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The Jury Requirement in Death Sentencing after Hurst v. Florida

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The Jury Requirement in Death Sentencing after *Hurst v. Florida*

THE JURY REQUIREMENT IN DEATH SENTENCING AFTER *HURST V. FLORIDA*

ABSTRACT

The Supreme Court has long held that the death penalty is different from all other punishments and requires more substantive and procedural restrictions. Capital sentencing in particular requires more protections than non-capital sentencing. The Supreme Court has previously declared that death cannot be the mandatory penalty for committing a criminal offense. Instead after the conviction stage of a capital trial, states utilize a second, sentencing stage in which the sentencer decides whether the defendant receives a life sentence or the death penalty. States have developed several different kinds of sentencing schemes, most leaving sentencing exclusively to the jury, others exclusively to the judge, and still others a hybrid system wherein the jury gives a recommendation, but the judge independently determines and imposes the actual sentence.

While the Eighth Amendment's ban on cruel and unusual punishment controls most death penalty jurisprudence, the Sixth Amendment's jury trial guarantee also limits the ways in which states may sentence a defendant to death. The Supreme Court struck down judge-only sentencing systems in 2002, holding that these schemes violated criminal defendants' jury trial right. Specifically, judge-only sentencing impermissibly removed from the jury the duty of finding the aggravating factors necessary to increase a criminal defendant's sentence from life imprisonment to death. However, some of the states that allowed for the judicial override of the jury's recommended sentence did not modify their state death penalty statutes in the wake of this decision. Instead, they argued that the jury's recommended sentence satisfied the Sixth Amendment's jury trial guarantee, even though the judge determined the actual sentence notwithstanding the jury's recommendation.

On January 12, 2016, the Supreme Court struck down Florida's hybrid sentencing statute. In *Hurst v. Florida*, the Court reiterated its previous sentencing jurisprudence, interpreting the Sixth Amendment as guaranteeing that a jury find all the facts necessary to elevate the possible sentence from life imprisonment to death. Since this decision, the Delaware and Alabama Supreme Courts have interpreted the Sixth Amendment's requirements and have come to radically different conclusions about their respective judicial-override systems. This Case Comment analyzes the breadth and limitations of *Hurst's* Sixth Amendment rationale. The Court's Sixth Amendment jurisprudence limits the jury's role in death sentencing to fact-finding. However, the evolving standards of decency that lie at the heart of the Eighth Amendment's prohibition on cruel and unusual punishment make it impermissible for a single state

actor to determine and impose the death penalty. Going forward, the Court should recognize that the Eighth Amendment requires the jury, representing and voicing the conscience of the community, to decide every sentence of death.

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INTRODUCTION

On August 2, 2016, in *Rauf v. State*,¹ the Supreme Court of Delaware ruled the state's death penalty statute unconstitutional.² The grounds for this ruling came from the recent United States Supreme Court decision in *Hurst v. Florida*,³ which held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."⁴ Delaware's capital sentencing statute created a hybrid system in which the jury recommended a sentence of life imprisonment or death, but the judge independently determined and imposed the sentence (also known as "judicial override").⁵ The Delaware Supreme Court justices who joined the majority split in their reasons, each interpreting *Hurst's* requirements in radically different ways.⁶

1. 145 A.3d 430 (Del. 2016) (per curiam).

2. *Id.* at 433–35.

3. 136 S. Ct. 616 (2016). In *Hurst*, the Court applied the sentencing requirements revealed in *Ring v. Arizona*, 536 U.S. 584 (2002), specifically to judicial-override capital sentencing. 136 S. Ct. at 620–22.

4. *Hurst*, 136 S. Ct. at 619.

5. *See Rauf*, 145 A.3d at 450.

6. *See id.* at 434–37, 454, 458–61, 464–66, 468–69, 475–77, 480 (Strine, C.J., concurring); *id.* at 482–87 (Holland, J., concurring); *id.* at 487–90, 492–501 (Valihura, J., concurring in part and dissenting in part).

Less than two months after *Rauf*, Alabama's Supreme Court held that *Hurst* did not invalidate Alabama's own hybrid capital sentencing system.⁷ Unanimous in the result and relying on earlier Alabama case law, the state supreme court held that Alabama's construction of capital crimes implicitly satisfied the Sixth Amendment's fact-finding requirements described in *Hurst*.⁸

These varied opinions illustrate the general confusion surrounding the U.S. Supreme Court's recent capital sentencing jurisprudence. This Case Comment analyzes the breadth and limitations of *Hurst*'s reliance on the Sixth Amendment to define the jury's role in capital sentencing. It argues that *Hurst* compels the conclusion that a jury, not a judge, must make all death eligibility findings, including the assessment of the relative weight of aggravating and mitigating factors. In addition to this Sixth Amendment guarantee, the Court should recognize the Eighth Amendment as requiring the jury to determine and impose every death sentence.

The Court's capital jurisprudence arose in the 1970s.⁹ In 1972's *Furman v. Georgia*,¹⁰ the Supreme Court declared that the present application of the death penalty violated the Constitution in a short per curiam opinion joined by five justices.¹¹ However, many states desired to retain the death penalty and struggled to parse the Court's confusing decrees and redraft their capital statutes accordingly.¹²

In response to *Furman*, every death penalty state adopted a bifurcated capital trial system, which divided trials into a guilt-innocence stage and a sentencing stage.¹³ The sentencing stage took several forms; while

7. See *Bohannon v. State (In re Bohannon)*, No. 1150640, 2016 WL 5817692, at *17–18 (Ala. Sept. 30, 2016).

8. *Id.* at *10–11, *15–17, *26.

9. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 183–86 (2010) (discussing the American anti-death penalty movement that faltered in the mid-1970s after the Supreme Court briefly ruled the death penalty unconstitutional); Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 533–35 (2011); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1091–93 (2003).

10. 408 U.S. 238 (1972) (per curiam).

11. *Id.* at 239–40. Far from united in its reasoning, the five justices who voted down the death penalty each issued his own concurrence. *Id.* at 240. Likewise, the four pro-death penalty justices each authored his own dissent. *Id.*

12. See Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 124–25 (2004); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62, 62 (1972). In what is perhaps an ironic nod to *Furman*, the Delaware Supreme Court in *Rauf* followed *Furman*'s lead by issuing a short per curiam decision followed by several concurrences, leading to an outcome, but no concrete rule of law. See *Rauf v. State*, 145 A.3d 430, 430–31 (Del. 2016) (per curiam) (“[T]he importance of [capital sentencing] to our state and our fellow citizens . . . makes it useful for all the Justices to bring our various perspectives to bear on these difficult questions.”).

13. See William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 932–33 (2006); cf. Abramson, *supra* note 12, at 124–26.

most states retained jury sentencing, some states instituted a system wherein the judge alone determined sentencing factors, imposing a life sentence or a death sentence based upon the judge's findings.¹⁴ Still others employed hybrid systems (also known as judicial override) in which the jury, having already convicted a criminal defendant of a capital offense, recommended a sentence of life imprisonment or death, but the judge independently determined and imposed the actual sentence.¹⁵

The Supreme Court set a capital-sentencing trend in 1976 by upholding Florida's hybrid system.¹⁶ Over the 1980s and 1990s, the Court routinely upheld hybrid and judge-only capital sentencing systems.¹⁷ However, in 1999 and 2000, the Court issued two non-capital sentencing opinions that undermined these previously-constitutional capital sentencing systems.¹⁸ In *Jones v. United States*¹⁹ and *Apprendi v. New Jersey*,²⁰ the Court held that the Sixth Amendment's jury trial guarantee requires that any fact necessary to increase the maximum penalty for an offense is an "element" of the offense and must be proved to a jury beyond a reasonable doubt.²¹ This requirement applied to any such fact, no matter what the state called it, and could not be avoided by describing the fact as merely a sentencing consideration.²² While both opinions distinguished the seemingly-conflicting holdings of the earlier capital cases,²³ the Court soon held in *Ring v. Arizona*²⁴ that judge-only capital sentencing was "irreconcilable" with the *Apprendi* rule.²⁵

While *Ring* determined the fate of judge-only capital sentencing, states were left to wonder about the constitutionality of hybrid schemes. Some abandoned the practice,²⁶ but other states kept their systems in

14. Bowers et al., *supra* note 13, at 933.

15. *Id.* States implemented judicial override systems in order to protect defendants, thinking that this gave defendants "a second chance for life with the trial judge" should the jury vote in favor of the death penalty. *See, e.g., Harris v. Alabama*, 513 U.S. 504, 513 (1995) (quoting *Dobbert v. Florida*, 432 U.S. 282, 296 (1977)).

16. *See Proffitt v. Florida*, 428 U.S. 242, 247-50, 253 (1976). In Florida's scheme, a jury, after the conviction stage and a sentencing hearing, recommended a sentence of life imprisonment or death; however, notwithstanding the jury's recommendation, a judge independently determined and passed the sentence. *Id.* at 248-50, 252.

17. *See, e.g., Harris*, 513 U.S. at 515 (upholding Alabama's hybrid sentencing system); *Walton v. Arizona*, 497 U.S. 639, 639 (1990) (upholding Arizona's judge-only sentencing system), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002); *Hildwin v. Florida*, 490 U.S. 638, 638-41 (1989) (upholding Florida's hybrid system), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016); *Spaziano v. Florida*, 468 U.S. 447, 449 (1984) (upholding Florida's hybrid system), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

18. *See cases cited infra* notes 19-20.

