handgun permit) or that extend protections afforded to those under 18 years).

¹⁴⁵ V. Schiraldi, B. Western and K. Bradner. *Community-based responses to justice-involved young adults*. New Thinking in Community Corrections Bulletin, Washington, DC, US Department of Justice, National Institute of Justice, 2015. NCJ 248900.

¹⁴⁶ *Atkins v. Virginia*, 2002 (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”)

¹⁴⁷ *Sparre v. State*, Florida Supreme Court, Justice Pariente, concurring in part, dissenting in part.

5.2 IMMATURITY COMPOUNDED BY DEPRIVATION AND ABUSE

Florida death row prisoner Richard Cooper was two months shy of his 48th birthday in 2011 when a federal court overturned the death sentence handed down in 1984 for a triple homicide committed in 1982 when Cooper was 18. The 11th Circuit Court of Appeals found that the trial lawyer had failed to present evidence of his abusive childhood, noting that “when Cooper committed the crimes at age 18, he was barely removed from being violently abused by his father and brother throughout his childhood”.¹⁴⁸

Richard Cooper is now serving a life sentence. Jermaine Foster remains on death row (see also §6 below). In 1994, 12 jurors in Orange County, Florida recommended that he be executed for two murders committed a month after he had turned 19. The judge agreed, yet in his sentencing order, wrote:

“Defendant Foster suffered an abusive childhood. He was subject to physical and mental abuse, deprived of proper nurturing and guidance, and was repeatedly exposed to the physical abuse of his mother by her live-in boyfriend. He often failed to receive proper nutrition and clothing. Expert testimony established that the Defendant suffers some organic brain damage, is mildly mentally retarded, and has a low IQ. Given the long duration and extent of his drug and alcohol use the Court concludes he suffers from a substance abuse problem and testimony showed he was to some extent under the influence of drugs and alcohol during the murders. All of these mitigating factors lead this Court to find...that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.”

Youth, wrote the US Supreme Court in 1982, is “more than a chronological fact”, but is “a time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹⁴⁹ The Court repeated this in *Roper*. A decade and a half earlier, four Justices had noted evidence that “Adolescents on death row appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness.” Studies of those on death row in the USA for crimes committed when they were under 18 showed frequent instances of mental disability, intellectual disability, head injuries, childhoods of physical and sexual abuse, and family life in which “violence, alcoholism, drug abuse, and psychiatric disorders were commonplace”.¹⁵⁰

As outlined in the Appendix, the same appears to be the case for many of the young adults not long over 18 at the time of the commission of the crime who end up on death row in Florida (and other states), their crimes occurring as they are emerging from childhoods of deprivation, poverty and abuse, some of them with mental disabilities resulting from or compounding the abusive nature of these backgrounds.¹⁵¹

Keith Brennan and Joshua Nelson were tried in Florida in 1996 for the murder of Thomas Owens in 1995. Brennan was a week shy of his 17th birthday at the time of the crime, Nelson was 18 years and two months old. Both were sentenced to death, with the judge finding that the two defendants were “equally culpable in the death of the victim”. It was Brennan’s case in 1999 in which the state Supreme Court banned Florida’s use of the death penalty against 16-year-olds.¹⁵² He was resentenced to life imprisonment.¹⁵³

Joshua Nelson was emerging from a highly dysfunctional childhood at the time of the crime. The relationship between his parents had been marked by domestic violence and alcoholism. When he was a baby, they would put vodka in his milk when he cried. His father moved out when the boy was about four. His mother married another man, and she, he and Joshua moved to Florida when the boy was 14.

Joshua Nelson began to engage in car theft and burglary, and started using drugs, huffing petrol and drinking alcohol. He was sent to an addiction treatment facility, but ran away after six months when he was hit by a staff member. He was returned to the facility for a further nine months. During this time he made friends with another patient, Keith Brennan.

According to the evidence, Joshua Nelson was sexually abused by his stepfather over a period of years. On the morning of the murder (in order to steal Thomas Owens’ car), the stepfather made a sexual advance towards the teenager, who this time responded that it was not going to happen anymore. He had previously told his mother about the sexual abuse, but it had not stopped. After Joshua Nelson rebuffed this sexual

¹⁴⁸ *Cooper v. Secretary*, US Court of Appeals for the Eleventh Circuit, 21 July 2011. Richard Cooper is now serving a life sentence.

¹⁴⁹ *Eddings v. Oklahoma*, US Supreme Court, 19 January 1982.

¹⁵⁰ *Stanford v. Kentucky*, US Supreme Court, 26 June 1989, Justices Brennan, Blackmun, Marshall and Stevens, dissenting. One more Justice joining them would have ended the death penalty for people under 18 at the time of the crime. Instead, another 16 years would pass.

¹⁵¹ On poverty and brain development, see Poverty May Hinder Kids’ Brain Development, Study Says, Health Magazine, 20 July 2015, http://news.health.com/2015/07/20/poverty-may-hinder-kids-brain-development-study-says/?utm_source=inside&utm_medium=link.

¹⁵² *Brennan v. State*, 8 July 1999.

¹⁵³ In its motion for rehearing, the State noted that, “Although biologically older, Joshua Nelson appears in some ways to be less mature emotionally than Keith Brennan.” See *Nelson v. Secretary*, Petition for a writ of certiorari. US Supreme Court, 8 June 2018.

advance, his mother threw her son out of the house. He said that when he hit Thomas Owens with the baseball bat he was thinking about his hatred for his stepfather and could only see the latter's face even as he hit Owens.

Before the sentencing, a psychologist examined Joshua Nelson. He found that although the defendant was by then 19 (it was a year and a half since the crime), he had the emotional maturity of a 12 or 13 year old boy, had suffered a "markedly dysfunctional" home life with a "very disturbed type of family" and a history of mental disability on his father's side; that because he was neglected as a child he had gravitated towards situations and individuals that led him into conflict with the law and to engage in substance abuse; that at the time of the crime he had become very angry because his mother had told him to leave the house after he had resisted his stepfather's sexual advance; and that he had good potential for rehabilitation in a structured environment. The defence lawyer was intending to present Joshua Nelson's mother and stepfather as witnesses, but after he said that he would be presenting evidence of the sexual abuse of the defendant, both the mother and the stepfather absconded.

On 31 January 2018, the Florida Supreme Court ruled that *Hurst* did not apply to Joshua Nelson because his death sentence became final in 2000, two years before *Ring*.

The expert paper published by the National Institute of Justice in 2015 (above) noted that:

"The transition to adulthood is especially challenging for young men and women who are involved in crime, as they are more likely to have personal histories that can further disrupt their psychosocial development. Justice-involved individuals are more likely to have experienced a traumatic incident, including sustaining a traumatic brain injury (TBI) – more than twice as likely as the general population, by some measures. In addition, justice-involved youth and young adults have a higher likelihood of parental incarceration, poverty, foster care, substance abuse, mental health needs and learning disabilities, all of which have been linked to impeding psychosocial maturity."¹⁵⁴

On 13 December 2013, a Marion County judge sentenced Michael Bargo to death for a murder committed when he was 18. The judge gave "only slight weight" to the age mitigator, explaining that while Bargo was "chronologically young", he had been a "fully functioning adult at the time of the killing", and adding that there was "no evidence" that he was "immature". At the same time, he made the following finding:

"The Court finds there is some evidence that the Defendant's brain development was impacted by his mental illness. There is also some evidence that an adolescent brain operates differently from a more mature brain, mainly in that an adolescent lacks an ability to inhibit impulses, lacks an ability to handle stressors, and is more influenced by peers. The Court accepts this as a mitigating circumstance but affords it slight weight".

On 29 June 2017, the Florida Supreme Court overturned Michael Bargo's death sentence pursuant to *Hurst*. His jury had voted for death by 10 votes to two. Justice Pariente wrote that she had "serious concerns" about whether the death sentence was proportionate:

"The defendant was eighteen years old at the time of the crime, and the trial court found two statutory mitigators (age and under the influence of extreme emotional distress) and numerous non-statutory mitigators – including that defendant suffers from frontal lobe brain damage, bipolar disorder, schizoaffective disorder, complex partial seizure disorder, hallucinations, and diminished control over inhibitions, was abandoned by his father, grew up in a disadvantaged and abusive home, has a severe substance abuse problem which aggravated a neurological disorder, along with the possibility that the defendant was misdiagnosed and treated for ADHD.

The trial court did not ascribe great weight to any of this mitigation. However, a review of the record indicates that Bargo's mental health mitigation reaches far back into his childhood, rather than emanating from evaluations occurring after the murder occurred. By the age of fourteen or fifteen, Bargo was self-harming... In March 2009, approximately two years before the crime in this case, Bargo was diagnosed with bipolar disorder diagnosis rapid cycling. Although not taking medication at the time of the crime, Bargo had been prescribed several strong medications in the past."

The Marion County prosecution is intending to seek the death penalty at Michael Bargo's resentencing due in 2019. In May 2018, his lawyer filed a motion to have the death penalty removed as an option. Among other things, she wrote: "Neuroscientific research has shown that the human brain does not fully mature until a person reaches her mid-20s. Young adults do grow out of impulsive behavior or reckless behaviors; they become more reflective, more risk-averse, more mature and less vulnerable to peer pressure".¹⁵⁵

¹⁵⁴ Schiraldi et al. *Community-based responses to justice-involved young adults*. *Op. cit.*

¹⁵⁵ *State v. Bargo*, Motion to exclude the death penalty. Circuit Court, Fifth Judicial Circuit, Marion County, Florida, 8 May 2018.

5.3 REHABILITATION IMPERATIVE IGNORED

Dissenting from the Florida Supreme Court's 1973 ruling upholding Florida's post-*Furman* capital statute, arguing that the legislature had failed to do any assessment on whether the death penalty was an effective or necessary policy, Justice Richard Ervin emphasised rehabilitation as a goal of criminal justice: "We often avoid the psychological and scientific methods of coping with society's ills the slower, painstaking rehabilitative measures requisite to the evolution of a peaceful, enlightened society..."¹⁵⁶

In August 2017, a trial judge in Kentucky credited recent new scientific and psychological research into maturation and development when he ruled that the death penalty should not be an option in the case before him, of a defendant who was 18 years old at the time of the crime. He granted a defence motion to declare Kentucky's capital statute unconstitutional in as far as it allowed defendants under 21 years old at the time of the crime to be subjected to the death penalty. He pointed to the positive prospects for rehabilitation in individuals whose "character is not yet well formed".¹⁵⁷ The potential for young people to change was a factor underpinning the US Supreme Court's *Roper* ruling.¹⁵⁸

The International Covenant on Civil and Political Rights (ICCPR) requires countries to prioritize reformation and rehabilitation of inmates in the prison system.¹⁵⁹ The UN Human Rights Committee has said that "No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".¹⁶⁰ The death penalty "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice".¹⁶¹

Rodney Lowe was sentenced to death in 1991 for a murder committed during a robbery in Florida when he was one month past his 20th birthday. That sentence was overturned on appeal because of inadequate legal representation, but Lowe was resentenced in 2012. The jury voted 12-0 for death. He was 40 years old at the time of the resentencing. The defence had presented evidence of his personal growth and development. A number of correctional officers testified that he was a "model inmate" while held in the local jail for prolonged periods, and that he had eventually been allowed to mingle with other prisoners because of his complete absence of disciplinary infractions. A death row chaplain testified that Rodney Lowe was sincerely "seeking to transform himself", had shown a "constant increasing maturity" and had been a calming presence upon other prisoners. A former warden of Florida State Prison testified that he had reviewed Rodney Lowe's records and met with him. He testified that for a prisoner to go so long on death row with only two very minor disciplinary reports (the most recent being 15 years earlier) was "more than amazing" because such reports are so easy to receive. The former warden testified that if Rodney Lowe was in the general prison population, he would not be a danger to anyone.

The judge found that "the person on trial in this sentencing proceeding has matured considerably from the person who stood trial in 1991"; that he had "engaged in remarkably good behaviour while in confinement"; "was extremely well-mannered and courteous to all staff members" on death row and in pre-sentencing jail custody; and "is of considerable assistance to other Death Row inmates during times of anxiety and stress". Yet the judge deemed Lowe's age at the time of the crime and his conduct since then worthy of little or no weight. Rodney Lowe remains on death row.

The Florida Supreme Court has long held that "Evidence indicating potential for rehabilitation, although not mitigating in the sense that it diminishes the defendant's culpability for the crime he committed, is clearly mitigating in the sense that it might serve as a basis for a sentence less than death."¹⁶² Yet judges have given little mitigating weight to the potential for rehabilitation of young adult offenders, or their capacity to benefit from a structured environment after their often chaotic backgrounds. In the case of Terry Smith, sentenced to death in Duval County in 2011 for a crime committed when he was 19 years old, a forensic psychologist experienced in working with troubled youth opined that Smith could be rehabilitated in a programme designed for a young individual who was in the process of maturing and who had limited intellectual functioning (his IQ was assessed at 77). Terry Smith's former employer testified that the defendant had been an "exceptional employee", and he would hire him again if he could, and had the potential for rehabilitation because he was an "exceptional kid" in terms of respect for others and other characteristics. The judge gave "little" weight to this in mitigation.

By the time of Troy Merck's third resentencing in 2004 for a crime committed when he was 19, more than

¹⁵⁶ *State v. Dixon*, Florida Supreme Court, 1973, Justice Ervin dissenting.

¹⁵⁷ *Kentucky v. Bredhold*, Fayette Circuit Court, 1 August 2017. The state has appealed and the issue is pending before the Kentucky Supreme Court.

¹⁵⁸ "The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."

¹⁵⁹ ICCPR, article 10(3).

¹⁶⁰ General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty). 1993.

¹⁶¹ *Furman v. Georgia*, 1972, Justice Stewart concurring.

¹⁶² *Cooper v. Dugger*, Florida Supreme Court, 12 May 1988.

a decade had passed since he was first sentenced to death. The prosecutor speculated that his self-education in prison was his lawyer's strategy to get him off death row:

"They want you to believe that this man that you heard testify today is the new Troy. This is not the Troy that taught [the victim] how to bleed. He is reading books...He is reading Steinbeck now, books on science, great literature. It is interesting that his lawyer with 20 years of experience thought we have this proceeding coming up here, while we are waiting. Why don't you read these books. I'm sure that you are bored in your solitary cell there. I guess we can go and tell a jury that you are reading these books. Could I be so cynical to say that that was all by design? Maybe so. It is a strategy, is what I'm saying."

Three Florida Supreme Court Justices said there was "no evidence" that Merck's reading was his attorney's idea. This and other "improper" prosecutorial arguments appeared to be an attempt "to inflame the jury's passions towards imposition of the death penalty". Troy Merck was granted *Hurst* relief in May 2017, but resentencing was still on hold in July 2018 pending resolution of a continuing challenge to his conviction.

5.4 THE CASE OF BILLY KEARSE

'[T]he killing resulted from the impulsive act of an eighteen-year-old who functions on a low average-borderline intelligence level and has a documented history of emotional problems'

Three Florida Supreme Court Justices, *Kease v. State*, 2000

Billy Leon Kearse was two months past his 18th birthday when, driving back from picking up a pizza with a female friend, the shooting for which he remains on Florida's death row occurred.

On 18 January 1991, Sergeant Danny Thomas Parrish, a 29-year-old officer with the Fort Pierce Police Department, stopped a car that was being driven the wrong way down a one-way street.¹⁶³ The driver was unable to produce a driving licence, gave a false name, and Sergeant Parrish ordered him to get out of the vehicle. Sergeant Parrish began to handcuff the driver, apparently striking him under the left eye with the cuffs as he did so. A struggle between the two ensued. The driver grabbed the officer's gun and fired. A taxi driver heard the gunfire and saw a dark blue car with a black male and female inside being driven away from the scene. Sergeant Parrish was taken to hospital, where he died. He had nine gunshot wounds.

Sergeant Parrish had radioed the car licence plate in before the shooting occurred, and the police found that it was registered to an address in Fort Pierce. Billy Kearse was arrested at the address on that same night. In his pocket were the two remaining rounds from the officer's gun, which was itself later found buried in the back yard of the house. Billy Kearse waived his right to a lawyer and told police that he had shot the police officer during a struggle.

At the trial, the jury convicted Billy Kearse and recommended death by a vote of 11 to one.¹⁶⁴ The judge found two statutory mitigating circumstances: that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The judge also found in mitigation that the defendant had endured a childhood of poverty and deprivation, that he was severely emotionally disturbed as a child, and that his IQ was just above the level of intellectual disability (then known as "mental retardation"). The judge, who did not find Kearse's age to be a mitigating circumstance, accepted the jury's death recommendation.

In 1995, the Florida Supreme Court granted Billy Kearse a new sentencing because of a number of errors by the judge. At the resentencing in 1996, the prosecutor took aim at whatever the mitigation case presented by the defence might be, by opening with the following:

"Now I don't know what the Defense is going to show you in an attempt to mitigate this horrible crime... But whatever that mitigation is, I would ask you now, listen to it, consider it and ask yourself

¹⁶³ The officer was posthumously promoted to the rank of sergeant.

¹⁶⁴ The murder occurred in St Lucie County. Billy Kearse was tried in neighbouring Indian River County. The sentencing was held in St Lucie County. The resentencing in 1996 was held in Indian River County. For the trial in 1991 and the resentencing in 1996, Billy Kearse was represented by Robert Udell. He was permanently disbarred by order of the Florida Supreme Court in October 2009.

what does this have to do with the true character of the Defendant on January 18th, 1991, when he took that gun and pulled that trigger 14 times. We are here because this Defendant is guilty of murder. We are here because the Defendant wants to live, even though he denied that right to Officer Parrish... The bottom line, Ladies and Gentlemen, is we're here seeking justice on behalf of Officer Danny Parrish... We are here asking you to show this Defendant the same mercy he showed Officer Parrish..."

During jury selection, the prosecutor commented that the Florida Supreme Court had affirmed the defendant's conviction from the original trial but had remanded the case for a "proceeding to recommend death". At the time, the prosecutor had been elected as a judge in the county where the resentencing was held, but he was not due to take office until January 1997.¹⁶⁵

This time, the jury voted unanimously for death. The judge (different from the original trial) found that Billy Kears's age at the time of the crime was a mitigating factor, giving it "some but not much weight". He did not find any other statutory mitigating mental circumstances, but found the non-statutory mitigating factors that Billy Kears had displayed acceptable behaviour during the sentencing, and that he had endured a difficult childhood that had resulted in psychological and emotional problems. Again, the judge found that these did not outweigh the aggravating factors (that the murder was committed during a robbery (of the officer's gun) and that the victim was a police officer killed by the defendant to avoid arrest.

The Florida Supreme Court upheld the death sentence, over the dissent of three Justices:

"Based on the amount of mitigation presented by the defense and accepted by the trial court, and the presence of only one serious aggravator, this case is clearly not one of the most aggravated, least mitigated of first-degree murders. Rather, the killing resulted from the impulsive act of an eighteen-year-old who functions on a low average-borderline intelligence level and has a documented history of emotional problems. Importantly, there is no evidence that Kears set out that night intending to commit any crime, let alone murder. In fact, he had just picked up a pizza and was returning home to eat it with friends when this tragic incident took place..."

The bottom line is that this is clearly not a death case. It is not one of the most aggravated and least mitigated or among the worst of the worst for which we have reserved death as the only appropriate response. What eighteen-year-old Kears did was horrible – but his actions in light of the bizarre circumstances in this case do not warrant the ultimate penalty of death..."

The dissent took issue with the judge's decision to attribute only a little weight to Billy Kears's young age at the time of the crime because he had "exhibited sophistication" rather than immaturity:

"The evidence demonstrates that Kears was eighteen years old at the time of the offense. As a child, he was placed in schools for the emotionally handicapped. In 1991, after the commission of the crime, Kears underwent a series of neuropsychological tests to determine his intellectual functioning. These tests revealed a verbal IQ of 75... According to one expert, this score places Kears in the borderline range of intelligence and means that he has difficulty receiving, integrating, and sequencing information. This expert noted that Kears's score is similar to the score Kears received when tested in 1981, which means that his intellectual function did not significantly increase with age. Further testing indicated that in 1991 (at age eighteen) Kears could spell on a third grade level and do arithmetic on a fourth grade level. According to the defense expert, these scores indicate severe learning problems... The State's expert agreed that the test results suggest that Kears has intellectual deficits and subnormal IQ. The sentencing order fails to acknowledge this evidence. Further, contrary to the trial court's conclusion, the record establishes that Kears operated at an intellectual level much lower than his chronological age."¹⁶⁶

The majority on the Florida Supreme Court found that the prosecutor's comments during his opening statement had been "improper" but were harmless. The dissenters disagreed: "The prosecutorial comments here set the course for the entire proceeding because they established that justice could only be served by imposing death (i.e., the same fate met by Officer Parrish). Thus, the jury started listening to the State's evidence immediately after the prosecutor's erroneous remarks. Under these circumstances, it is difficult to say that the prosecutor's final words had no effect on the jurors' minds."

Billy Kears had just turned 19 when he arrived on death row in 1991. He is now 45. An appeal is pending before the 11th Circuit Court of Appeals of the denial of his habeas corpus petition.

¹⁶⁵ The Honorable Judge David Morgan has been an Indian River County Judge in the 19th Judicial Circuit of Florida since January 1997, after being elected in 1996 and re-elected in 2000 and 2006

¹⁶⁶ *Kears v. State*, 29 June 2000, Justices Anstead, Shaw and Pariente dissenting.

Snapshot: The quality of mercy and Florida are estranged



21 April 1986. Execution protest sign - Tallahassee, Florida. Photographer: Thomas, Deborah. Photo courtesy of State Archives of Florida

Gubernatorial mercy was not forthcoming on this occasion (or since). David Funchess, an African American convicted in Duval County of the murder of two white people, was executed on 22 April 1986. He had a serious mental disability. As a soldier, he had been involved in some of the heaviest fighting in the Vietnam War. He was first diagnosed with post-traumatic stress disorder in 1982 by a leading expert. His family described how he had returned from Vietnam a changed person and addicted to heroin. He had been unable to tolerate noise, suffered from frequent flashbacks, sleeplessness and recurring nightmares. There has been no executive clemency granted in a capital case in Florida since 1983, a period that has seen nearly 100 executions.

6. INTELLECTUAL DISABILITY, ‘A CONDITION, NOT A NUMBER’

‘Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects’

Hall v. Florida, United States Supreme Court, 27 May 2014

Some 12 years passed between the US Supreme Court handing down *Ring v. Arizona* and its decision in *Hurst v. Florida*. On intellectual disability (formerly known as “mental retardation”), it was also 12 years before Florida law was brought into line with constitutional standards set in 2002.

In 2002, the Supreme Court ruled in *Atkins v. Virginia* that the execution of people with intellectual disability violates the Constitution.¹⁶⁷ The Court found that Florida was one of six states which in 2000 and 2001 had enacted laws prohibiting such executions. Prior to this, at least four prisoners with strong claims of intellectual disability had been executed in Florida.¹⁶⁸ However, in 2014 the US Supreme Court found that Florida’s law fell short of the protection required under *Atkins*.

It was the Florida Supreme Court’s narrow interpretation of the statute which rendered it incompatible with *Atkins*. In 2007, that Court had set this standard when it rejected the claim brought on behalf of death row prisoner Roger Cherry, whose IQ had been assessed at 72, that the standard error measurement (SEM) of plus or minus five points should be taken into account so that the actual cut-off score would be 75, and his IQ described as being within a range (67-77) rather than a single number. Noting that the *Atkins* ruling had left it up to the individual states to set their rules to comply with the prohibition, and because Roger Cherry did not meet the IQ prong of intellectual disability (IQ of 70 or below), the Florida Supreme Court ruled that there was no need to consider the other two prongs (adaptive skill deficits and manifestation before the age of 18).¹⁶⁹

Thereafter, the Florida Supreme Court repeatedly rejected the claim that Florida’s law violated *Atkins*.¹⁷⁰ Then in 2012, it upheld the death sentence imposed on Freddie Lee Hall, whose IQ had been assessed at 71 and whose original trial judge in 1991 had found in mitigation that he had intellectual disability. One of the Justices noted that “in some states Hall would be mentally retarded”; two others asserted that “the record here clearly demonstrates that Hall is mentally retarded”.¹⁷¹

The US Supreme Court took the case, and in 2014, ruled five to four against Florida. “Intellectual disability is a condition, not a number”, the majority held; “Courts must recognize, as does the medical community, that the IQ test is imprecise”. It took issue with Florida’s rigid IQ 70 cut-off, which blocked the presentation of evidence other than IQ that would demonstrate limitations in the individual’s mental faculties:

“Pursuant to this mandatory cut-off, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant’s failure or

¹⁶⁷ The *Atkins* ruling pointed to clinical definitions of “mental retardation” as a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning, and with limitations in two or more adaptive skill areas.

¹⁶⁸ Arthur Goode (executed 1984); James Dupree Henry (1984); Nollie Martin (1992); John Earl Bush (1996).

¹⁶⁹ *Cherry v. State*, 12 April 2007.

¹⁷⁰ For example, *Nixon v. State*, 22 January 2009; *Franqui v. State*, 6 January 2011.

¹⁷¹ *Hall v. State*, 20 December 2012.

inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.

Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise."