19. 526 U.S. 227 (1999).

20. 530 U.S. 466 (2000).

21. *See id.* at 476, 490; *Jones*, 526 U.S. at 243-44.

22. *See Apprendi*, 530 U.S. at 490, 495-96.

23. *See id.* at 496-97; *Jones*, 526 U.S. at 250-51.

24. 536 U.S. 584 (2002).

25. *See id.* at 609.

26. *See Bowers et al., supra* note 13, at 937 (noting that Indiana replaced the judicial override with jury-sentencing).

place, relying on the Supreme Court's pre-*Apprendi* decisions upholding these sentencing schemes.²⁷ However, in the recent decision of *Hurst*, the Court extended *Apprendi* and *Ring*, holding that Florida's hybrid sentencing system denied criminal defendants their Sixth Amendment right to a jury trial.²⁸

Despite one Delaware Supreme Court justice's broad reading of *Hurst*,²⁹ this Case Comment will demonstrate that the Supreme Court's recent extension of the Sixth Amendment is, at best, a modest step toward guaranteeing that the death penalty be imposed without violating constitutional safeguards. Part I explores the legal background leading up to *Hurst*. Part II examines *Hurst* itself. Part III discusses the implications of *Hurst*. It first looks to the limits of *Hurst* by examining exactly what kinds of facts fall under the Sixth Amendment's jury trial guarantee. It then looks to the Delaware Supreme Court's application and varied interpretations of *Hurst*'s mandates. The Case Comment then turns to *Hurst*'s implications, arguing that Alabama's judicial override statute will almost certainly be overturned. Finally, it argues that the *Hurst* majority should have supported its Sixth Amendment holding with the Eighth Amendment's prohibition on cruel and unusual punishment.³⁰ These twin constitutional bulwarks limit the government's ability to sentence and apply the death penalty.³¹ Taken together, they guarantee that a judge—as the state's agent—can neither find the facts necessary to make a defendant death eligible nor can a judge impose the ultimate penalty. Rather, an impartial jury, as representative of the community's conscience and voice, should make any findings necessary to sentence a defendant to death.

I. BACKGROUND

In 1972, the Supreme Court ruled that the death penalty systems in Texas and Georgia were so arbitrary that they violated the Eighth Amendment's prohibition on cruel and unusual punishment.³² The deci-

27. See, e.g., *Waldrop v. State (In re Waldrop)*, 859 So. 2d 1181, 1184, 1191 (Ala. 2002) (upholding Alabama's hybrid system), *cert. denied*, 540 U.S. 968 (2003); *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002) (upholding Florida's hybrid system), *abrogated by Hurst v. Florida*, 136 S. Ct. 616 (2016).

28. *Hurst v. Florida*, 136 S. Ct. 616, 619–21, 624 (2016). The Court struck down Florida's statute 7–1. See *id.*

29. *Rauf v. State*, 145 A.3d 430, 434–36 (Del. 2016) (Strine, C.J., concurring) (per curiam).

30. Justice Stevens and Justice Breyer provide the foundation for this argument. See *Ring*, 536 U.S. at 613–14 (Breyer, J., concurring); *Harris v. Alabama*, 513 U.S. 504, 515–16, 524–26 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 467, 471–73, 477–90 (1984) (Stevens, J., concurring in part and dissenting in part), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

31. Kamin & Marceau, *supra* note 9, at 532–33.

32. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam). The opinions of Justices Stewart, White, and Douglas—which were concerned with the states' formulation of the death penalty and not the per se constitutionality of the death penalty—have had the largest influence on death penalty jurisprudence going forward. While varied, the opinions criticized the lack of statutory guidance for death sentencing and the randomness of death sentences. See Kamin & Marceau, *supra* note 9, at 533–34.

sion set the stage for modern death penalty jurisprudence as thirty-five states scrambled to decipher the Court's requirements in *Furman* and craft constitutionally permissible capital punishment statutes.³³ While this reworking took many forms, every death penalty state adopted a bifurcated capital trial system, which split capital trials into two parts: (1) the guilt-innocence stage (which must always be proven to a jury beyond a reasonable doubt) and (2) the sentencing stage.³⁴ In 1976, the Supreme Court issued five death penalty decisions in which it declared that some states had overcome *Furman*'s critiques.³⁵ Effectively, the death penalty was reinstated.

Over the years since restoring capital punishment, the Court has evolved and adopted a "death-is-different" jurisprudence, primarily linked to the Eighth Amendment's prohibition on cruel and unusual punishment.³⁶ This jurisprudence holds generally that because of its finality, irrevocability, and severity, the death penalty requires "greater procedural and substantive protections" than all other forms of punishment.³⁷ For example, in *Woodson v. North Carolina*,³⁸ the Court held that, unlike lesser punishments, the death penalty cannot be a mandatory punishment for violation of a criminal statute.³⁹

What makes a punishment cruel and unusual is not static but changes as society progresses.⁴⁰ Recognizing this principle, the Court derived

33. See *Stevenson*, *supra* note 9, at 1091 n.4. In the first stage, the Sixth Amendment required that the defendant's guilt be proved to a jury by a reasonable doubt. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

34. See *Bowers et al.*, *supra* note 13, at 932-33; *cf.* *Abramson*, *supra* note 12, at 124-26.

35. The Court upheld death penalty statutes in three cases. See *Jurek v. Texas*, 428 U.S. 262, 268, (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Gregg v. Georgia*, 428 U.S. 153, 186-87, 206-07 (1976) (plurality opinion). The Court struck down statutes in two cases. See *Roberts v. Louisiana*, 428 U.S. 325, 327, 336 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 282, 305 (1976) (plurality opinion).

36. *Abramson*, *supra* note 12, at 118-19. Since 2002, the Court has generally expanded the scope of the Eighth Amendment in terms of both capital punishment and life without the possibility of parole (LWOP). See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (striking down mandatory LWOP for juveniles); *Graham v. Florida*, 560 U.S. 48, 81-82 (2010) (striking down LWOP for juveniles who commit non-homicide crimes); *Kennedy v. Louisiana*, 554 U.S. 407, 412-13 (2008) (striking down capital punishment for the rape of a child where the crime did not result and was not intended to result in death of the victim); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (striking down capital punishment for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (striking down capital punishment for intellectually disabled defendants).

37. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1150, 1164-65, 1167, 1174 (2009); see also *Abramson*, *supra* note 12, at 118-19; Erwin Chemerinsky, Sydney M. Irmas Professor of Pub. Interest Law, Legal Ethics & Political Sci., Univ. S. Cal. Law Sch., Keynote Address at the Honorable James J. Gilvary Symposium on Law, Religion & Social Justice: Evolving Standards of Decency in 2003-Is the Death Penalty on Life Support?, in 29 U. DAYTON L. REV. 201, 219 (2004) ("[D]eath, after all, is different than any other punishment because it's irrevocable. Any other mistake could to some extent be corrected, but not when somebody is executed.").

38. 428 U.S. 280 (1976).

39. *Id.* at 301.

40. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static.").

“two essential touchstones for defining the evolving standards of decency . . . at the core of Eighth Amendment’s prohibition against cruel and unusual punishments: (1) ‘objective indicia’ of contemporary values” seen in death penalty legislation and jury verdicts and (2) “whether the death penalty ‘comports with the basic concept of human dignity at the core of the Amendment.’”⁴¹ Although the Court has mostly applied the “evolving standards of decency” to limit substantive offenses (e.g., no capital punishment for non-homicide offenses and no capital punishment for juveniles or those with intellectual disabilities),⁴² the Court has indicated several times in the past that this standard applies to procedural concerns as well (e.g., whether only a jury may pass the sentence of death).⁴³

Since 1976, states that did not leave capital sentencing determinations exclusively to the jury adopted one of two systems. The first was a judge-only sentencing scheme, in which a judge, sitting without a jury, determined and imposed the sentence.⁴⁴ The second was a hybrid

41. Stevenson, *supra* note 9, at 1139 (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 180–81 (1976) (plurality opinion)); accord William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1060–61 (2013). In short, the objective indices boil down to how many states (and perhaps other countries as well) use the form of punishment in question, whether states (or other countries) expanded or reduced the practice over time, and how often the punishment was imposed in the states (or countries) which employ them. See, e.g., *Atkins*, 536 U.S. at 312 (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002))); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (Eighth Amendment evaluated by jury determinations and legislation). The second part, the independent judgment of the Court, is evaluated “by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators” when the objective indicia show a general consensus. See *Atkins*, 536 U.S. at 313.

42. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2457–58 (2012) (striking down mandatory LWOP for juveniles); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (striking down LWOP for juveniles who commit non-homicide crimes); *Kennedy v. Louisiana*, 554 U.S. 407, 434–35 (2008) (striking down capital punishment for non-homicide crimes); *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005) (striking down capital punishment for juveniles); *Atkins*, 536 U.S. at 321 (striking down capital punishment for mentally intellectually disabled defendants); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (striking down capital punishment for felony murder when defendant did not kill, attempt to kill, or intend to kill the victim); see also *Trop*, 356 U.S. at 100–01 (Warren, C.J.) (using the “evolving standards of decency that mark the progress of a maturing society” for the first time, holding that the Eighth Amendment does not allow denationalization as a form of punishment).

43. See *Harris v. Alabama*, 513 U.S. 504, 520–22 (1995) (Stevens, J., dissenting) (criticizing the majority for not considering Alabama’s judicial override under the evolving standards of decency set forth in *Trop*); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) (evaluating Florida’s judicial override statute in terms of “contemporary standards of [fairness and] decency”), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016); *id.* at 490 (Stevens, J., concurring in part and dissenting in part) (“History, tradition, and the basic structure and purpose of the jury system persuade me that jury sentencing is essential if the administration of capital punishment is to be governed by the community’s evolving standards of decency.”); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (per curiam) (discussing the evolving standards of decency that govern the Eighth Amendment and noting that “[it] would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices”).

44. See Bowers et al., *supra* note 13, at 932–33, 933 n.9 (noting that this system was adopted by Arizona, Colorado, Idaho, Montana, and Nebraska).

scheme, in which a jury recommended a sentence, but the judge independently made an assessment and imposed the sentence.⁴⁵ In this hybrid system, after finding a criminal defendant guilty beyond a reasonable doubt of a capital crime, a jury issued an advisory sentence by recommending either a life sentence or the death penalty.⁴⁶ However, the trial judge, far from being bound by the jury's recommendation, could override the jury and impose the opposite sentence.⁴⁷

In *Proffitt v. Florida*,⁴⁸ the Court upheld hybrid sentencing on Eighth Amendment grounds.⁴⁹ With Eighth Amendment challenges no longer available in the wake of *Proffitt*, criminal defendants turned to the Sixth Amendment's jury trial guarantee to challenge non-jury death penalty sentencing.⁵⁰ For the next quarter century, these challenges did not move the Court.⁵¹ In both 1984 and 1989, the Court upheld Florida's hybrid system, explaining that the Sixth Amendment did not require a jury to impose a death sentence.⁵² In 1990, the Court also approved Arizona's judge-only system.⁵³ It held that during sentencing the Sixth Amendment jury trial guarantee was not violated when a judge found the facts necessary to impose a death sentence because these were "sentencing considerations" and not elements that must be proved to a jury beyond a reasonable doubt.⁵⁴ This long period of Supreme Court approval seemed to indicate that non-jury capital sentencing was constitutionally permissible for the foreseeable future.

However, in 1999 and 2000, the Supreme Court issued two non-capital sentencing opinions that laid the groundwork for a reversal of the Court's previous Sixth Amendment decisions. The first of these decision

45. *Id.* at 932–33, 933 n.10 (noting that the judicial override was adopted by Alabama, Delaware, Florida, and Indiana). Although the judicial override system started as a protection against capital juries imposing unjust death sentences, judges in most hybrid states more often increase the jury's sentence of life to death. *See* Stevenson, *supra* note 9, at 1140–45 (discussing the breakdown of statistics on judicial overrides in hybrid states).

46. *See* Bowers et al., *supra* note 13, at 932–33.

47. *See id.* at 933.

48. 428 U.S. 242 (1976).

49. *Id.* at 247. The Court lauded a judge's decision-making capabilities over a jury's, stating that a trial judge's greater sentencing experience would "lead, if anything, to even greater consistency" in capital sentencing, helping to alleviate the randomness of the death penalty identified in *Furman*. *See id.* at 252.

50. *See* *Walton v. Arizona*, 497 U.S. 639, 647–48 (1990), *overruled by* *Ring v. Arizona*, 536 U.S. 584 (2002); *Hildwin v. Florida*, 490 U.S. 638, 638 (1989), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Spaziano v. Florida*, 468 U.S. 447 (1984), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

51. *See* *Harris v. Alabama*, 513 U.S. 504, 515 (1995); *Walton*, 497 U.S. at 647–49; *Hildwin*, 490 U.S. at 640–41; *Spaziano*, 468 U.S. at 464–65. Justice Stevens dissented in both *Harris* and *Spaziano*, arguing that the Eighth Amendment's ban on cruel and unusual punishment prohibited a judge from imposing death by overriding a jury's life sentence. *Harris*, 513 U.S. at 526 (Stevens, J., dissenting); *Spaziano*, 468 U.S. at 490 (Stevens, J., concurring in part and dissenting in part). In *Ring*, Justice Breyer, who supported the majority in *Harris*, changed his mind, opining that the Eighth Amendment prohibits the judicial override. *See infra* notes 72–77 and accompanying text.

52. *Hildwin*, 490 U.S. at 639–41; *Spaziano*, 468 U.S. at 464–65.

53. *Walton*, 497 U.S. at 648.

54. *Id.*

adopted the eponymous *Apprendi* rule: “[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁵⁵ Crucially, it did not matter how the State labeled the fact in question.⁵⁶ *Apprendi*’s mandate focused on the effect of the sentencing scheme rather than its form.⁵⁷ States could not circumvent the Sixth Amendment through clever statutory drafting by labeling these facts as “sentencing factors” or “sentencing considerations.”⁵⁸

When applied to capital sentencing, the *Apprendi* rule would seem to prohibit a system in which the judge, at sentencing, has to find an aggravating circumstance before a defendant is eligible for death.⁵⁹ Confusingly, in both *Jones* and *Apprendi* the Court went to great lengths to distinguish and harmonize the *Apprendi* rule with its previous capital sentencing decisions, such as *Spaziano v. Florida*,⁶⁰ *Hildwin v. Florida*,⁶¹ and *Walton v. Arizona*,⁶² that permitted a judge to decide whether aggravating factors were present.⁶³

Two years later, the Supreme Court reversed itself in *Ring*.⁶⁴ The Court held “that the Constitution requires that at least some aspects of the capital sentencing determination be allocated to a jury rather than a judge.”⁶⁵ Overruling its decision in *Walton*, the Court held that the *Apprendi* rule applied to capital sentencing.⁶⁶ Specifically, Arizona’s scheme violated the Sixth Amendment’s jury trial guarantee because it required a judge to determine the existence of an aggravating circumstance without which the death penalty could not be imposed.⁶⁷ As in *Apprendi*, the Court determined that the Sixth Amendment does not care how the statute labeled this crucial determination: “If a State makes an increase in a defendant’s authorized punishment contingent on the find-

55. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Rule was originally set forth in *Jones v. United States*, 526 U.S. 227, 251–53 (1999). *Apprendi* concerned a New Jersey hate crime statute in which a judge could find that a crime involved racial animus thus doubling the potential maximum prison sentence. Kamin & Marceau, *supra* note 9, at 541–42.

56. *Apprendi*, 530 U.S. at 495–96.

57. *See id.*

58. *See id.* at 485.

59. *See* Kamin & Marceau, *supra* note 9, at 543.

60. 468 U.S. 447 (1984), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

61. 490 U.S. 638 (1989), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

62. 497 U.S. 639 (1990), *overruled by* *Ring v. Arizona*, 536 U.S. 584 (2002).

63. *Apprendi*, 530 U.S. at 496–97; *Jones v. United States*, 526 U.S. 227, 250–51 (1999). Justice O’Connor described this attempted distinction as “baffling.” *Apprendi*, 530 U.S. at 538 (O’Connor, J., dissenting).

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

65. *Stevenson*, *supra* note 9, at 1094.

66. *Id.* at 1109.

67. *Id.* at 1109–10.

ing of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”⁶⁸

However, the State of Arizona argued in *Ring* that judicial death sentencing was an important mechanism for ensuring that juries did not arbitrarily or cruelly sentence defendants to death.⁶⁹ On the one hand, the *Ring* Court questioned the “superiority of judicial factfinding,” while on the other hand it reasoned that the Sixth Amendment jury trial guarantee “does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”⁷⁰ Instead, the Founders adopted the amendment because they were not willing to allow the State to single-handedly carry out criminal justice.⁷¹

A crucial development in *Ring* was that Justice Breyer changed his mind about capital sentencing.⁷² Where in an earlier case, *Harris v. Alabama (Harris I)*,⁷³ he supported the majority’s decision to uphold Alabama’s judicial override, in *Ring* he endorsed Justice Stevens’s *Harris I* dissent.⁷⁴ However, unlike the *Ring* majority, Justice Breyer did not argue for a limit based on the Sixth Amendment jury trial guarantee. Rather he argued for one based on the Eighth Amendment prohibition on cruel and unusual punishment.⁷⁵ The death penalty, he argued, had no demonstrable deterrent or incapacitative effects above and beyond lesser forms of punishment.⁷⁶ Therefore, capital sentences found their primary justification in retribution.⁷⁷

Justice Breyer then highlighted the many controversies surrounding the death penalty in general and with judicial imposition in particular: (1) the political pressures on appointed and elected judges; (2) the large divide in community opinion on whether the death penalty is ever justified; (3) the “potentially arbitrary application” of capital punishment; (4) the fact that “the race of the victim and socio-economic factors seem to matter”; (5) the potentially unconstitutional waits that death row prisoners endure before execution; (6) the poor legal representation that many capital defendants receive; and (7) the United States’ status as an

68. *Ring*, 536 U.S. at 602. Endorsing this point in his concurrence Justice Scalia quipped that these facts were elements “whether the statute calls them elements of the offense, sentencing factors, or Mary Jane.” *Id.* at 610 (Scalia, J., concurring).

69. *Id.* at 607 (Ginsburg, J.).