The Court noted that in 41 US states (including 18 abolitionist states), an individual with an IQ of 71 would "not be deemed automatically eligible for the death penalty". Once again, Florida was an outlier, and had showed a chilling determination over the years to defend its unreasonable position. Freddie Hall's case was sent back to the Florida Supreme Court which overturned his death sentence. It found "unrefuted evidence" that he "meets the clinical and statutory definition of intellectual disability" and that he had been "intellectually disabled his entire life".¹⁷²

On 1 December 2016, the Florida Supreme Court remanded Roger Cherry's case to the trial level court for an evidentiary hearing on his intellectual disability claim given the *Hall* ruling. Justice Pariente noted that the Court had been wrong in 2007, and that she had been "part of the Court in *Cherry* that made a legal error – one that could literally mean the difference between life and death". On 10 April 2017, Roger Cherry was sentenced to life imprisonment after the prosecution decided to no longer challenge his intellectual disability claim. His lawyer wrote: "Roger Cherry had had four evidentiary hearings over the previous 20 years, including the hearing in 2005 at which both court appointed experts, including the State's hand-picked expert, concluded that he was intellectually disabled. At that hearing, both experts testified that Mr Cherry's IQ score of 72 met the standard for intellectual disability and that the state courts should consider the SEM. The state courts rejected the experts' testimony and instead adopted the Cherry Rule – a bright line cut-off of an IQ score in determining intellectual disability. The Cherry Rule was finally reversed [in *Hall v. Florida*] for all of the reasons that had been argued almost a decade before in Mr Cherry's case."

The Hall and Cherry cases show a state willing to defend the indefensible for years, even decades. Those lawyers whose clients have claims of intellectual disability today continue to face this hard-line attitude.

Meanwhile, the US Supreme Court had handed down its *Hurst* ruling in January 2016, and since then several individuals with intellectual disability claims have had their death sentences overturned pursuant to *Hurst* and their cases remanded for resentencing. The outcomes, including in relation to the intellectual disability issue, remain to be seen.

At Willie Hodges' 2008 sentencing, a mental health expert testified that the defendant had twice been assessed as having an IQ of 66. The expert's own testing put the defendant's IQ at 62, and he concluded that Hodges had impaired conceptual and social skills. A psychologist also testified that jail records indicated that Hodges had been diagnosed with PTSD, anxiety disorder and depression. For the prosecution, a psychologist testified that he had assessed Hodges' IQ at 69 and 65 on another test. Although this expert had said in a pre-trial hearing that he believed Willie Hodges had intellectual disability, he testified that he had since concluded that he did not, on the basis that he did not have deficits in adaptive functioning. The jury voted 10-2 for the death penalty.

At a subsequent hearing before the judge, another mental health expert testified for the defence that, in his opinion, Willie Hodges had intellectual disability. The defence psychologist who had testified before the jury also again said that he believed Willie Hodges had intellectual disability. The judge found that at the time of the murder "the defendant was under the influence of an extreme mental or emotional disturbance"; that his capacity "to conform his conduct to the requirements of the law was substantially impaired", and other mitigating factors having to do with Hodges's "low intelligence, difficult upbringing and background, mental and emotional problems, and similar or related matters". The judge decided that Willie Hodges did not have deficits in adaptive functioning and sentenced him to death. The Florida Supreme Court upheld that decision.¹⁷³ Seven years later, in March 2017, it overturned the death sentence pursuant to *Hurst* and remanded for a new sentencing hearing.

On 2 April 2012, a Duval County jury recommended by nine votes to three that Arthur Martin be sentenced to death for a murder committed on 28 October 2009. The judge imposed the death sentence on 3 August 2012 after finding a number of mitigating factors relating to intellectual functioning. The judge gave "slight" weight to the fact that Arthur Martin was "functionally illiterate" and had a "learning disability"

¹⁷² *Hall v. Florida*, Florida Supreme Court, 8 September 2016.

¹⁷³ *Hodges v. State*, 2 December 2010.

and “some” weight to the mitigating evidence of his “low cognitive functioning”. The judge gave “no weight” to the fact that the jury had been less than unanimous for the death penalty.

Having presented no witnesses at the guilt/innocence phase of the trial, the defence presented three at the sentencing phase: the defendant’s sister, his mother, and a court-appointed psychologist. In 2011, the latter had assessed Arthur Martin’s IQ at 54, which the psychologist testified placed him in the “mildly mentally retarded range”. However, he did not definitively conclude that Arthur Martin had intellectual disability as the psychologist was unable to show its onset before the age of 18 and adaptive deficits in that childhood period. He had been unable to fully review school records because a majority of them had been destroyed when Arthur Martin turned 25 years old. Prison records indicated that he was assessed as “low functioning”. In various tests over the years his IQ had been assessed at 58, 64, 71 and 94. At the sentencing, the psychologist testified that his assessment in 2011 was the only “full-scale” test that Arthur Martin had been administered. At a hearing on 15 March 2017, the state conceded that Arthur Martin was entitled to a new sentencing phase pursuant to *Hurst*. That sentencing had not yet been held by August 2018 as his conviction was still being appealed.

Harry Phillips, who turned 73 years old in April 2018, has been deemed not to be entitled to *Hurst* relief, because his death sentence became final in 1998, four years before *Ring*.¹⁷⁴ He remains on death row, sent there after a jury voted 7-5 for the death penalty. At a post-*Atkins* hearing, an expert said he had assessed his IQ at 74 and concluded that he had adaptive deficits, manifested before the age of 18, and that he had intellectual disability. Another expert testified that Harry Phillips had an IQ of 70 but was unable to make a categorical assessment on intellectual disability, concluding that he would “place Phillips in the retarded category in some areas and the borderline category in others”.¹⁷⁵ For the state, a neuropsychologist testified that in his view, Harry Phillips was functioning at a low average level of intelligence, but did not have intellectual disability. The trial court ruled that intellectual disability had not been proved and the Florida Supreme Court affirmed that. His case, including the intellectual disability issue, was pending in the US Court of Appeals at the time of writing. On 14 June 2018, a state court judge issued an order denying further evidentiary development in her court.

The following case examples illustrate the sort of challenges being faced by those representing death row prisoners with claims of intellectual disability in Florida in the face of the state’s continuing pursuit of executions.

6.1 THE CASE OF TAVARES WRIGHT

‘He was born with fetal alcohol syndrome and microcephaly, conditions that limited the growth of his brain to two thirds the size of normal’

Petition to US Supreme Court, *Tavares Wright v. State of Florida*, 2017

After two mistrials in 2003, on 13 November 2004 a jury found Tavares Wright guilty of two counts of first-degree murder during a carjacking in April 2000 in which two people were shot dead. Tavares Wright then waived his right to a jury in the sentencing phase, and on 12 October 2005, the judge sentenced him to death for each of the two murders.

Tavares Wright was 19 at the time of the crimes. His co-defendant, a year older than Wright, was tried separately and also convicted of two counts of first-degree murder. He was sentenced to life. There was no eyewitness testimony to definitely establish who was the triggerman; the prosecution “advanced theories that both defendants were equal participants in the crime”.¹⁷⁶

At the sentencing hearing in May 2005, Tavares Wright’s lawyers presented evidence of his traumatic childhood, including parental neglect and abandonment. Two experts testified that his exposure *in utero* to cocaine and alcohol had caused some microcephaly, with some traumatic injury to his brain. They variously testified that he had borderline intellectual functioning, foetal alcohol syndrome, and had

¹⁷⁴ *Phillips v. State*, Florida Supreme Court, 22 January 2018.

¹⁷⁵ *Phillips v. State*, Florida Supreme Court, 20 March 2008.

¹⁷⁶ *Wright v. Florida*, Florida Supreme Court, 2009.

adaptive deficits. The judge held a separate hearing four months later and determined that the defendant did not have intellectual disability under Florida's statutory definitions which required an IQ score of 70 or below before other evidence of intellectual disability could be presented.

The judge sentenced Tavares Wright to death despite finding a number of mitigating factors of "some weight", including that the defendant had been under "extreme mental or emotional disturbance" at the time of the crime; his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been "substantially impaired"; he had endured emotional deprivation during his childhood, his low IQ affected his judgment and perceptions, he had neurological impairments which affected his impulse control and reasoning ability, and he lacked mature coping skills.

The claim was raised that Tavares Wright's trial lawyers had failed to adequately investigate evidence of intellectual disability. An expert testified that when Wright's childhood IQ scores were corrected for the "Flynn Effect" (upward drift of scores over time unless tests are reset), he met the statutory measure for intellectual disability, with corrected scores of 70 and 69 taken before he was 18. She found evidence of adaptive deficits, including in school records classifying him as emotionally and learning disabled.

While Tavares Wright's appeal was pending, the US Supreme Court issued its *Hall* ruling. The case was remanded to the trial court for a determination of the intellectual disability claim under *Hall*. The lower court conducted an evidentiary hearing, and ruled against Wright, finding that his prior IQ scores between 75 and 82 did not show significant sub-average intellectual functioning under the Florida statute and although his adaptive behaviour could be argued to show intellectual disability, it had not been proved by clear and convincing evidence. The Florida Supreme Court upheld this, also ruling that *Hurst* did not apply to the death sentence because he waived his right to jury sentencing. Because his intellectual functioning had not been proven to be at a level that would render his execution unconstitutional, he could not challenge the validity of the waiver on the grounds of intellectual disability.¹⁷⁷

Two weeks later, on 28 March 2017, the US Supreme Court issued a ruling on another state's scheme for determining intellectual disability in capital cases. In *Moore v. Texas*, it found fault with the Texas scheme that relied on non-scientific factors in making such determinations. Its use of "lay perceptions" and "stereotypes" of intellectual disability was incompatible with the requirements of *Hall v. Florida* that adjudications of intellectual disability must be "informed by the views of medical experts".

Tavares Wright's lawyers appealed to the US Supreme Court arguing that the Florida Supreme Court (FSC) had made the sort of errors in assessing Wright's adaptive functioning highlighted in *Moore*. The FSC had "disregarded the diagnostic framework for intellectual disability established in *Moore v. Texas*, *Hall v. Florida*, and *Atkins v. Virginia* by treating intelligence tests as dispositive of intellectual disability and requiring proof of adaptive deficits beyond mild intellectual disability... The FSC erred in treating IQ scores as dispositive of death eligibility and deviating from current medical standards in assessing adaptive functioning". They said "clinicians warn against assessing adaptive strengths in controlled settings such as prisons", but the FSC had done just that, "by diagnosing Wright as fully intellectually capable based on skills performed in a controlled environment with assistance from other inmates":

"Because Wright has lived in prison since age nineteen, his childhood behavior is the only available evidence of his true adaptive functioning outside of prison. The FSC's flawed analysis in Wright's case accomplished a miraculous cure for intellectual disability caused by a decade on death row. This is a classic example of backwards legal engineering. By looking solely to adult adaptive behavior in prison and ignoring childhood indicators of intellectual disability, the FSC supplants uninformed legal judgement for expert medical judgement... More egregiously, the FSC ignored constitutional standards by holding that Wright's trouble reading and writing were attributable to a lack of education, poverty, 'neighborhood culture' and a learning disability, rather than a deficit in conceptual or academic adaptive functioning. *Moore's* holding is clear. Scientific consensus has concluded that poverty, childhood trauma, and learning disabilities are viewed as *risk factors* for intellectual disability rather than evidence of its nonexistence."

On 16 October 2017, the US Supreme Court remanded the case to the FSC for "further consideration in light of *Moore v. Texas*". His lawyers maintain that "experts agreed that Wright suffers from significantly sub-average intellectual functioning" and that his IQ is in the 69-81 range; "eight experts documented that Wright had below average intellectual functioning in the borderline range".¹⁷⁸ The state argues that the *Moore* decision changes nothing; the FSC should "again reject his claim of intellectual disability".¹⁷⁹

¹⁷⁷ *Wright v. Florida*, 16 March 2017, revised opinion.

¹⁷⁸ *Wright v. Florida*. Supplemental initial brief of appellant on remand, In the Florida Supreme Court, 28 December 2017.

¹⁷⁹ *Wright v. Florida*. Supplemental answer brief of appellee following remand, In the Florida Supreme Court, 17 January 2018.

6.2 THE CASE OF GUILLERMO OCTAVIO ARBELAEZ

‘In hindsight, perhaps counsel could have been more aggressive in his investigation. But there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance’

Arbelaez v. Crosby, Florida Supreme Court, 27 January 2005

To succeed on a claim of inadequate legal representation, a prisoner must prove both deficient performance by the lawyer *and* that it affected the outcome, and must do so in the face of US law requiring appeal courts to give high deference to a lawyer’s decisions and federal courts to give high deference to state court decisions.