70. *Id.*

71. *Id.* (“[The jury-trial guarantee] has never been efficient; but it has always been free.” (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring))).

72. *Id.* at 614 (Breyer, J., concurring) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” (quoting *Henslee v. Union Planters Nat’l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting))).

73. 513 U.S. 504 (1995).

74. *Ring*, 536 U.S. at 614–15 (Breyer, J., concurring).

75. *Id.* at 612–14.

76. *Id.* at 614–15.

77. *Id.* at 614.

outlier on the world stage, being the “only Western industrialized Nation that authorizes the death penalty.”⁷⁸

All of these controversies led Justice Breyer to determine that if the United States should impose the death penalty then “the Eighth Amendment requires individual jurors to make, and to take responsibility for,” individual death sentences.⁷⁹ The jury, as a cross-section of the community, has access to the community’s conscience and may speak with the community’s voice above and beyond appointed or elected judges.⁸⁰

The majority opinion in *Ring*, on the other hand, focused exclusively on judge-only sentencing schemes, necessarily invalidating the statutes in other judge-only sentencing states.⁸¹ In *Ring*’s wake, hybrid states struggled to decide how to respond.⁸² Some hybrid states chose to proactively comply with *Ring* by replacing their questionable systems with jury sentencing.⁸³ Others chose to follow *Ring* in only the narrowest possible sense.⁸⁴ Alabama and Florida, on the other hand, left their statutes unchanged and their respective state courts later affirmed that their hybrid schemes either did not violate *Ring* or that *Ring* did not apply to hybrid systems.⁸⁵ This refusal to address *Ring* led to the Supreme Court’s recent decision in *Hurst*.⁸⁶

II. *HURST V. FLORIDA*

A. Facts

In May of 1998, Cynthia Harrison was stabbed to death and left in the freezer of the restaurant in which she worked.⁸⁷ The restaurant’s safe was missing a large amount of money.⁸⁸ Timothy Lee Hurst was the only other person scheduled to work that night.⁸⁹ He insisted that he never

78. *Id.* at 615–18.

79. *Id.* at 615–16, 618–19. Note that Justice Breyer’s Eighth Amendment argument requires much more than the *Ring* majority’s Sixth Amendment mandate; instead of a jury making the fact-finding determinations necessary for the imposition of a death sentence (allowing the judge to determine and impose the sentence itself), the Eighth Amendment requires the jury to pass the actual sentence of death. See *id.* at 618–19; see also *Harris v. Alabama*, 513 U.S. 504, 515–17, 519–20 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 467, 469, 470–72, 476–77, 482–84, 486–88, 490 (1984) (Stevens, J., concurring in part and dissenting in part), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

80. See *Ring*, 536 U.S. at 615–16 (Breyer, J., concurring).

81. See Bowers et al., *supra* note 13, at 937.

82. See *id.* at 937–38.

83. See *id.* (discussing how Indiana replaced the judicial override with a jury-sentencing scheme).

84. See *id.* (discussing how Delaware changed its statute to require a jury to find at least one aggravating circumstance but then left the finding of mitigating circumstances and the weighing of the aggravating and mitigating circumstances as well as the imposition of the sentence to a judge).

85. *Waldrop v. State (In re Waldrop)*, 859 So. 2d 1181, 1187–90 (Ala. 2002); *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002), *abrogated by Hurst v. Florida*, 136 S. Ct. 616 (2016).

86. *Hurst v. Florida*, 136 S. Ct. 616, 620–21 (2016).

87. *Id.* at 619.

88. *Id.*

89. *Id.*

made it in, but called Harrison to report that his car had broken down. During his phone call with Harrison, Hurst claimed that she seemed scared and that he had heard someone else “whispering in the background.”⁹⁰

B. Procedural History

The State of Florida charged Timothy Lee Hurst, the only other restaurant employee scheduled to work that night, with murder.⁹¹ The State put on “substantial forensic evidence” and numerous witnesses who testified to Hurst’s culpability.⁹² The jury found Hurst guilty of first degree murder without explaining upon which theory—premeditated murder or felony murder—it made its finding.⁹³

The trial court then held a sentencing hearing in which the jury recommended the death penalty.⁹⁴ The judge agreed and sentenced Hurst to death.⁹⁵ However, the Florida Supreme Court vacated the sentence “for reasons not relevant to this case.”⁹⁶

After a new sentencing hearing, the jury again recommended the death penalty.⁹⁷ Having given “great weight” to the jury’s recommendation, the judge independently found that “both the heinous-murder and robbery aggravators existed” and sentenced Hurst to death.⁹⁸

Hurst challenged his sentence as a violation of his Sixth Amendment right to a jury trial in light of the Court’s decision in *Ring*.⁹⁹ Although recognizing that *Ring* “held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment,” Florida’s highest court rejected Hurst’s argument in a four-to-three decision.¹⁰⁰ The Florida court stated that *Ring* was “inapplicable” because the Supreme Court of the United States had repeatedly upheld the constitutionality of Florida’s sentencing scheme over the past twenty-five years.¹⁰¹ The Supreme Court then granted Hurst’s petition for review.¹⁰²

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.* at 619–20.

94. *Id.* Florida’s death penalty statute bifurcates capital trials into a guilt–innocence stage and a sentencing stage. *See Bowers et al., supra* note 13, at 937–39.

95. *Hurst*, 136 S. Ct. at 619–20.

96. *Id.* at 620.

97. *Id.* (noting that the jury voted 7–5 for death).

98. *Id.*

99. *Id.*

100. *Id.* at 620–21 (quoting *Hurst v. State*, 147 So. 3d 435, 445–46 (Fla. 2014), *abrogated by Hurst v. Florida*, 136 S. Ct. 616 (2016)).

101. *Id.* at 620.

102. *Id.* at 621.

C. Opinion of the Court

Justice Sotomayor delivered the majority opinion joined by six other justices.¹⁰³ The Court held that Florida's sentencing scheme was unconstitutional in light of *Apprendi* and *Ring*.¹⁰⁴ It found that Florida's capital sentencing system required a judge, independent of a jury, to find aggravating factors before sentencing a defendant to death.¹⁰⁵ Because a criminal defendant could not receive a death sentence absent this finding, the *Apprendi* rule required this determination to be made by a jury because "[a] jury's mere recommendation is not enough."¹⁰⁶

Justice Sotomayor then acknowledged and rejected three arguments made by Florida in defense of the statute.¹⁰⁷ First, the State argued that the jury's recommendation of a death sentence "necessarily included a finding of an aggravating circumstance"; the judge's finding at the sentencing stage then was a redundant safeguard, not a necessary step before a death sentence could be passed.¹⁰⁸ The Court rejected this argument, highlighting that the State fundamentally mischaracterized the judge's role.¹⁰⁹ Without a judge's independent finding of an aggravating circumstance at sentencing, Florida's law did not allow for a death sentence.¹¹⁰

Second, the State argued that Hurst admitted to an aggravating circumstance and that *Ring* "[did] not require jury findings on facts defendants have admitted."¹¹¹ The Court, however, determined that Florida had misapplied precedent and that Hurst, in fact, had admitted no such thing.¹¹² Lastly, the State argued that the Court's decisions in *Spaziano* and *Hildwin* settled the issue in Florida's favor, having twice ruled the state's system constitutional.¹¹³ The Court responded by overruling the earlier cases, finding them "irreconcilable with *Apprendi*."¹¹⁴ However, rather than vacating Hurst's sentence, the Court remanded the case to determine whether or not this error was harmless.¹¹⁵

103. See *id.* at 619, 624.

104. See *id.* at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.").

105. *Id.* at 624.

106. *Id.* at 619.

107. *Id.* at 622–24.

108. *Id.* at 622 (quoting Brief for Respondent at 44, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505), 2015 WL 4607695, at *44).

109. *Id.* (noting that Florida's statute required "[t]he trial court *alone*" to find the facts necessary to impose the death penalty).

110. *Id.*

111. *Id.* at 622–23 (quoting Brief for Respondent at 41, *Hurst*, 136 S. Ct. 616 (No. 14-7505), 2015 WL 4607695, at *41).

112. *Id.* (explaining that Florida relied on a case concerning guilty pleas not jury findings).

113. *Id.* at 623.

114. *Id.* at 623–24 (finding support in *Ring*'s earlier overruling of *Walton*).