The Florida courts upheld the death sentence imposed on Guillermo Octavio Arbelaez, a now 60-year-old Colombian national convicted in Miami-Dade County in 1991 of the murder of his former girlfriend’s five-year-old child. In 2000, the Florida Supreme Court ordered a hearing into the claim that the trial lawyer had been ineffective during the sentencing phase for failing to present expert testimony about Guillermo Arbelaez’s epilepsy, or any mental health evidence about his possible intellectual disability, organic brain damage, mental disability and suicide attempts, or evidence of his family history of abuse and deprivation. Apparently, the trial lawyer, who had never presented a mitigation case before, had prepared for this sentencing during the six days of the guilt phase.¹⁸⁰ The sentencing phase lasted half a day.

After the evidentiary hearing, the trial court denied relief, saying that the lawyer’s performance had not been deficient. The Florida Supreme Court disagreed, saying that the lawyer

“did not conduct a reasonable investigation of Arbelaez’s mental health status. To the contrary, counsel ignored various red flags indicating that Arbelaez could have significant mental health problems... The lack of a serious and sustained effort by counsel to pursue mental health mitigation, despite various red flags indicating Arbelaez’s low intelligence and his history of depression, amounted to deficient performance.”

However, the test is two-pronged, and the Court said the defendant had not been prejudiced. While “expert testimony relating to Arbelaez’s low intelligence would have been vastly preferable” and “counsel was deficient in failing to arrange for such testimony”, the Court said it was “confident” that “such testimony would not have changed the outcome.”

None of the defendant’s relatives had testified at the trial. At the evidentiary hearing, two of his sisters appeared as witnesses. They testified that their brother endured epileptic episodes, was beaten by their father on a daily basis because of his low intelligence and that he had “wanted to kill himself” and drank poison on several occasions. After one of his attempted suicides, their brother was sent to a mental hospital “far away.” Both said they would have testified at the trial if asked. Guillermo Arbelaez’s post-conviction lawyer had also obtained documents for the evidentiary hearing, including an affidavit from a teacher who described Arbelaez as a “poor student” with “mental problems”; a letter from an emergency doctor with Colombian social services, who had treated Arbelaez “for a suicidal attempt and depression” in 1976; and a letter from a psychiatrist who had treated him in Colombia with electroshock therapy while he was hospitalized for a suicide attempt. A psychologist testified that in her opinion he had borderline intelligence and likely had organic brain impairment and a neuropsychologist concluded that he had intellectual disability or organic brain impairment. For the state, a clinical psychologist disagreed with such diagnoses.

The Florida Supreme Court upheld the death sentence in 2005.¹⁸¹ In 2014, applying “a strong presumption that counsel’s conduct fell within the range of reasonable professional assistance”, and “deference to the state court’s decisions”, the US District Court did the same. In 2016, the US Court of Appeals affirmed this.¹⁸²

¹⁸⁰ *Arbelaez v. Jones*, Initial brief of petitioner-appellant, 11th Circuit Court of Appeals, October 2015.

¹⁸¹ *Arbelaez v. Crosby*, Florida Supreme Court, 27 January 2005.

¹⁸² *Arbelaez v. Corrections*, 12 October 2016

6.3 THE CASE OF JERMAINE FOSTER

‘The State has repeatedly argued that Mr Foster has ‘received a full hearing on his intellectual disability claim in which he was afforded an opportunity to present evidence as to all three prongs of the test’. This is blatantly inaccurate’

Foster v. State, Appellant’s reply brief. In the Florida Supreme court, 8 May 2018.

Eight years before the Supreme Court issued its *Atkins* ruling banning the use of the death penalty against people with intellectual disability, and two decades before it found Florida’s law in breach of *Atkins* in *Hall v. Florida*, Jermaine Foster was convicted of two counts of first-degree murder. One of the mitigating factors found by the judge was that the defendant “is mildly mentally retarded”. Nineteen years old at the time of the crimes, Jermaine Foster is now 44. He has spent more than half of his life on Florida’s death row.

The mitigation case presented at the July 1994 sentencing phase included testimony from a doctor who had assessed Jermaine Foster as having an IQ of 75 and as having “adaptive dysfunction”. The judge sentenced him to death despite finding that he was “mildly mentally retarded” (five years earlier, in 1989, the US Supreme Court had ruled that there was no categorical bar against executing people with “mental retardation”). The judge also found that Jermaine Foster’s capacity to appreciate the criminality of his conduct or conform his conduct to the requirements was substantially impaired; that he had endured “an abusive childhood”, and “suffers from a substance abuse problem and... was to some extent under the influence of drugs and alcohol” at the time of the crime.

Six years after the trial, a post-conviction evidentiary hearing was held. The doctor who had testified at the trial did so again. He said that Jermaine Foster “could be considered mildly retarded”, and that “he didn’t keep a job”, had not “kept any accounts”, and “always depended on other people for support”. He described Jermaine Foster as “a follower”.

The *Atkins* ruling was issued before the Florida court had issued its decision. Jermaine Foster’s lawyer requested another hearing, but instead the court summarily denied the intellectual disability claim and the Florida Supreme Court upheld this in 2006. Then in 2014, the US Supreme Court issued its *Hall v. Florida* ruling, finding that Florida’s law employed a rigidity that created “an unacceptable risk that persons with intellectual disability will be executed”.

In 2017, new legal counsel for Jermaine Foster filed a motion claiming again that Jermaine Foster has intellectual disability. Because the state was not disputing the IQ score of 75 and that this was within the range for intellectual disability under *Hall v. Florida*, the question of adaptive deficits and whether the intellectual disability had manifested before the age of 18 became the focus. The defence submitted a report from an experienced psychologist, whose expertise had earlier been relied upon by the Florida Supreme Court when ruling that the *Hall* opinion would apply retroactively.¹⁸³ He concluded that Jermaine Foster has adaptive deficits in all three areas described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) – conceptual, social, and practical (deficits in one area is required to meet the adaptive deficit prong for intellectual disability). The psychologist concluded:

“Mr Foster does have significant adaptive deficits. It is also quite clear that these deficits originated in childhood... [H]is intelligence was previously tested with the current range for an intellectual disability diagnosis. A diagnosis of intellectual disability is appropriate for Jermaine Foster under the current professional and legal standards.”

The state’s main response to the claim was not with rebuttal evidence but to argue that the claim was procedurally barred. The trial-level court dismissed the petition on 17 November 2017, ruling that he “concurs with the State’s argument that all three prongs of the intellectual disability test have already been considered and therefore, Mr Foster is not entitled to an evidentiary hearing or any relief under *Hall*”. At the time of writing, Jermaine Foster was the only Florida death row prisoner whose intellectual disability claim was rejected under the illegal scheme adopted after *Atkins* not to have had a post-*Hall* evidentiary hearing on his claim.

¹⁸³ *Walls v. State*, Florida Supreme Court, 4 May 2017 (corrected opinion)

Snapshot: Prosecutorial misconduct, 40 years and counting



11 MARCH 1988. MAGDALENO ROSE-AVILA (CENTRE) NATIONAL DIRECTOR OF AMNESTY INTERNATIONAL USA'S CAMPAIGN TO ABOLISH THE DEATH PENALTY, OUTSIDE THE FLORIDA CAPITOL BUILDING. Photographer: FOLEY, MARK T. PHOTO Courtesy of the State Archives of Florida

Willie Darden, the subject of this press conference, was executed four days after it. At his 1974 trial, the prosecutor had argued to the jury that the (white victim/black defendant) crime was carried out “by what would have to be a vicious animal”; “it’s the work of an animal, there’s no doubt about it”; “As far as I am concerned... this person [is] an animal”; and “he shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.” The prosecutor repeatedly expressed the wish ‘that I could see [Darden] sitting here with no face, blown away by a shotgun’, (the victim had been shot in the face). Five US Supreme Court Justices wrote that the prosecutor’s conduct “deserves the condemnation it has received from every court to review it”, but decided it had not rendered the trial unfair. The four others dissented, accusing the majority of being “willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe”.¹⁸⁴

Prosecutorial misconduct in Florida did not end there. In 2004, urging the Pinellas County jury to vote for the death penalty for Troy Merck for a murder committed when he was 19, the prosecutor argued that he should be denied the mercy that he denied the victim. This, three Florida Supreme Court Justices said, was “in essence a demand for vengeance”. And in 2008, arguing for a death sentence against Renaldo McGirth for a murder committed when he was 18, the Marion County prosecutor argued that to consider lessening his culpability because of the possible role of the victim’s daughter in the shooting of her parents would “be like giving the pilots of two planes that crashed into the World Trade Center a pass... because it was Osama’s idea”. Two Florida Supreme Court Justices condemned this “completely inappropriate”, “highly emotional” argument.

At Anthony Farina’s resentencing for a crime when he was 18, the defence lawyer presented a Baptist minister who testified that since going to prison, the defendant had “sincerely accepted religion, studied the Bible, joined a church, and expressed a desire to minister to other inmates”. The prosecutor sought to deflect attention from this rehabilitation evidence by getting the minister to agree that, as a matter of Christian faith and according to passages from the Bible the prosecutor got him to read out, it was fine for a jury to vote for death. Anthony Farina was sentenced to death, but in 2013 this was overturned by a federal court because of the failure of his first appeal lawyer to raise a prosecutorial misconduct claim despite the “unremitting” injection of religious authority into the sentencing. Until late 2016, the Volusia County prosecution was intending to seek the death penalty again at a resentencing. In April 2017, however, Anthony Farina was resentenced to life pursuant to a plea deal.

On 18 February 2016, for the second time, the Florida Supreme Court granted Cuban national Ana Maria Cardona a new trial. At the 1992 trial, it had been the prosecutor’s failure to disclose statements made by a co-defendant. At the 2010 retrial, the prosecutor had “repeatedly crossed the line” into improper and inflammatory arguments. In February 2017, the prosecution announced it would not seek the death penalty at her retrial. The jury votes for death had been 8-4 and 7-5 at her first two trials, and under the new post-*Hurst* law, a unanimous jury was required. The Miami-Dade County prosecution could no longer rely on a bare majority for death.

¹⁸⁴ *Darden v. Wainwright*, 23 June 1986, Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens.

7. FLORIDA PLUS FEDERAL, FINALITY OVER FAIRNESS

‘Many observers, on and off this Court, have questioned the reliability and fairness of the imposition of the death penalty in America’

Elmore v. Holbrook, US Supreme Court, 17 October 2016, Justices Sotomayor and Ginsburg dissenting

Paul Howell, Juan Chavez and Chadwick Banks were executed in 2014. While it was the State of Florida which had put each of them to death, it had received a helping hand from the federal government in getting them to the execution chamber. That help came in the form of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, signed into law by President Bill Clinton on 24 April 1996. The AEDPA compromised fairness in pursuit of finality. In 1998, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that this legislation had “further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments”.¹⁸⁵ The AEDPA has contributed to manifest injustices in capital cases.¹⁸⁶

The AEDPA placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted federal court ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited “successive” appeals except in very narrow circumstances. The US Supreme Court has said that under the AEDPA federal courts must operate a “highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt”.¹⁸⁷ Even before the AEDPA, when federal courts addressed claims of, for example, inadequate defence representation, “judicial scrutiny of counsel’s performance [had to] be highly deferential”.¹⁸⁸ The AEDPA added another layer of deference; now federal review has to be “doubly deferential”.¹⁸⁹

Under the AEDPA, state prisoners must file their federal habeas corpus petitions within one year of their convictions and sentences becoming final, that is when affirmed on direct appeal (here by the Florida Supreme Court). The clock will be stopped for the time during which a state post-conviction appeal (that is, other than the direct appeal) has been properly filed and is pending.

Chadwick Banks was the third Florida inmate to be executed in 2014 whose lawyer had missed the one-year deadline under the AEDPA. All three went to their deaths without their claims of constitutional violations being reviewed on their merits by the federal courts. For Chadwick Banks, this meant that his claim of ineffective assistance of trial counsel went unreviewed:

“Chadwick Banks might as well have had no lawyer at all. His court-appointed trial lawyer had the pediatrician’s records but did not find out about the beatings and head injuries from those beatings or the escalating drinking that resulted in car accidents and more head injuries... Chadwick Banks’ back and legs are covered with scars from severe beatings. The scars are noted in his pediatrician’s records as early as 3 years old. The beatings continued until he grew big enough to fight back. Then his father tried to kill him with a gun... All of this evidence, and more, could have been presented in

¹⁸⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Mission to the United States of America. UN Doc.: E/CN.4/1998/68/Add.3, 22 January 1998.

¹⁸⁶ For example, see Amnesty International Urgent Action, 21 January 2015, <https://www.amnesty.org/en/documents/amr51/0004/2015/en/>

¹⁸⁷ *Woodford v. Visciotti*, 537 U.S. 19 (2002).

¹⁸⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁸⁹ See *Knowles v. Mirzayance*, US Supreme Court (2009).

federal court. But the lawyer missed the deadline.”¹⁹⁰

The State moved for the US District Court to summarily deny the habeas corpus petition as “time-barred without further judicial proceedings”.¹⁹¹ The federal judge granted the motion, finding that there was no excuse for the untimely filing, and that under 11th Circuit precedent, “attorney error does not create the ‘extraordinary circumstances’ which equitable tolling requires”.¹⁹² The 11th Circuit Court’s position was that “a truly extreme case” of attorney misconduct would be required to trigger equitable tolling (a legally justifiable reason for the clock to be stopped on the one-year limit) and that even “grossly negligent” attorney conduct could not “rise to the level of egregious attorney misconduct” unless the prisoner provided “proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part”.

Meanwhile, the US Supreme Court agreed to take the Florida case of death row prisoner Albert Holland to review this 11th Circuit standard. The Supreme Court ruled in *Holland v. Florida* in 2010 that the 11th Circuit standard was “too rigid”; “gross negligence” by an attorney could be the “extraordinary circumstances” to trigger equitable tolling on AEDPA’s one-year statute of limitations.¹⁹³

Chadwick Banks’s lawyers appealed to the District Court to reconsider the summary dismissal of Banks’s habeas petition given the *Holland* ruling. The judge denied the motion, and the 11th Circuit affirmed this in October 2012. On 13 November 2014, as Chadwick Banks’s execution approached, the 11th Circuit again ruled against him. One of the three judges wrote that, “given the historic importance of the writ of federal habeas corpus” it was “troubling” that “Mr Banks will be executed without ever having received federal review of the merits of his constitutional claims”. He added, “sadly, Mr Banks is not alone” and “neither is he likely to be the last”, given that there were “about three dozen men on Florida’s death row who missed their federal filing deadline”.

Writing in the Chadwick Banks case, Judge Beverly Martin pointed out that the US Supreme Court had written – in its *Hall v. Florida* opinion issued only six months earlier that “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”¹⁹⁴ Judge Martin continued that “I cannot say with confidence that he has been given a ‘fair opportunity’ to show any constitutional violation that might be associated with his conviction or the sentence of death that will be carried out today”. The US Supreme Court declined to intervene, and Chadwick Banks was executed on 13 November 2014.

In 2014, Judge Martin wrote that, by her count, at least 34 Florida death row prisoners had missed their one-year deadlines under the AEDPA, or about 12% of those whose cases were at that stage. She noted that on several occasions, where the AEDPA deadline had been met and so federal review was undertaken, the US Court of Appeals for the 11th Circuit, and the US Supreme Court, had found serious errors in Florida cases after they had been upheld by the state courts. They included:

- 2009 – Former soldier George Porter was granted relief by the US Supreme Court because of trial counsel’s failure to investigate and present mitigating evidence. Evidence presented on appeal “described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.”
- 2011 – The 11th Circuit overturned Richard Cooper’s death sentences for three murders committed when he was 18. His trial lawyer had failed to present evidence of Cooper’s abusive childhood from which he was emerging at the time of the crimes.
- 2013 – Anthony Farina’s death sentence for a crime committed when he was 18 was overturned by the 11th Circuit because his lawyer had failed to object to the prosecutor’s repeated injection of religious authority at the re-sentencing – “repeatedly and improperly” using religion to support his request for the death penalty.¹⁹⁵ Anthony Farina was sentenced to life imprisonment in 2017.

If any of these inmates had missed their AEDPA filing deadline, Judge Martin noted, “they likely would have been put to death without ever having received a look by the federal courts into the merits of their claims.”

¹⁹⁰ Opinion, Susan Cary: Death-row inmates denied rights because of missed deadlines, Gainesville Sun, 13 November 2014. Ms Cary is a very experienced capital lawyer in Florida, long involved in capital cases there.

¹⁹¹ *Banks v. Crosby*, Respondents’ motion for summary judgment. In the US District Court for the Northern District of Florida, 18 January 2005.

¹⁹² *Banks v. Crosby*, Order. US District Court for the Northern District of Florida, 29 July 2005.

¹⁹³ *Holland v. Florida*, 14 June 2010.

¹⁹⁴ *Hall v. Florida*, 27 May 2014.

¹⁹⁵ More constitutional errors have been found on federal review since then. In 2015, the 11th Circuit found John Hardwick’s trial lawyer failed to conduct “even a rudimentary investigation” into the “copious and powerful mitigating evidence” about his client, including of his abusive childhood and his mental disability. *Hardwick v. Secretary*, US Court of Appeals for the 11th Circuit, 18 September 2015.

Snapshot: Act in haste, repent at leisure



1972. MEMBERS OF FLORIDA'S HOUSE OF REPRESENTATIVES DISCUSS DEATH PENALTY LEGISLATION. IN DECEMBER 1972 FLORIDA BECAME THE FIRST STATE IN THE USA TO ENACT A NEW CAPITAL STATUTE AFTER THE US SUPREME COURT'S FURMAN RULING. Photograph courtesy of State Archives of Florida

On 12 May 1964, Sie Dawson – an African American man convicted by an all-white jury on the basis of an allegedly coerced confession – was executed despite serious doubts about his guilt, becoming the last person to be put to death in Florida under its pre-*Furman* law.¹⁹⁶ Seven years after that, in May 1971, David Keaton, an 18-year-old African American, was sentenced to death in Florida by an all-white jury for the murder of a white off-duty police officer. He was exonerated two years later. His conviction was based on a coerced confession. He became the first death row prisoner in the USA to be exonerated following *Furman* (sentenced to death a year before *Furman*, his death sentence was reduced to life imprisonment in late 1972 because of the ruling, before being granted a new trial in 1973 and having his charges dismissed).¹⁹⁷

Within two years of the Florida legislature passing its post-*Furman* statute in late 1972, the state had put another man on death row for a crime he did not commit. Delbert Tibbs, an African American man, was arrested for the rape of a white teenager and murder of her white male companion. He was put on trial before an all-white jury and sentenced to death for the murder and life imprisonment for the rape. In 1976, 26 days after the US Supreme Court upheld Florida's new capital law, the state Supreme Court overturned the conviction on the basis that there was not the evidence to support it. The prosecution decided not to retry him and dismissed all charges.¹⁹⁸

Florida accounts for more wrongful convictions discovered in capital cases in the post-*Furman* era than any other state. The state that comes second to Florida on this list – Illinois – responded with a moratorium on executions and eventual abolition of the death penalty in 2011. Signing the abolitionist bill into law, the Illinois Governor said: "I have concluded that our system of imposing the death penalty is inherently flawed... [I]t is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right".

On 13 April 2013, the Florida House of Representatives passed the Timely Justice Act, a bill which, in the words of its sponsor Rep. Matt Gaetz, aimed to "fix the death penalty" in Florida by cutting "frivolous appeals". His stated aim was to cut the time between conviction and execution to eight years. In eight of the 27 cases of wrongful convictions discovered in Florida since 1973, the number of years between conviction and exoneration had been in double figures.

In 2015, the Governor of Pennsylvania announced a moratorium on executions in his state. While the discovery of six men sentenced to death in Pennsylvania for crimes they did not commit featured in his reasons for the move, executions in Florida have continued to receive political backing even though there been more than four times as many such cases uncovered there.

¹⁹⁶ See Miscarriages of Justice in Potentially Capital Cases, H.A. Bedau & M. L. Radelet, Stanford Law Review, November 1987, Vol. 40, p. 109. ("The conviction by an all-white male jury was based solely on a confession obtained from Dawson [black] after he had spent more than a week in custody without the assistance of counsel, and on an accusation by the victim's husband. Dawson had an IQ of 64. At trial, Dawson repudiated his alleged confession, claiming it was given only because 'the white officers told him to say he killed Mrs Clayton or they'd give him to the mob outside.'...Dawson had claimed that the victim's husband had committed the murders. There were no eyewitnesses and the circumstantial evidence was slight and inconclusive").

¹⁹⁷ *Anderson v. State*, Florida Supreme Court, 8 September 1972, rehearing denied, 19 October 1972. *Keaton v. State*, 21 February 1973.

¹⁹⁸ Delbert Tibbs died in 2013 and David Keaton in 2015.

CONCLUSION

The grave problem of whether the death penalty should be imposed ought not to be a vehicle for political capital or to serve as an extraneous scapegoat to illogically appease our society's sense of guilt, fear, passion, and vengeance

State v. Dixon (1973), Florida Supreme Court, Justice Ervin dissenting

In July 1973, the Florida Supreme Court became the first state high court in the USA to uphold a post-*Furman* death penalty statute, setting Florida on the road to where we find it today in relation to a punishment abandoned by much of the world. The Court did so over the dissent of Justice Richard Ervin, a former Florida Attorney General, who believed that the legislature had acted hastily and without proper consideration of the issue. He expressed the hope that it would reconsider before too long. It has not.

Four decades later, the Florida Supreme Court's decision to apply the 2016 *Hurst* ruling to only half of those on death row is unfair. This partial retroactivity has added a layer of arbitrariness to a punishment which in the USA is already riddled with inconsistency and unreliability, as pointed out by US Supreme Court Justices Breyer and Ginsburg in 2015. The following year, they reiterated their concern in the case of a prisoner who was 18 at the time of the crime, had an IQ of 74, and was tried in a jurisdiction that accounted for a disproportionate number of death sentences. He "may well have received the death penalty", they suggested, "because of an arbitrary feature of his case, namely, geography".



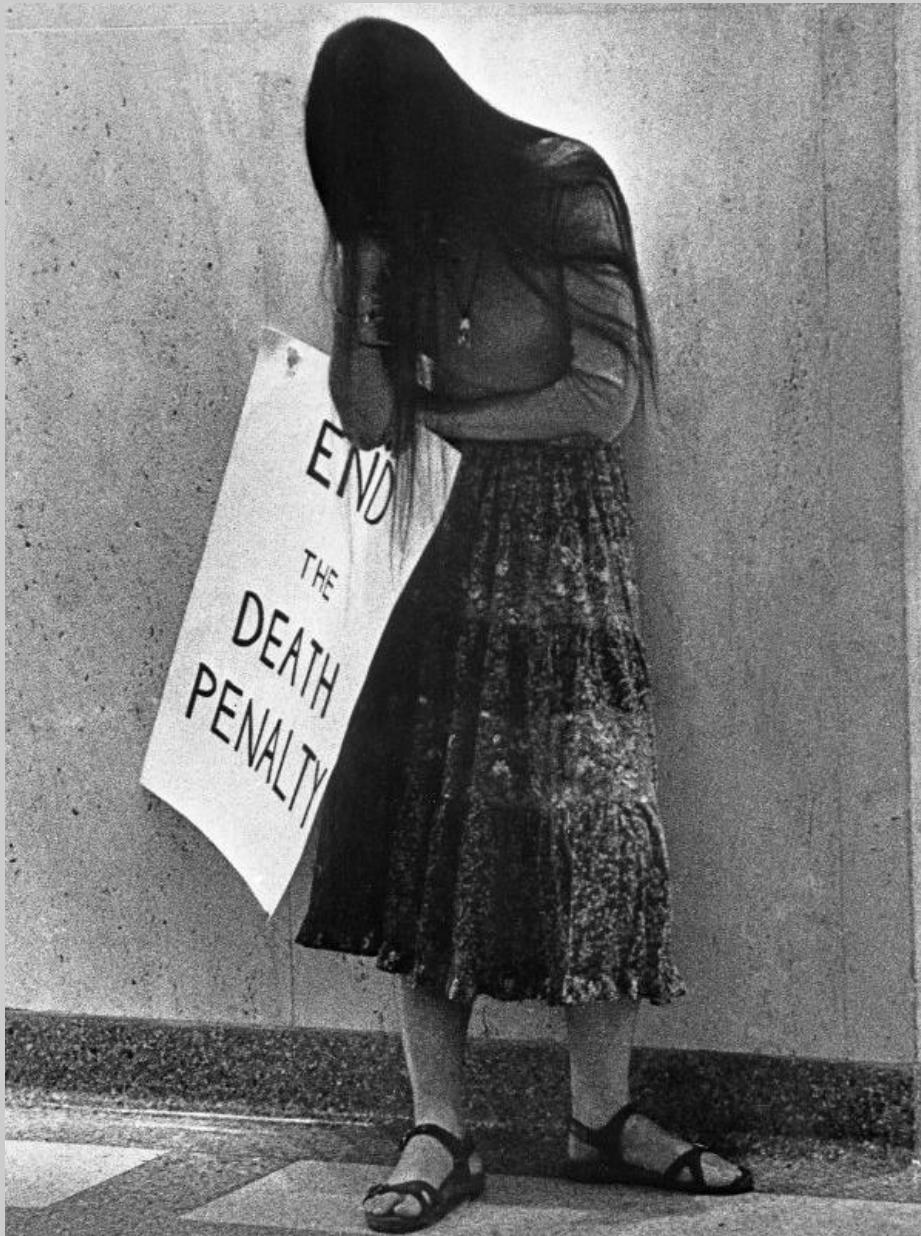
Florida is one of a handful of states which together account for the bulk of death penalty use in the USA. At the time of *Hurst*, there were more than 50 people on death row in Florida alone for crimes committed when they were 18, 19 or 20, more than the total death row populations in 19 other states.¹⁹⁹ Some of these Florida prisoners, and others, had mental disabilities or claims of intellectual disability. Their cases beg the question raised by Justices Breyer and Ginsburg – namely, whether the death penalty is being limited to the “worst of the worst” as constitutionally required.