115. *Id.* at 624 (avoiding the question of whether the error was harmless or not and stating that this is a determination usually left to state courts). Florida judges have not overridden the jury's recommendation of life imprisonment since 1999. See Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011

D. Justice Breyer's Opinion Concurring in the Judgment

Concurring in the judgment, Justice Breyer reasoned that the Eighth Amendment's prohibition on cruel and unusual punishment requires that a jury, not a judge, impose a sentence of death.¹¹⁶ Justice Breyer used his concurrence in *Ring* to explain his reasoning.¹¹⁷ As a retributive form of punishment with minimal, if any, penal benefit over life imprisonment, Justice Breyer would have held that the death penalty is only permissible when a jury, acting as the conscience and voice of its community, determines and passes the sentence.¹¹⁸

E. Justice Alito's Dissenting Opinion

Justice Alito alone dissented.¹¹⁹ He began by analyzing the Court's approval of Florida's sentencing system over the past twenty-five years.¹²⁰ Further, he opined that rather than overruling *Spaziano* and *Hildwin*, the Court should reexamine *Ring*.¹²¹

Justice Alito then wrote that even if *Ring* was correct, the Court erred in extending it to Florida's sentencing system.¹²² He found crucial differences between Arizona's judge-only sentencing scheme in *Ring* and Florida's hybrid system in *Hurst*.¹²³ Unlike Arizona's completely jury-free system, Florida required a capital jury to be "the initial and primary adjudicator of the factors bearing on the death penalty."¹²⁴ Juries heard evidence of aggravating and mitigating circumstances, weighed these circumstances against each other, and recommended death only if the State proved beyond a reasonable doubt one or more aggravating circumstances.¹²⁵ Justice Alito endorsed the State's argument that the judge then merely duplicated the steps taken by the jury.¹²⁶

Finally, in the alternative, Justice Alito asserted that the error in *Hurst*'s case was harmless.¹²⁷ The State, he concluded, proved with "overwhelming" evidence both the robbery-aggravator and the heinous-

MICH. ST. L. REV. 793, 809–10 (2011). "Between 1972 and early June 2011, a total of 166 death sentences were imposed in Florida following a jury recommendation. . . . [O]nly about twenty-six percent (43 ÷ 166) of the override cases were affirmed on direct appeal. Of those forty-three, thirty-four won relief (so far) after subsequent litigation. Five remain on death row, and four were executed." *Id.* at 809 (footnotes omitted).

116. *Hurst*, 136 S. Ct. at 624 (Breyer, J., concurring).

117. *Id.*

118. *See Ring v. Arizona*, 536 U.S. 584, 614–17 (2002).

119. *Hurst*, 136 S. Ct. at 624–27 (Alito, J., dissenting).

120. *Id.* at 624–25.

121. *Id.* at 625 (referencing his dissent in *Alleyne v. United States*, 133 S. Ct. 2151, 2172–73 (2013) (Alito, J., dissenting)).

122. *Id.*

123. *Id.* at 625–26.

124. *Id.* at 625.

125. *Id.*

126. *See id.* at 625–26 (highlighting that a judge has not overridden the jury to impose death in over fifteen years as support for judicial fact-finding functioning as a mere redundancy).

127. *Id.* at 626.

ness-aggravator which made Hurst eligible for the death penalty.¹²⁸ To Justice Alito, “it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding.”¹²⁹

III. ANALYSIS

In *Hurst*, the Supreme Court made a straightforward application of the *Apprendi-Ring* requirements to Florida’s hybrid sentencing scheme.¹³⁰ By doing so, the Court has taken another modest step toward securing Sixth Amendment protections for capital defendants. However, the narrowness of the *Ring* and *Hurst* holdings might signal a moderation of the sweeping sentencing reforms of *Jones* and *Apprendi*. While the Court has recognized that the Sixth Amendment guarantees a defendant the right to have a jury find the facts necessary to make him or her eligible for death, the Court, aside from Justice Breyer, seems reluctant to declare that the Sixth Amendment guarantees a criminal defendant the right to have a jury pass the death sentence itself.

This Part first analyzes the breadth and limitations of the *Hurst* decision: what kinds of facts at sentencing, in addition to aggravating factors, are “elements” for the purposes of complying with the Sixth Amendment after *Apprendi*, *Ring*, and *Hurst*? It then examines the Delaware Supreme Court’s application of *Hurst* in *Rauf* and the justices’ competing interpretations of what *Hurst* requires for capital sentencing.

This Part next examines the constitutionality of certain state death penalty statutes in light of these decisions, determining that Alabama’s statute, at the very least, must be overturned. Finally, it looks to Justice Breyer’s and Justice Stevens’s calls for an Eighth Amendment right to have a jury determine, impose, and take responsibility for each particular sentence of death. The death penalty requires the most stringent of protections because of its severity and irrevocability. The Court should recognize that the Sixth and Eighth Amendments bar judges, as state officials, from imposing the death penalty. Instead, a jury, representing and expressing the community’s conscience, when aided by proper statutory guidelines, should determine and impose death sentences.

A. The Limits of *Hurst*: What Kinds of Facts Are Elements?

The *Ring* and *Hurst* holdings limit the manner in which a state may sentence criminal defendants to death.¹³¹ However, these rulings are quite narrow. The *Apprendi* rule mandates that “any fact that increases

128. *Id.*

129. *Id.* However, the jury only recommended death by seven votes to five. *Id.* at 620 (Sotomayor, J.).

130. *Id.* at 620–24.

131. *Id.* at 624; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

the penalty for a crime beyond the prescribed statutory maximum” has to be found by a jury.¹³² These facts, according to the rule, are actually “elements” of the crime regardless of whether the legislature classifies them in statutory drafting as “sentencing factors” or “sentencing conditions.”¹³³ By relying exclusively on the *Apprendi* rule, the Court has held that the Sixth Amendment guarantees only that the jury make all fact-finding determinations necessary for death penalty eligibility rather than guaranteeing a jury determine and impose a sentence of death itself.¹³⁴ The effects of *Ring* and *Hurst* depend on what exactly a “fact” is with regard to capital sentencing. In *Ring* and *Hurst*, the Court clarified that at least one kind of fact is subject to *Apprendi*: the existence (or absence) of an aggravating circumstance—an issue addressed during the sentencing stage of a capital trial—is a fact for the purposes of the Sixth Amendment because it is a necessary finding before a defendant can become eligible for a death sentence.¹³⁵

However, death sentences are not imposed based on aggravating circumstances alone.¹³⁶ Instead, there are two other requirements: (1) the consideration of mitigating circumstances and (2) the weighing of the aggravating and mitigating circumstances against one another and the determination that the aggravating outweigh the mitigating.¹³⁷

These requirements are not just statutory mandates imposed by state legislatures.¹³⁸ Rather, the Court has held that the Eighth Amendment requires that the sentencing body in a capital case—whether judge or jury—considers mitigating factors before it passes a sentence and that a state may not limit the kinds of mitigating factors that the sentencer may

132. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

133. *Id.* at 494 (“[T]he relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”).

134. Kamin & Marceau, *supra* note 9, at 529–30.

135. *See Hurst*, 136 S. Ct. at 619; *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002).

136. *See, e.g., ALA. CODE* § 13A-5-47(d)–(e) (1975) (describing how the trial court must “enter specific written findings” for (1) aggravating circumstances, (2) mitigating circumstances, and then (3) “determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist”).

137. *See Kamin & Marceau, supra* note 9, at 548–50 (“[States] generally ask triers of fact to consider any proffered mitigating evidence against the government’s case in aggravation and to determine whether, on balance, the evidence supports a punishment of life imprisonment or death.”). This is a necessary simplification of how states have structured their capital sentencing statutes. In practice, states statutes often look different than the three-step process. For example, Texas has a two-step process. In the first step, the jury must determine whether the defendant poses a future danger (the aggravating factor). In the second-step, the jury must determine whether “taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant” a life sentence. *TEX. CODE CRIM. PROC. ANN.* art. 37.071, § 2(a)(1), (b)(1)–(2), (e)(1) (West 2013). Thus far, the Supreme Court has not recognized any particular constitutional limitations for how the weighing process must occur. *See Kansas v. Marsh*, 548 U.S. 163, 175 (2006); *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988); *see also Kamin & Marceau, supra* note 9, at 550.

138. *See, e.g., DEL. CODE ANN.* tit. 11, § 4209(d)(1) (2013) (Delaware’s death sentencing statute), *held unconstitutional* by *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam).

consider as grounds for leniency.¹³⁹ Crucially, mere consideration of mitigating factors is not enough; instead, the Constitution requires the sentencing body to be able to act on these factors.¹⁴⁰ The Court went on to declare that “[o]nly then can we be sure that the sentencer has treated the defendant as a ‘uniquely individual human bein[g]’ and has made a reliable determination that death is the appropriate sentence.”¹⁴¹

Some states have narrowly interpreted *Ring* and *Hurst*, arguing that the jury need not make all three of these determinations to meet the Sixth Amendment’s requirements.¹⁴² According to this interpretation, when a jury first finds an aggravating factor beyond a reasonable doubt, the defendant becomes death eligible; any mitigation at this point is not an element under *Apprendi* (anything necessary to increase the maximum punishment) but, rather, an opportunity to lessen an already available punishment.¹⁴³ For instance, in Texas, a defendant cannot be given the death penalty unless a jury finds the existence of a single kind of aggravating circumstance (future dangerousness), but after this finding, the judge determines the existence or absence of mitigating factors, weighs the aggravating factors against the mitigating factors, and ultimately decides to impose the death penalty or not.¹⁴⁴

Ring and *Hurst* leave defendants and legislators unsure whether these two types of findings function as “elements” of the crime by being necessary facts that must be found before imposition of a death sentence (like the finding of aggravating circumstances).¹⁴⁵ The Supreme Court could decide that these findings are not elements. Instead, it might hold, as the highest criminal court in Texas has ruled,¹⁴⁶ that the finding of an aggravating circumstance alone lifts the possible sentence from life to death. These secondary findings then function as true sentencing factors. Under this interpretation, these findings are not necessary for a particular

139. See *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (invalidating an Ohio statute that limited the kinds of mitigating factors the sentencer could consider as a basis for granting life over death); see also *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”).

140. *Perry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). The jury’s consideration of mitigating factors may be guided by state statutes in capital cases but never removed. See *Marsh*, 548 U.S. at 171 (“So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death.”).