US constitutional law aside, in an increasingly abolitionist world, use of the death penalty against those who were young adults at the time of the crime or who had mental or intellectual disabilities seems ever more excessive. Not only have most countries turned against the death penalty against anyone, the international community has ruled it out as a sentencing option in international tribunals for even the worst crimes – genocide, war crimes and crimes against humanity. The UN General Assembly has repeatedly called for a moratorium on executions, pending abolition of the death penalty.

This is Rick Scott's final year as Governor of Florida, and in April 2018 he announced he would run for the US Senate in the elections in November. In his penultimate State of the State address in 2017, he said, “let's paint the picture of what we want Florida to look like in the future”. In his final such address in 2018, he urged Floridians to “recognize the larger role Florida plays globally”. This report seeks to encourage Florida to consider the global death penalty picture, and to imagine a future where The Sunshine State has joined the abolitionist cause.

¹⁹⁹ Arkansas, Colorado, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Virginia, Washington, and Wyoming. There are also 18 abolitionist states.

Snapshot: The long march



1979. DEATH PENALTY OPPONENT DURING DEMONSTRATIONS AT THE CAPITOL, TALLAHASSEE, FLORIDA. PHOTO COURTESY OF THE STATE ARCHIVES OF FLORIDA

Working to end the death penalty is a long-term effort, and Florida is a diehard state as far as this cruel punishment is concerned. In the four and a half decades since Florida reinstated the death penalty after the 1972 *Furman* ruling, country after country has turned against this punishment and today 142 countries are abolitionist in law or practice. In Florida, there have been more than 47,000 reported murders since the state enacted its post-*Furman* capital statute in December 1972.²⁰⁰ While “every murder is tragic”, wrote US Supreme Court Justice Stephen Breyer in 2015, “the constitutionality of capital punishment rests on its limited application to the worst of the worst”. Can anyone assert with confidence that those cases in Florida that have resulted in the death penalty were the “worst of the worst” crimes and offenders? Did geography, race, economic class, or other “irrelevant or improper factors” influence this outcome? (see *Glossip v. Gross*, US Supreme Court, 2015, Justice Breyer dissenting).

²⁰⁰ Source: Florida Statistical Analysis Center. Florida Department of Law Enforcement.

APPENDIX

A. ON DEATH ROW IN JANUARY 2016 (*HURST*), FOR CRIMES AT AGE 18 OR 19

Key: W = white; B = black; H = Hispanic; FSC = Florida Supreme Court

NAME	AGE	RACE	MITIGATING WEIGHT GIVEN TO AGE BY JUDGE	YEAR OF ORIGINAL TRIAL AND COUNTY	NOTES ON DEFENDANT'S BACKGROUND (FROM THE RECORD IN THE FLORIDA SUPREME COURT UNLESS OTHERWISE NOTED)	DEVELOPMENTS SINCE <i>HURST</i>
DARYL BARWICK	19	W	None	1986 Bay	Childhood of severe physical and emotional abuse especially at the hands of his father, was knocked unconscious on several occasions, evidence of brain damage, emotional age 12-14. Psychiatrist testified that physical abuse during childhood could have affected his conduct at the time of the crime. A clinical psychologist testified that Barwick was very unstable and disturbed.	28 February 2018, FSC found death sentence (12-0 jury vote) became final in 1996 and <i>Hurst</i> did not apply
BILLY KEARSE	18	B	None (original trial) "Some but not much" (resentence)	1991 St Lucie	Born to 15-year-old mother who drank alcohol excessively during pregnancy; parental neglect; physical abuse; at school for severely emotionally disturbed children; diagnosed with fetal alcohol effect resulting in neurodevelopmental problems; poor memory, motor skills, planning skills; IQ 69 at age 12; hyperactivity, impulsivity; mental age lower than chronological age; drinking alcohol and smoking from early age	First death sentence, on an 11-1 vote overturned in 1995. 1997 death sentence, on a 12-0 vote, became final in 2001
RANDALL JONES	19	W	None	1988 Putnam	Endured an "emotionally deprived and neglectful early environment" in mother's custody, said to be "very primitive, almost animalistic", when he first came to live with his father" at age six. Hospitalized in psychiatric facility at 11, diagnosed with borderline schizophrenic syndrome and borderline personality disorder. Stressors at time of crime included recent death of father and being discharged from military due to poor adjustment. A mental health expert testified that Jones's "emotionally deprived and neglectful early environment . . . set a pattern for the rest of his life," and that in his subsequent years Jones had trouble "compensat[ing] for that early neglect." ²⁰¹	Death sentence (11-1 jury vote) at 1991 resentencing became final in 1993
ALVIN MORTON	19	W	Very little	1994 Pasco	"Blue baby". Childhood marked by ill-health, neglect, poverty, family dysfunction. Alcoholic father was physically abusive to Alvin, would brag about how he had committed murder, and threatened to murder family members. When Alvin was one year old, father put him on an inflated inner tube and pushed it out into the middle of a lake and then tried to prevent the boy's mother from rescuing him. Violence continued until parents divorced when Alvin was eight years old after father was caught having sex with his daughter. Some evidence of brain damage and mental disability, and diagnosed with anti-social personality disorder attributed to his early childhood. Judge gave little weight to defendant being "a product of a highly dysfunctional family at least through age eight" and "was repeatedly physically abused by his alcoholic father".	2 February 2018, FSC found that his death sentence (following an 11-1 jury vote) became final in 2001 and so <i>Hurst</i> did not apply
JACK SLINEY	19	W	Little	1994 Charlotte	Immature for his age. Heavy alcohol use around time of crime, and possible abuse of steroids which may have led to hyperactive aggression.	31 January 2018, FSC found death sentence (7-5 jury vote) became final in 1998 and <i>Hurst</i> did not apply.

²⁰¹ *Jones v. McDonough*, Order, US District Court for the Middle District of Florida, 31 March 2008.

NAME	AGE	RACE	MITIGATING WEIGHT GIVEN TO AGE BY JUDGE	YEAR OF ORIGINAL TRIAL AND COUNTY	NOTES ON DEFENDANT'S BACKGROUND (FROM THE RECORD IN THE FLORIDA SUPREME COURT UNLESS OTHERWISE NOTED)	DEVELOPMENTS SINCE <i>HURST</i>
ANTONIO MELTON	18	B	None	1992 Escambia	“Strikingly immature” and “easily manipulated”, parental neglect. Federal judge noted evidence that Antonio Melton was “a follower, not a leader”; his “chronological age, at the time of the crime was far greater than his emotional maturity”; and that his “immaturity resulted in Melton being easily manipulated and susceptible to the influences of his more experienced peers”.	On 28 February 2018, FSC found that death sentence (8-4 jury vote) became final in 1994 and <i>Hurst</i> did not apply.
FRANK WALLS	19	W	Unknown	1992 Okaloosa	“Blue baby”, brain damage, organic brain dysfunction, ADHD and took Ritalin until age 13, contracted viral meningitis at age 12 and suffered severe headaches thereafter, bipolar disorder, significant paranoid thinking, impulsive acting out, emotional underdevelopment, substance abuse, and low IQ. At his 1992 retrial, among the mitigation factors that the judge found were that Walls was 19 at the time of the crime, had been classified as emotionally handicapped, suffered from brain dysfunction and brain damage, and functioned at the level of a 12-year-old because of his low IQ.	October 2016, FSC remanded for hearing into intellectual disability claim. 22 January 2018, FSC found death sentence (12-0 jury vote) finalized in 1995 and <i>Hurst</i> did not apply.
THOMAS MOORE	19	B	Slight	1993 Duval	According to appeal lawyers, upbringing “filled with degrading and senseless violence.” Father was shot dead when the boy was seven. He had “looked to the streets for a replacement which inevitably led to trouble he was too young to prevent”. Also: “Mr Moore was exposed to harmful and potentially deadly hazardous waste in and around his neighborhood while growing up... While growing up, Mr Moore suffered from repeated migraine headaches and month-long bouts of vomiting. These frequently occurring conditions suffered by Mr Moore are symptomatic of chronic exposure to lead. Mr Moore's exposure to lead was of such an extent that it adversely affected Mr Moore's learning ability, damaged his nervous system...”	
BOBBY RALEIGH	19	W	Unknown	1995 Volusia	Chaotic early childhood, witnessed physical abuse in the home, allegedly victim of sexual abuse as early as age four. Difficulties with abstract reasoning, logical analysis, conceptual processes, had low self-esteem, was a follower, easily manipulated by others, would make inappropriate decisions under stress. Self-harming during adolescence, and suicide attempt. Diagnosed with cognitive disorder related to developmental factors and huffing of Freon, gas used in air conditioning, depression, PTSD, and borderline personality disorder and dependent personality disorder. Substance abuse from teen years, including inhalants, LSD and alcohol. Had “consumed a great deal of alcohol before the murders”. ²⁰² Pled guilty, which the trial judge found to be mitigating evidence. The judge also found that Raleigh was remorseful.	On 28 February 2018, FSC found that death sentence (12-0 jury vote) became final in 1998 and <i>Hurst</i> did not apply
JERMAINE FOSTER	19	B	None	1994 Orange	Trial judge found that as a child, Foster was “subject to physical and mental abuse, deprived of proper nurturing and guidance, and was repeatedly exposed to the physical abuse of his mother by her live-in boyfriend. He often failed to receive proper nutrition and clothing. Expert testimony established that the Defendant suffers some organic brain damage, is mildly mentally retarded, and has a low IQ [75]. Given the long duration and extent of his drug and alcohol use the Court concludes he suffers from a substance abuse problem and testimony showed he was to some extent under the influence of drugs and alcohol during the murders”	In August 2018, the claim that Jermaine Foster has intellectual disability was pending before FSC. Also that <i>Hurst</i> should apply to his death sentence

²⁰² *Raleigh v. Sec.*, Order, US District Court, Middle District of Florida, 19 September 2013. Amended petition for habeas corpus, 9 May 2012. *Raleigh v. State*, Florida Supreme Court, 13 November 1997.

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JOSHUA NELSON	18	W	Great	1996 Lee	Highly dysfunctional childhood, sexual abuse, family history of mental disability, emotional age of 12 or 13	On 31 January 2018, FSC found death sentence (12-0 jury vote) became final in 2000 and <i>Hurst</i> did not apply
KEVIN FOSTER	18	W	None	1998 Lee	Some post-conviction expert opinion pointing to possible brain damage and bipolar disorder. Rejected an offer of a life sentence in return for a guilty plea	On 29 January 2018, FSC found death sentence (9-3 jury vote) became final in 2001 and <i>Hurst</i> did not apply
TAVARES WRIGHT	19	B	Some	2000 Polk	Exposure to cocaine and alcohol in utero resulting in brain underdevelopment. Parental neglect and virtual abandonment, fetal alcohol syndrome, frontal lobe impairment, low IQ, borderline intellectual disability. In 2017, US Supreme Court remanded to FSC for reconsideration, in light of <i>Moore v. Texas</i> , of its 2017 denial intellectual disability claim	16 March 2017, FSC Upheld his death sentence, concluding that his waiver of jury sentencing at his trial was valid and as a result he was not entitled to relief under <i>Hurst</i> .
PAUL EVANS	19	W	Little	1999 Indian River	ADHD, on Ritalin from age of 6. Possible brain damage, diagnosis of schizoid-type personality disorder. Another mental health expert diagnosed him with a "significant profile of current cognitive impairments" ²⁰³ The trial judge gave "moderate" weight to the mitigating factor that Evans "suffered great trauma during childhood" when he accidentally shot his younger brother	<i>Hurst</i> relief, 20 March 2017. Death sentence on 9-3 jury. June 2017, Indian River County prosecution filed notice of intent to seek the death penalty at resentencing
ADAM DAVIS	19	W	Little	1999 Hillsborough	Early years were marked by "chaos, neglect and instability". Was born to a 16-year-old mother, who regularly abandoned him for days or weeks at a time. Father remarried and Adam Davis' discovery that his stepmother was not his real mother came at about the age of 15, and at about the same time that his father was killed in a motorcycle accident, after which the boy displayed suicidal and self-destructive conduct. After the trial, a psychologist diagnosed him as suffering PTSD, ADHD, chronic depression and concluded that he had poor impulse control and at the time of the crime had an emotional age that was much younger than his chronological age of 19. He had begun abusing drugs at the age of 13, and was using LSD and crystal meth at 14. Had taken LSD shortly before the crime. ²⁰⁴ A Florida Supreme Court Justice dissented against conviction and death sentence on basis that the trial judge should have granted defence motion to suppress "confession obtained from this nineteen-year-old defendant shortly after he acknowledged killing the victim during a custodial interrogation administered without <i>Miranda</i> warnings", and because jury death vote was 7-5	<i>Hurst</i> relief, 2 May 2017, Death sentence was recommended by 7-5 jury. In September 2017, the Hillsborough prosecution filed notice that it would seek the death penalty at resentencing

²⁰³ *Evans v. State*, Florida Supreme Court, 28 August 2008.

²⁰⁴ *Davis v. Secretary*. Order, US District Court for the Middle District of Florida, 15 October 2009.

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TIMOTHY HURST	19	B	Very little Moderate	2000 2012 Escambia	Was in special education classes as a child. Emotional and mental development was lower than average for his age. Judge at resentencing found that Hurst had significant mental disabilities – namely “limited mental intellectual capacity with widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome”. Rejected claim that he had actual Intellectual Disability.	<i>Hurst</i> relief, 14 October 2016, 7-5 jury. On 14 November 2017, Escambia County prosecution filed notice of its intent to seek the death penalty at the resentencing
J.B. PARKER	19	B	Very little (1983)	1983 Martin	Childhood abuse, hunger, deprivation, poverty, neglect. Psychologically classified as a “follower”	20 April 2017, <i>Hurst</i> relief. December 2000 resentencing was 11-1. On 6 June 2018, Martin County prosecutor filed notice of intent to seek death penalty at resentencing
RANDY SCHOEN-WETTER	18	W	Little	2003 Brevard	Asperger's Syndrome, ADHD, developmental and emotional age of 12-13; physical and emotional abuse; absent biological father (in prison); A doctor and expert in psychiatry testified that a PET scan of the defendant indicated abnormalities in his frontal lobe and temporal cortex	<i>Hurst</i> relief granted on 7 April 2017. Original two death sentence based on 10-2, 9-3
JEFFREY MUEHLEMAN	18	W	Moderate (2003 resentence)	1984 Pinellas	Pled guilty. Original death sentence overturned. At new sentencing in 2003, he represented himself and chose to present no mitigating evidence or testimony whatsoever	10-2 jury votes for death at both 1984 trial and 2003 resentencing
TROY MERCK	19	W	Some (2004 resentence)	1993 Pinellas	The defendant's sister testified that their mother had attempted to abort her son, and that after he was born she subjected him to psychological and physical abuse, including frequent beatings. Another witness testified that Troy Merck's mother used her son as a “hitting post” and that he had been placed in a class for emotionally disabled children. In 1992, a mental health expert had concluded that Troy Merck suffered from Post-Traumatic Stress Disorder (PTSD), ADHD, foetal alcohol effect, brain injuries and alcoholism	5 May 2017, <i>Hurst</i> relief, 9-3 jury. Resentencing on hold in June 2018 pending resolution of appeal on conviction issues
JERONE HUNTER	18	B	Some	2006 Volusia	Defence expert testified that PET scan revealed frontal lobe deficits, with abnormal metabolism in 25-35 regions of brain; parental mental disability, defendant had possible early stage paranoid schizophrenia; trial judge gave some weight to mitigating evidence that Hunter acted under extreme duress or under substantial domination of another person at time of crime. The judge said: “The defendant was 18 years of age at the time of the murders. In addition, the defendant presented testimony of Dr Eric Mings, Dr Rubin Gur and Dr Allen Berns which suggested that in addition to his age, Mr Hunter was in the early stages of schizophrenia, perhaps even paranoid schizophrenia. Their diagnosis and conclusions were based on the core history of severe mental illness, perhaps schizophrenia, of Mr Hunter's father and at least some treatment for mental problems on the part of his mother. These factors suggest that Mr Hunter was much more likely than others to have a mental defect or disease. Historically he had lost a twin brother as an infant and apparently over his childhood had regularly spoken to his twin as though that person was present in his life which was reliably established.”	<i>Hurst</i> relief, 6 June 2017, 10-2, 9-3 jury. On 6 July 2017, the Volusia County prosecutor filed notice of intent to seek the death penalty at resentencing

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ALAN WADE	18	W	Great	2008 Duval	Father absent from his life from age of 8 had negative impact; raised by largely absentee mother; Drug use from early teens; evidence of domination of older co-defendant	Hurst relief 1 May 2017, 11-1, 11-1
RENALDO MCGIRTH	18	B	Significant	2008 Marion	Childhood of abuse, neglect, poverty; diagnosed with conduct disorder. On appeal, his lawyers have written: "McGirth did not know who his father was, grew up in relative poverty, was sexually battered at eight or nine by an older female relative, was committed to Department of Juvenile Justice at age ten for one year, and again at twelve for sexual battery, obtained his high school degree at the Lake County jail, received multiple serious head wounds, had a discernible injury to the frontotemporal and/or subcortical areas of his brain that affect judgment, and was diagnosed as suffering from a psychotic disturbance [by a psychologist during post-conviction proceedings]" ²⁰⁵	<i>Hurst</i> relief, 26 January 2017, 11-1. As of June 2018, the Marion County prosecution was intending to seek the death penalty at resentencing
DANE ABDOL	18	W	Moderate	2008 Orange	Judge found that Abdool's social and emotional maturity was that of a 12- to 14-year-old". Hyperactivity, learning disability, impulse control disorder with obsessive-compulsive features, and a delusional disorder. A forensic psychologist testified that Dane Abdool had "very low" intellectual functioning, was immature, and developmentally delayed. She concluded that he had an impulse control disorder, meaning he had a tendency to act before thinking, with obsessive-compulsive features, and a delusional disorder. The judge found that Dane Abdool's immaturity did not allow him "to think through the adult situation in which he found himself [at the time of the crime] and arrive at a reasonable conclusion". Had he been more mature at the time of the events which led to the murder, "he likely would have dealt with the adversity that he believe he was under in a different manner".	<i>Hurst</i> relief 6 April 2017, 10-2. That day, Governor Scott reassigned the case from State Attorney Aramis Ayala to State Attorney Brad King because of Ayala's announcement that she would no longer seek the death penalty in capital cases. The resentencing of Dane Abdool was set for May 2019
JOSHUA ALTERS-BERGER	19	B	Slight	2009 Highlands	Brain dysfunction and underdevelopment, psychological underdevelopment, dysfunctional family background, extreme immaturity for age, history of substance abuse from age of 15. On alcohol at the time of the crime. A neuro-psychologist testified that the orbital frontal and amygdala regions of his brain were significantly undersized, impairing the teenager's ability to control emotions and impulses. The judge gave "moderate weight" to "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired". The judge merged several factors into this statutory mitigator, namely that Altersberger: did not fully develop emotionally; did not fully develop cognitively; has brain deficiencies that reduce his ability to control impulse behaviour; has brain deficiencies that reduce his capacity to make reasoned decisions; suffered significant emotional deprivation while growing up that adversely affected his psychological development; and a dysfunctional family life prevented healthy psychological development.	<i>Hurst</i> relief 27 April 2017, 9-3 jury. At the time of writing, the Highlands County prosecution was intending to seek the death penalty at resentencing, scheduled for October 2018. In June 2018, the judge denied a defence motion for a change of venue because of prejudicial publicity
TAVARES CALLOWAY	18	B	Some	2010 Miami-Dade	Father had schizophrenia and PTSD following military service in Vietnam. Tavares suffered physical abuse at hands of father, including beatings. Boy witnessed abuse of his mother at the hands of the father, including an incident when he attempted to drown her in the bath. Mother was cocaine user who was unable to care for her children. Mother moved with Tavares to Miami when boy was six to get away from abusive father. She became	<i>Hurst</i> relief 26 January 2017, 7-5 jury

²⁰⁵ *McGirth v. State*, Initial brief of the appellant, In the Supreme Court of Florida, 24 February 2016.

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					heavily involved in drug use. When Tavares was 14 they moved to the Scott Projects, notorious for drugs and criminal violence. Psychologist testified that his childhood of neglect and lack of structure, exposure to violence impacted his development. Mental age lower than chronological age	
HECTOR SANCHEZ-TORRES	19	H	Insignificant	2010 Clay	Scored a “very, very good” result on a polygraph test on whether he had shot the victim, which he denied. Pled guilty and waived jury sentencing. He apologized to the victim's family, saying he could not “apologize enough”, that he took responsibility even though he had not shot the victim, adding that it was not supposed to “go down the way it did”. The judge found that “it is not unreasonable to infer that evidence presented during the sentencing proceedings could suggest that the fatal gunshot was the result of an accidental discharge of the gun”. On post-conviction, the fact that the judge declined to give any significant weight to the statutory mitigating factor of age, the trial court “ignored evidence that Sanchez-Torres's crime was related to his age, mental and emotional immaturity, and the resultant inability to cope with the stresses of life”.	He pled guilty (on appeal has said he did not understand the consequences of this plea in relation to the death penalty) and waived jury sentencing
TERRY SMITH	19	B	Moderate	2011 Duval	Assessed by psychologist as borderline intellectual functioning, with an IQ of 77; immaturity, vulnerable to influences; impulsivity. Judge gave “moderate” weight to mental mitigation, the expert evidence of which the judge summarized as “defendant is immature for his age, suffers from depression, is very vulnerable to outside influences, has a need for approval, has borderline intellectual functioning, does not have normal intellectual capacity (which [expert] contends impacts all of the Defendant's decision-making, has adaptive skills functioning deficit, has some suicidal ideations, has no major psychopathology traits, is impulsive, and is capable of rehabilitation”. Gave “some” weight to fact that Smith had grown up in a “terrible” neighbourhood with a high crime rate and low graduation rate for school children	
RANDALL DEVINEY	18	W	Moderate Retrial 2015 Some Resentencing 2017	2011 Duval	Born to parents who reunited after serving prison sentences after conviction for murder of their first child at the age of 15 months. At age of three and half, Randall Deviney was hospitalized after being stabbed in the chest. Doctors found coins, a paper clip and a rubber band in his stomach. He was “persistently learning disabled” and in school was enrolled in special education programs “from kindergarten through high school”. By 17 he was being prescribed an anti-depressant (Zoloft). Told jury was subjected to sexual and physical abuse as a child by both parents. At the 2017 resentencing, the judge accepted that “adolescent brains are not fully developed at the age of eighteen”. He also found in mitigation that Deviney had been physically abused by his mother and father, and sexually abused by his mother and his mother's drug dealer, was neglected by his mother as far as supervision, health and educational upbringing, that the boy witnessed his parents' violence against each other, was diagnosed with ADD, and PTSD, and at the time of the murder was “under the influence of extreme mental or emotional disturbance”	In 2013, the FSC ordered a new trial on the basis that this teenager of “limited abilities” had been denied his rights during interrogation. In 2015 the jury recommended death by eight votes to four (it had been 10-2 at the first trial). In 2017, this sentence was overturned pursuant to <i>Hurst</i> . The state sought and obtained a third death sentence, this time on a 12-0 jury vote in October 2017.
MICHAEL BARGO	18	W	Slight	2013 Marion	FSC Justice noted that trial judge found that “defendant suffers from frontal lobe brain damage, bipolar disorder, schizoaffective disorder, complex partial seizure disorder,	<i>Hurst</i> relief 29 June 2017, 10-2 jury. As of June 2018, the