141. *Perry*, 492 U.S. at 319 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion)).

142. See, e.g., *Perry v. State*, 158 S.W.3d 438, 447–48 (Tex. Crim. App. 2004) (arguing that Texas’s sentencing scheme did not run afoul of *Ring*).

143. *Id.*

144. See Kamin & Marceau, *supra* note 9, at 568–69. Before *Rauf*, Delaware had a similar system in which a jury found “at least one statutory aggravating factor” before a judge weighed the aggravating and the mitigating and decided the sentence. Bowers et al., *supra* note 13, at 937.

145. See Bowers et al., *supra* note 13, at 945–46 (discussing the confusion over whether *Ring* demands that jurors find and weigh mitigating factors).

146. *Perry*, 158 S.W.3d at 447–49.

defendant's eligibility for death and do not increase the sentence available prior to their evaluation by the judge, but merely affect the sentencing outcome.¹⁴⁷ The Eastern District Court of Missouri recently interpreted *Ring* and *Hurst* in just this way.¹⁴⁸

Before 2013, there was some reason to believe that the Court would adopt this reasoning and hold that these two findings are not subject to the *Apprendi* rule.¹⁴⁹ In *Harris v. United States (Harris II)*,¹⁵⁰ which followed shortly on the heels of *Ring*, the Court limited *Apprendi*, holding that the Sixth Amendment did not require a jury to make fact-finding determinations which trigger a mandatory minimum sentence.¹⁵¹ In 2013, however, the Court expressly rejected and overruled *Harris II* in *Alleyne v. United States*.¹⁵² In *Alleyne* the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."¹⁵³

Although the *Alleyne* ruling suggests that the Court might reject such rigid formalisms, it is not dispositive. The *Alleyne* decision made clear that *Apprendi* should not be read as cutting off the United States' long history of judicial discretion in sentencing.¹⁵⁴ The Court may well decide that mitigating circumstances and the weighing of those circumstances against the aggravating are truly sentencing factors, not elements. This interpretation would hold these are the kinds of facts that a judge or jury can and should consider to decide between a sentence of life or death once the finding of an aggravating factor by the jury has made the defendant death eligible. In their analysis of the fact-driven requirements of *Ring*, Professors Sam Kamin and Justin Marceau have argued that states can circumvent such an interpretation of *Ring* "by dispensing with any legalistic limits on the process of balancing, by making it look more like a moral judgment and less like a legal one."¹⁵⁵

However, this position would undermine the last sixteen years of sentencing jurisprudence, as it supports the kind of formalism that the Court sought to remove from criminal sentencing with the *Apprendi*

147. See Bowers et al., *supra* note 13, at 945–46.

148. See *McLaughlin v. Steele*, No. 4:12CV1464 CDP, 2016 WL 1106884, at *29–30 (E.D. Mo. Mar. 22, 2016). In *McLaughlin*, the court decided that *Ring* and *Hurst* did not, of themselves, make the finding of mitigating circumstances and the weighing of the aggravating and mitigating circumstances fact findings necessary to impose the death penalty. However, it still vacated the defendant's death sentence because it found that the Missouri statute of its own power made such findings "facts." *Id.*

149. See *Abramson*, *supra* note 12, at 154 (discussing whether the Court will apply the logic of *Harris* to mitigating factors).

150. 536 U.S. 545 (2002), overruled by *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

151. *Id.* at 555–57 (holding that it is constitutionally permissible for a judge to make this determination because it imposed a minimum penalty permitted under the statute, rather than increasing the ceiling of permitted punishment).

152. 133 S. Ct. 2151, 2155 (2013).

153. *Id.*

154. *Id.* at 2163.

155. See Kamin & Marceau, *supra* note 9, at 572.

rule.¹⁵⁶ Under this interpretation, a state, like Missouri in *McLaughlin v. Steele*,¹⁵⁷ can sidestep the Sixth Amendment by merely characterizing mitigating circumstances as “sentencing factors” notwithstanding *Apprendi*’s disapproval of such tactics. Under this interpretation, Texas’s hybrid system, in which a jury need only find an aggravating circumstance and the judge then determines the sentence, would withstand Sixth Amendment scrutiny.¹⁵⁸

The determination of aggravating factors is an obvious example of fact-finding. Aggravating factors can be enumerated in a statute and the jury can simply decide that the evidence shows the defendant did or did not do X (e.g., intentionally murder for pecuniary gain).¹⁵⁹ On the other hand, the consideration of mitigating factors and then weighing them against the aggravating factors is not as obvious an example of fact-finding.¹⁶⁰ Nonetheless, fact-finding determinations have never been limited to such obvious examples. For instance, the Supreme Court has long held that the finding of negligence in tort cases is a question of fact.¹⁶¹ The legal system treats negligence as a factual determination in large part because juries determine negligence by means of a balancing test.¹⁶² Justice Scalia, in dicta mere days after *Hurst* was decided, reiterated that the process of finding and weighing of mitigating circumstances contained fact-finding determinations even though they were in large part “question[s] of mercy.”¹⁶³

156. See *id.* at 569–71 (“The jury right cannot be evaded by simply redefining critical elements as defenses or sentencing factors . . .”).

157. See *McLaughlin v. Steele*, No. 4:12CV1464 CDP, 2016 WL 1106884, *26–28 (E.D. Mo. Mar. 22, 2016).

158. See *Perry v. State*, 158 S.W.3d 438, 448 (Tex. Crim. App. 2004).

159. See FLA. STAT. § 921.141(6) (2016) (enumerating a finite list of aggravating factors of Florida’s capital punishment statute), *held unconstitutional* by *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016) (per curiam); *cf. id.* § 921.141(7) (enumerating a list of mitigating circumstances, but with “[t]he existence of any other factors in the defendant’s background that would mitigate against imposition of the death penalty”); see also *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (in dicta) (discussing how the finding of aggravating circumstances “is a purely factual determination”).

160. Others have argued that the Supreme Court’s Sixth Amendment jurisprudence allows states to exclude the jury from these crucial sentencing decisions “by making [them] open-ended rather than fact-based, by making the decision to impose death a moral judgment rather than a legal conclusion.” Kamin & Marceau, *supra* note 9, at 530.

161. *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (“[A]lthough the facts [in this case] are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.”); see also Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1781 (2003) (“[I]t is a firmly entrenched rule that juries shall decide both the underlying facts and whether those facts constitute negligence.”).

162. See *Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307–08 (7th Cir. 2002) (Posner, J.) (citing Judge Learned Hand’s famous balancing test for negligence in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[T]he owner’s duty . . . to provide against resulting injuries is a function of three variables: (1) The probability that [a ship] will break away [from its mooring]; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.”)).

163. See *Carr*, 136 S. Ct. at 642 (Although Justice Scalia drew a distinction between aggravating and mitigating circumstances, he explicitly stated that this argument did not “reference . . . our

A better ruling would hold that the determination of mitigating factors and the process of weighing aggravating factors against mitigating factors constitutes an element of the offense for the purposes of *Apprendi*, *Ring*, and *Hurst*.¹⁶⁴ While *Ring* and *Hurst* mandate that a jury find aggravating factors necessary to make death eligible, the Supreme Court has already held that it is unconstitutional to sentence someone to death without considering mitigating evidence and without weighing that evidence against the aggravating factors.¹⁶⁵

The consideration and weighing of mitigating factors are elements of a capital crime under the *Apprendi* rule because without such consideration and without making a fact-finding determination in how much weight to assign those factors, a sentencer cannot pass a sentence of death.¹⁶⁶ Stated another way, the existence of an aggravating factor alone does not make a defendant eligible for death. Without considering mitigating evidence and without weighing that evidence against the aggravating circumstances, a sentencer cannot impose the death penalty.¹⁶⁷ To treat a defendant as death-eligible once the jury has found an aggravating factor—a necessary premise of the narrow reading of *Ring* and *Hurst*—is flatly inconsistent with the Court's insistence that the death penalty is only constitutionally permissible once mitigating factors have been considered and weighed.¹⁶⁸ Therefore, the narrow interpretation of *Ring* and *Hurst* cannot be squared with the Court's existing death penalty precedents.

This interpretation forms the basis of much of the Delaware Supreme Court's rationale in *Rauf* for striking down the State's capital pun-

capital-sentencing case law"); see also *id.* at 648 (Sotomayor, J., dissenting) (discussing the majority's fact-judgment contained in the weighing of mitigation).

164. See *Rauf v. State*, 145 A.3d 430, 474 (Del. 2016) (Strine, C.J., concurring) (per curiam) ("[I]t is not clear what constitutional line exists involving facts that aggravate toward greater punishment or those that mitigate toward leniency. These are both key factual components. . . . [A] consideration of the mitigating factors is every bit as crucial—as necessary—to the determination of life or death."). This comment makes no argument as to mitigating factors and the weighing of aggravation against mitigation as part of the Eighth Amendment's narrowing principle. For a detailed discussion of this principle, see Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015).

165. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (court may not preclude sentencing body from considering mitigating evidence as a matter of law); *Lockett v. Ohio*, 438 U.S. 586, 607–08 (1978) (legislature may not limit relevant mitigation in statute); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (state may not limit mitigating evidence).