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					hallucinations, and diminished control over inhibitions, was abandoned by his father, grew up in a disadvantaged and abusive home, has a severe substance abuse problem which aggravated a neurological disorder, along with the possibility that the defendant was misdiagnosed and treated for ADHD. The trial court did not ascribe great weight to any of this mitigation. However, a review of the record indicates that Bargo's mental health mitigation reaches far back into his childhood, rather than emanating from evaluations occurring after the murder occurred. By the age of fourteen or fifteen, Bargo was self-harming... In March 2009, approximately two years before the crime in this case, Bargo was diagnosed with bipolar disorder diagnosis rapid cycling. Although not taking medication at the time of the crime, Bargo had been prescribed several strong medications in the past."	Marion County prosecution was intending to seek the death penalty at the resentencing, due in March 2019
JAMES HERARD	19	B	None	2015 Broward	Introduced to alcohol at the age of seven by his father, by 14 was drinking various spirits, and smoking marijuana. Mother was a "strict disciplinarian who believed in punishments considered child abuse today". James was repeatedly subjected to forced prolonged kneeling and also had his fingers burned. The judge found that the boy "never received the help and attention he need to mature as an adult", but also found that there was "no evidence of mental or emotional maturity" and therefore gave no weight to the age mitigator. The judge also gave "little weight" to evidence of his potential for growth and development, including that while awaiting trial for a crime committed when he was 19, had written a novel, had talked two fellow inmates out of committing suicide, and had been a positive influence on other inmates, including teaching them mathematics and English. ²⁰⁶	
MICHAEL SHELLITO	18	H	Slight	1995 Duval	At a post-conviction evidentiary hearing in trial-level court in 2004, experts variously presented evidence that had not been heard at trial, of mental disability and mental impairment, including brain damage and bipolar disorder, and evidence that Michael Shellito had had a mental age of 14 or 15 at the time of the crime, and an emotional age of 12 to 13. Other witnesses testified at the evidentiary hearing about the physical and other abuse to which Michael Shellito had been subjected as a child, his behavioural and emotional problems, and his alcohol and drug abuse from a young age.	Death sentence overturned - inadequate legal representation. In late 2016, prosecution was still intending to seek death again. In July 2017, under new State Attorney, resentenced to life under a plea deal
ANTHONY FARINA	18	W	None (original) Moderate (re-sentence)	1992 Volusia	Emotional age of 14, diagnosed with dependent personality disorder, 'abused and battered' childhood, history of emotional problems, abandonment by father, lack of education	Death sentence overturned- lawyer failure relating to prosecutorial misconduct. Resentenced to life in April 2017 under a plea arrangement
TED HERRING	19	B		1982 Volusia	Hyperactivity, learning disabilities, IQ 70-75, abusive childhood. Intellectual disability	31 March 2017, FSC commuted death to life imprisonment on the basis of his intellectual disability
TERRANCE PHILLIPS	18	B	Considerable	2012 Duval	IQ assessed at 76 in a pre-trial evaluation. Trial judge found in mitigation, childhood abuse and neglect,	November 2016, FSC found death

²⁰⁶ *State v. Herard*, Sentencing order, Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, 23 January 2015.

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					borderline IQ, learning disability, easily influenced by others, grew up in neighbourhood with high crime rate, father murdered when he was five years old. The trial judge had given "moderate" mitigating weight to the intellectual disability evidence, "slight" weight to the evidence of his lifelong speech impediment and that he was easily influenced by others, "some" weight to the fact that Phillips grew up in a high crime area and was neglected as a child, but only "little" weight to the severe impact on him of his father's murder.	sentence disproportionate and ordered reduction to life imprisonment. "Phillips' mental health mitigation, coupled with the fact that he was eighteen at the murders, constitutes extremely compelling mitigation"

B. EXECUTED IN FLORIDA FOR CRIMES COMMITTED AT 18 OR 19 YEARS OLD

NAME	AGE	RACE	MITIGATING WEIGHT GIVEN TO AGE BY JUDGE	YEAR OF ORIGINAL TRIAL AND COUNTY	NOTES ON DEFENDANT'S BACKGROUND
RICHARD HENYARD	18	B	Some	Executed 2008 Prosecuted Lake County July 12-0	Among mitigating factors found by trial judge was evidence that Richard Henyard was acting under an extreme emotional disturbance; his capacity to conform his conduct to the requirements of law was impaired; he functioned at the emotional level of a 13-year-old and was of low intelligence; he was born into a dysfunctional family and had an impoverished upbringing. Three months after Henyard's trial, the judge expressed regret that the co-defendant now before him, Alfonza Smalls, 14 at the time of the crime, could not be sentenced to death as well. The judge wrote: "Just prior to Henyard's trial the Florida Supreme Court ruled that under Florida law defendants under sixteen (16) years old cannot receive the death penalty, therefore Smalls who was fourteen (14) years old at the time of these murders cannot be sentenced to death. The Supreme Court of Florida unfortunately has spared Smalls from the same fate as Henyard, despite them being equally guilty of the very same acts". ²⁰⁷
MARTIN GROSSMAN	19	W	None	Executed 2010 Prosecuted Pinellas County July 12-0	A forensic psychologist retained on appeal concluded that there was much mental health evidence that called into question the notion that Martin Grossman had acted in premeditated fashion at the time of the crime or that should serve as mitigating evidence. Grossman had "compromised intellectual functioning, probable brain dysfunction", and a "developmental history characterized by profound and untreated complicated bereavement" — (including as a result of the death in 1981 of his father, during whose long and serious illness Martin had acted as primary care-giver) — "a high level of fear and depression, and parental neglect, abandonment and mistreatment."
DARIUS KIMBROUGH	18	B	None	Executed 2013 Prosecuted Orange County July 11-1	IQ assessed at 76. The trial judge declined to find that Kimbrough's age was a mitigating factor, on the grounds that there was no proof that he was immature or impaired. The judge did find that Kimbrough had an unstable childhood, maternal deprivation, an alcoholic father, and a dysfunctional family.

²⁰⁷ Sentencing order, Case No. 93-159-B-CF. Circuit Court of the Fifth Judicial Circuit, Lake County, Florida, 21 November 1994.

C. SELECTED UNITED STATES SUPREME COURT DECISIONS

Furman v. Georgia (1972) – death penalty ruled unconstitutional because of arbitrariness in its application. States move to revise their capital statutes. Florida is the first to pass one into law.

Proffitt v. Florida (1976) – Florida's new law is upheld, one of five rulings on 2 July 1976 (*Jurek v. Texas*, *Roberts v. Louisiana*, *Woodson v. North Carolina*, and *Gregg v. Georgia*) defining the contours of post-*Furman* death penalty. Main ingredients of the new laws are separate guilt and sentencing phases and no mandatory death penalty.

Strickland v. Washington (1984) – ineffective assistance of counsel turns on whether defendant received reasonably effective assistance and, if not, and whether outcome would have been different if lawyer had performed adequately. This two-prong test will prove to be a huge obstacle for successful appeals on this issue.

Caldwell v. Mississippi (1985) – it is constitutionally impermissible to rest a death sentence on a determination made by a judge or jury led to believe that the responsibility for deciding that the defendant should be sentenced to death lies with someone else. The *Caldwell*-compliance of Florida's capital law giving juries only an advisory role is challenged from now on.

Batson v. Kentucky (1986) – a prosecutor's use of peremptory (summary) dismissals may not be used to exclude potential jurors because of their race. One Justice pointed out that the ruling "will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."

Ford v. Wainwright (1986) – execution of person who is mentally incompetent for execution is unconstitutional. In *Panetti v. Quarterman* (2007) the Court elaborates that a standard to determine *Ford* competency is too restrictive if it considers only whether a prisoner is aware of their impending execution and the reason for it, without considering delusions that may prevent a real understanding.

McCleskey v. Kemp (1987) – statistical evidence which demonstrates disparity in imposition of death penalty due to race of victim and defendant is insufficient to show constitutional violation; a defendant must prove that the decision makers in the case acted with discriminatory purpose. Court suggests this is an is.

Atkins v. Virginia (2002) – execution of offenders with intellectual disability ("mental retardation") violates the constitutional prohibition against cruel and unusual punishment, overruling the Court's 1989 ruling *Penry v. Lynaugh*.

Ring v. Arizona (2004) – a statute allowing a judge, without a jury, to find aggravating factors necessary for imposition of a death sentence violates the constitutional requirement that any finding necessary to enhance punishment be made by a jury (*Apprendi v. New Jersey*, 2000). Appeals that Florida law violates *Ring* will be routinely denied for the next decade

Roper v. Simmons (2005) – death penalty unconstitutional for offenders who were under 18 at the time of the crime, overruling the Court's 1989 ruling *Stanford v. Kentucky* (1989).

Hall v. Florida (2014) – Florida law is found unconstitutional for failing to provide the protection to capital defendants with intellectual disability as required under *Atkins* (2002).

Hurst v. Florida (2016) – Florida's capital sentencing statute is incompatible with *Ring* (2004) because it gives juries a merely advisory role. The constitutional right to a jury trial, the Court said, "requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." The US Supreme Court remanded the case to the Florida Supreme Court "for further proceedings not inconsistent with this opinion".

ON REMAND: FLORIDA SUPREME COURT'S RESPONSE TO *HURST V. FLORIDA*

Mullens v. State, 16 June 2016. Where the defendant knowingly, voluntarily and intelligently waived right to jury sentencing, there is no violation under *Hurst*.

Hurst v. State, 14 October 2016. Among other things, the jury's recommended sentence of death must be unanimous before judge can impose it. Until now, bare majority votes (7-5) for death have been allowed in Florida

Perry v. State, 14 October 2016. Florida's revised capital sentencing statute (March 2016) struck down for only requiring 10-2 jury vote for death. In March 2017, the legislature revised the statute again, now requiring unanimous jury determinations.

Asay v. State, 22 December 2016. *Hurst* applies to all Florida death row prisoners whose conviction and sentence became final (upon completion of automatic direct appeal) after 24 June 2002, the date of *Ring v. Arizona*.

Mosley v. State, 22 December 2016. If *Hurst* applies, relief will be denied where the constitutional violation is deemed harmless beyond a reasonable doubt. In practice, the Florida Supreme Court has found that when jury vote for death was unanimous the *Hurst* error was harmless and when the vote for death was less than unanimous it was not.

Hitchcock v. State, 10 August 2017. The Court summarily dismissed multiple arguments, including arbitrariness claim, challenging the constitutionality of a death sentence based on a non-unanimous jury vote but that become final before *Ring*.

D. IN BRIEF: ROUTE FROM INDICTMENT TO EXECUTION IN FLORIDA

Indictment – A grand jury must find ‘probable cause’ that the individual committed a capital crime before the case can proceed.

Arraignment – the individual enters a plea in court. If the prosecution intends to seek the death penalty, it must file notice of its intention to do so within 45 days of the arraignment.

Trial – Trials are conducted in circuit court. Florida is divided 67 counties and 20 judicial circuits, each circuit being composed of counties and each Circuit having an elected chief prosecutor (State Attorney). The trial is conducted in two phases – the guilt/innocence stage and the sentencing stage. The judge and jury will hear mitigating and aggravating evidence.

Direct Appeal – All capital cases are automatically appealed to the Florida Supreme Court, which will be a review only of issues on the trial record, and during which the Court will evaluate the sufficiency of the evidence used to convict the defendant and whether the death sentence is proportionate. The defendant may seek review of this by the US Supreme Court. Once this direct appeal is completed, the death sentence is considered “final” (a key issue now in relation to the *Hurst* retroactivity framework).

State post-conviction – here the defendant may bring in claims from outside of the trial record, such as failure of defence counsel to investigate mitigating evidence, or of the prosecution to reveal exculpatory information.

Federal habeas corpus – All claims must have been raised in state court or they risk being procedurally defaulted from federal review. The federal habeas corpus petition is filed in US District Court for either the Northern, Middle or Southern Districts of Florida (depending where the defendant was convicted). Evidentiary hearings may be held if the judge deems the conditions have been met. To be able to appeal the District Court decision, the appellant must request and be granted a “certificate of appealability” by the District Court judge. If this occurs, the appeal goes to the Eleventh Circuit Court of Appeals. Review of the 11th Circuit decision may be sought in the US Supreme Court, which reviews only a tiny number of cases put before it.

Clemency – The governor can grant reprieves from execution. He or she can only commute death sentences with the approval of two other members of the Board of Executive Clemency, made up of the Governor and members of the Cabinet.

Execution may not be carried out without a death warrant signed by the Governor. The executioner in Florida is an anonymous private citizen who is paid \$150 per execution

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USA: DARKNESS VISIBLE IN THE SUNSHINE STATE

THE DEATH PENALTY IN FLORIDA

Florida promotes itself as a destination for tourists and a hub for trade. It is less well-known as a diehard proponent of a cruel policy discarded by much of the world.

Florida has the second largest death row in the USA, and is ranked fourth in the number of executions carried out. In 2016, the US Supreme Court ruled its capital sentencing scheme constitutional. Florida's response has added another layer of arbitrariness to its death penalty, as described in this report.

In 2015, two US Supreme Court Justices argued that the time had come for the Court to revisit the constitutionality of the death penalty in the USA. Its constitutionality hinges on it being limited to the so-called "worst of the worst", but it is not being so limited, they argued. They pointed to race, geography and other factors as improper determinants in capital cases.

In 2016, the two Justices pushed again, this time in a case of a death row prisoner who was 18 at the time of the crime, and had an IQ of 74. Could a borderline intellectually disabled teenager really be among the "worst of the worst"? This report asks the same question of Florida. It focusses on the state's use of the death penalty against people who were young adults at the time of the crime and/or who have mental or intellectual disabilities.

Amnesty International opposes the death penalty unconditionally. The Sunshine State should end its use of the ultimate cruel, inhuman and degrading punishment.