166. See *Eddings*, 455 U.S. at 113–14; *Lockett*, 438 U.S. at 608; *Jurek*, 428 U.S. at 271; see also *Rauf*, 145 A.3d at 474 (Strine, C.J., concurring) ("[T]he fact finding necessary to sentence a defendant to death cannot avoid a consideration of mitigating factors too."). In *Jurek*, the Supreme Court explicitly stated that a system that did not allow the consideration of mitigating factors in determining death sentences came perilously close to mandatory capital punishment statutes which the Court held to be unconstitutional. 428 U.S. at 271 ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.").

167. *Woodward v. Alabama*, 134 S. Ct. 405, 410–11 (2013) (Sotomayor, J., dissenting from denial of certiorari).

168. See *id.*

ishment statute in early August.¹⁶⁹ It also strongly suggests that all three sentencing considerations are elements of the offense, no matter what a state legislature names them.¹⁷⁰ Rather than withdrawing from *Apprendi*, this interpretation embraces the spirit of the *Apprendi* rule: “When a judge’s finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as ‘a tail which wags the dog of the substantive offense.’”¹⁷¹

B. Delaware’s Unconstitutional Death Penalty Statute: Rauf v. State

Seven months after *Hurst*, the Supreme Court of Delaware struck down the state’s death penalty statute.¹⁷² The court issued a short per curiam opinion joined by three justices, holding the statute unconstitutional because it, among other things, allowed a judge to determine aggravating factors and weigh the aggravating factors against the mitigating.¹⁷³ Finding that the statute rendered the “respective roles of the judge and jury . . . so complicated,” the court held that they could not sever the sentencing provisions from the statute as a whole and struck down the entire death penalty statute.¹⁷⁴ Rather than presenting unified reasons for these holdings, the court’s justices split, authoring three concurrences with separate legal arguments.¹⁷⁵

Chief Justice Strine’s concurrence presents the most far-reaching interpretation of *Hurst*.¹⁷⁶ He recognizes that the Supreme Court has previously held that consideration of mitigation, along with balancing of mitigation against aggravating circumstances, is “necessary to sentence a defendant to death.”¹⁷⁷ However, his analysis does not end there. He further argues that, “[r]ather than write more and more intricate judicial decisions parsing different kinds of fact findings,” *Hurst* restores the historical role of the jury in death sentencing: “200 years of our nation’s customs and traditions” reveal that the jury has typically passed death

169. See discussion *supra* Section III.A.

170. See *Rauf*, 145 A.3d at 474 (Strine, C.J., concurring).

171. See *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); see also *Woodward*, 134 S. Ct. at 410–11 (Sotomayor, J., dissenting from denial of certiorari) (describing the weighing of aggravating factors against mitigating factors as a “factual finding [that] exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole”).

172. *Rauf*, 145 A.3d at 432–33 (Strine, C.J., Holland, J. & Seitz, J.). Delaware’s Attorney General has decided not to pursue an appeal to the United States Supreme Court. *Attorney General Will Not Appeal to U.S. Supreme Court on Death Penalty*, DELAWARE.GOV (Aug. 15, 2016), <http://news.delaware.gov/2016/08/15/cpl/>.

173. *Rauf*, 145 A.3d at 432–33 (Strine, C.J., Holland, J. & Seitz, J.). Delaware’s statute, like Florida’s, had the jury give a recommendation after finding aggravators, mitigators, and weighing, but the judge’s determination decided the ultimate sentence. DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013), held unconstitutional by *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam).

174. *Rauf*, 145 A.3d at 433 (Strine, C.J., Holland, J. & Seitz, J.).

175. See *id.* (Strine, C.J., concurring); *id.* at 482 (Holland, J., concurring); *id.* at 487 (Valihura, J., concurring in part and dissenting in part).

176. See *id.* at 434–36 (Strine, C.J., concurring).

177. *Id.* at 451.

sentences.¹⁷⁸ Ultimately, Chief Justice Strine concludes that the Sixth Amendment requires a jury to be the final sentencing body in capital cases, arguing “[i]f the right to a jury means anything, it means the right to have a jury drawn from the community and acting as a proxy for its diverse views and mores, rather than one judge, make the awful decision whether the defendant should live or die.”¹⁷⁹

Justice Holland, by contrast, restricts his argument to a straightforward extension of *Hurst*.¹⁸⁰ He argues that the language of *Ring* and *Hurst* differ just enough for *Hurst* to do something new: require the jury, not a judge, to weigh the aggravating factors against the mitigating.¹⁸¹ He finds support for this reading in Justice Sotomayor’s authorship of the majority opinion in *Hurst*.¹⁸² Three years before *Hurst*, Justice Sotomayor dissented from a denial of certiorari in *Woodward v. Alabama*,¹⁸³ arguing:

[A] defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. The statutorily required finding that the aggravating factors of a defendant’s crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.¹⁸⁴

According to Justice Holland, Justice Sotomayor intentionally placed new, broader language into the *Hurst* majority opinion.¹⁸⁵ Specifically, by inserting the sentence, “[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death,” Justice Sotomayor expanded *Ring* to include the process of weighing mitigation and aggravation because this too is a necessary fact-finding before a sentencer can pass a death sentence.¹⁸⁶

Justice Valihura, unlike Chief Justice Strine and Justice Holland, argues that, while *Hurst* does require a jury to find aggravating circumstances, it does not similarly require a jury to consider and weigh mitigating circumstances against aggravating circumstances before the im-

178. *Id.* at 477.

179. *Id.* at 436.

180. *See id.* at 482–87 (Holland, J., concurring).

181. *Id.* at 487 (“Although the United States Supreme Court’s holding in *Hurst* only specifically invalidated a judicial determination of aggravating circumstances, it also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute.”).

182. *Id.*

183. 134 S. Ct. 405 (2013).

184. *Id.* at 410–11 (Sotomayor, J., dissenting from denial of certiorari) (citation omitted).

185. *See Rauf*, 145 A.3d at 482 (Holland, J., concurring).

186. *See id.* (quoting *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (emphasis added)).

sition of death.¹⁸⁷ Justice Valihura also makes use of Justice Sotomayor's authorship of *Hurst* and the dissent in *Woodward*, but reaches a different conclusion—namely that if Justice Sotomayor wished to extend *Apprendi-Ring* to the process of weighing aggravating circumstances against mitigating circumstances, then she would have explicitly done so, rather than sneaking it in through the back door.¹⁸⁸ Instead, weighing is a “judicial function” both constitutionally and under Delaware's own statute.¹⁸⁹

C. State Implications of *Hurst*: What Happens Next?

Where the Supreme Court of Delaware held that *Hurst* invalidated its capital sentencing statute, the Supreme Court of Alabama found no such problem for its state's system.¹⁹⁰ After *Ring*, the Alabama legislature refused to change its judicial override system, and the state's highest court ruled that *Ring* was inapplicable because of the structure of the state death penalty statute.¹⁹¹ After *Hurst*, the Alabama Supreme Court relied on this interpretation, reasoning that *Hurst* was a mere application of *Ring* rather than an extension.¹⁹² The court held that, because *Hurst* did not reveal any new constitutional requirements, Alabama's statute remained constitutional.¹⁹³

Alabama's hybrid system largely mirrors the one that the Supreme Court struck down in *Hurst*.¹⁹⁴ However, there are two main differences between Florida and Alabama's statutes: one in the sentencing scheme itself and the other in the statutory division of capital offenses.

These sentencing differences make Alabama's system an even more egregious violation of the Sixth Amendment than Florida's. The Court struck down Florida's statute because “[a] jury's mere recommendation,” even when the judge is required to give it “great weight,” cannot satisfy the Sixth Amendment.¹⁹⁵ Yet Alabama's statute does not even require the judge to consider the jury's recommendation let alone give it great weight. Rather, as Justice Stevens stated in his dissent in *Harris I*, Ala-

187. *Id.* at 487–89, 495–97 (Valihura, J., concurring in part and dissenting in part).

188. *Id.* at 495–96.

189. *Id.* (emphasis in original).

190. *Bohannon v. State* (*In re Bohannon*), No. 1150640, 2016 WL 5817692, at *17–18 (Ala. Sept. 30, 2016).

191. *See Waldrop v. State* (*In re Waldrop*), 859 So. 2d 1181, 1194–95 (Ala. 2002). Similarly, both Alabama and Florida's high courts held that the Supreme Court's rejection of judge-only death sentencing in *Ring* was inapplicable to their own hybrid statutes. *See Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002), *abrogated by* *Hurst v. Florida*, 136 S. Ct. 616, 620–21 (2016). In *Bottoson*, the Florida Supreme Court denied the defendant's *Ring* challenge to his judicially-determined and imposed death sentence, holding that the Supreme Court of the United States—by denying the defendant's petition for certiorari, lifting his stay of execution without explanation, and not expressly overruling *Hildwin* in *Ring*—effectively affirmed the sentence. *Id.* For the Alabama Supreme Court's reconciliation of its hybrid scheme after *Ring*, see *In re Waldrop*, 859 So. 2d at 1185–88.

192. *In re Bohannon*, 2016 WL 5817692, at *14–15, *17–18.

193. *Id.* at *14–15.

194. *See Stevenson*, *supra* note 9, at 1093.

195. *See Hurst v. Florida*, 136 S. Ct. 616, 619–20 (2016).

bama judges have “unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.”¹⁹⁶ *Hurst* makes clear that such unbridled judicial discretion cannot meet the Sixth Amendment’s requirements to have a jury determine the facts which make a defendant death eligible.¹⁹⁷

In addition, Alabama cannot successfully argue that stare decisis—the Court’s upholding of Alabama’s death sentencing system in *Harris I*—is dispositive. As the Court in *Ring* and *Hurst* rejected its previous capital sentencing decisions in *Walton*, *Spaziano*, and *Hildwin*, here, the Court would likely decide that *Harris I* is irreconcilable with the holdings of *Apprendi*, *Ring*, and *Hurst*.¹⁹⁸

The second difference involves Alabama’s statutory division of capital crimes. On first glance, it appears that this difference provides some ground upon which Alabama’s law may rest, but this quickly disappears after further examination. Writing before *Hurst*, then-Solicitor General of Alabama Nathan Forrester argued that Alabama’s law met the Court’s requirement in *Ring* that a jury must find an aggravating factor to make a defendant eligible for death.¹⁹⁹ The state did so by dividing capital crimes into eighteen separate offenses, most containing its own aggravating circumstance.²⁰⁰ In order for a jury to convict a defendant of a capital crime in the trial’s guilt–innocence stage, it must necessarily find the existence of one of these aggravating factors.²⁰¹ Therefore, before the judge moves on to determine and impose the sentence, the jury has already found the facts that make the defendant eligible, making the statute constitutionally permissible.²⁰² The Alabama Supreme Court used a similar rationale in *Waldrop v. State*²⁰³ and *Bohannon v. State*²⁰⁴ when it twice upheld Alabama’s death sentencing system.²⁰⁵

196. *Harris v. Alabama*, 513 U.S. 504, 514–16 (1995) (Stevens, J., dissenting).

197. *Hurst*, 136 S. Ct. at 619.

198. *See id.* at 623; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

199. Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama’s Capital Sentencing Regime After Ring v. Arizona*, 54 ALA. L. REV. 1157, 1158–59 (2003).

200. *Id.* at 1180–81 (e.g., murder during a kidnapping, murder during a robbery, and murder during a rape).

201. *Id.* at 1197–98.

202. *See id.* at 1197–99.

203. 859 So. 2d 1181 (Ala. 2002).

204. No. 1150640, 2016 Ala. LEXIS 114 (Ala. Sept. 30, 2016), *cert. denied*, *Bohannon v. Alabama*, 137 S. Ct. 831 (2017).

205. *In re Bohannon*, 2016 WL 5817692, at *15–16; *In re Waldrop*, 859 So. 2d at 1190–91. This is not the first time in recent history that Alabama courts have defied federal court mandates on the issues of Constitutional Law; elected Chief Justice Roy Moore of the Alabama Supreme Court has once been removed from his office for defying a federal court order to remove a religious statue which he installed in the Judicial Building in Montgomery, Alabama, home to that state’s highest court. *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848, 850–52, 858, 862 (Ala. 2004). Even now C.J. Moore has been suspended over his order to Alabama probate judges to defy the U.S. Supreme

However, this argument ignores one crucial safeguard adopted by every death penalty state after *Gregg v. Georgia*²⁰⁶: the bifurcated trial system.²⁰⁷ Forrester and the Alabama Supreme Court effectively argue the bifurcated trial system into a mere formality, one which may be easily circumvented by narrowly defining capital offenses.²⁰⁸ At the sentencing stage, the judge need not make any fact-finding necessary to impose death because the findings have already been made.²⁰⁹ In simpler terms, a conviction of a capital crime in Alabama makes a defendant eligible for death.²¹⁰

This is exactly the kind of formalism that *Jones* and *Apprendi* struck down in non-capital sentencing, and it is exactly the kind of formalism that *Ring* and *Hurst* make improper in death sentencing.²¹¹ In addition, the mere finding of an aggravating circumstance—whether at the conviction stage or sentencing stage—cannot make a defendant eligible for death because Supreme Court precedent insists that the death penalty requires a consideration of mitigating factors and a subsequent weighing of those factors against aggravating circumstances.²¹²

For these reasons, *Ring* and *Hurst* make it clear that the Alabama capital sentencing scheme violates the Sixth Amendment because it allows a judge to make an independent fact-finding necessary to make a defendant eligible for the death penalty.²¹³

In *Bohannon*, Alabama's highest court willfully ignored the United States Supreme Court's signals in the months following *Hurst* that Alabama's capital sentencing statute cannot stand; within a five-week period, the Court vacated three Alabama death sentences, remanding each case to the state court for reevaluation in light of *Hurst*.²¹⁴ By upholding the Alabama statute in *Bohannon* and using reasoning that differs so greatly from the Delaware court's holding in *Rauf*, Alabama's highest

Court's gay marriage ruling in *Obergefell v. Hodges* by denying marriage licenses to same-sex couples. Kyle Whitmire, *Roy Moore Suspended from Office: Alabama Chief Justice Faces Removal over Gay Marriage Stance*, AL.COM, http://www.al.com/news/index.ssf/2016/05/alabama_chief_justice_roy_moor_10.html (last updated May 8, 2016, 6:35 PM).

206. 428 U.S. 153 (1976) (plurality opinion).

207. See Abramson, *supra* note 12, at 151–52.

208. *Id.*

209. See *id.* at 150–51.

210. Cf. *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (describing how a death penalty system that does not allow the sentencing body to consider mitigating circumstances would violate the Eighth and Fourteenth Amendments).

211. See *supra* notes 57–59, 65–69 and accompanying text.

212. See *supra* notes 166–68 and accompanying text.

213. See Stevenson, *supra* note 9, at 1120.

214. *Kirksey v. Alabama*, 136 S. Ct. 2409, 2409 (2016) (mem.); *Wimbley v. Alabama*, 136 S. Ct. 2387, 2387 (2016) (mem.); *Johnson v. Alabama*, 136 S. Ct. 1837, 1837 (2016) (mem.).

court has essentially guaranteed that litigants will petition for Supreme Court review.²¹⁵

Crucially, the makeup of the Court is now in flux with the death of Justice Antonin Scalia in February 2016.²¹⁶ Justice Scalia was a forceful advocate for limiting *Ring* to fact-findings of aggravating factors.²¹⁷ Without Justice Scalia's presence, Justice Sotomayor, who authored the majority opinion of *Hurst*, has a greater opportunity to persuade a majority of justices to explicitly and clearly recognize that the Sixth Amendment requires a jury to make all findings necessary to impose a sentence of death, including the finding of mitigating circumstances and the process of weighing mitigating circumstances against aggravating circumstances.²¹⁸

D. The Death Penalty Should Be Hard: Combining the Sixth and Eighth Amendments

Death is different.²¹⁹ State-sanctioned killing as punishment is final, irreversible, and extraordinarily severe.²²⁰ The death penalty is not only exceptional for defendants, but also has broader societal implications as well because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action."²²¹ Death requires more justification than other punishments: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."²²²

Similarly, the punitive justifications for the death penalty differ from those of lesser punishments.²²³ Death does not effectively deter

215. Three litigants have already petitioned for certiorari, but the Supreme Court declined to hear these cases without explanation. Richard Wolf, *Supreme Court Lets Alabama Judges Impose Death Penalty*, USA TODAY (Jan. 23, 2017, 12:18 PM), <http://www.usatoday.com/story/news/politics/2017/01/23/supreme-court-alabama-florida-death-penalty-judge-jury/96947280/>.

216. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

217. See *Ring v. Arizona*, 536 U.S. 584, 611–13 (2002) (Scalia, J., concurring).

218. See *Woodward v. Alabama*, 143 S. Ct. 405, 410–11 (2013) (Sotomayor, J., dissenting from denial of certiorari); see also *supra* notes 184–86 (discussing Delaware Supreme Court Justice Holland's interpretation of *Hurst* wherein he reasons that Justice Sotomayor has already made this requirement plain in *Hurst*).

219. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (per curiam) ("[T]he finality of death precludes relief."); *id.* at 306 (Stewart, J., concurring) ("[The death penalty] is unique in its total irrevocability."). For a discussion of "death-is-different" philosophy and jurisprudence, see Abramson, *supra* note 12, at 124–28.

220. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irredeemable and unfathomable of penalties . . . [D]eath is different."); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country" (alteration in original) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977))).

221. *Gardner*, 430 U.S. at 357–58.

222. See *id.* at 358.

223. See Abramson, *supra* note 12, at 119 ("[R]etribution provides the main justification for capital punishment." (quoting *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring))).

crime, does not significantly incapacitate criminals more than life without parole, and, of course, cannot rehabilitate. Instead, the death penalty's primary justification is retribution.²²⁴ Reinstating the death penalty in *Gregg* after *Furman*'s four-year moratorium, the Supreme Court recognized the retributive nature of the death penalty: "[capital punishment] is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."²²⁵

Retribution requires more than these other justifications. Justice Breyer has argued that the Eighth Amendment's prohibition on cruel and unusual punishment demands that such retributive punishment be decided and imposed by juries because juries "are more likely to 'express the conscience of the community on the ultimate question of life or death,' and [are] better able to determine in the particular case the need for retribution"²²⁶

In recent years, the Sixth Amendment has been an important tool for reforming the death penalty. However, the limits placed on the Amendment by the Court²²⁷ indicate that standing alone it may not be sufficient to protect capital defendants from state overreach. It was under the Eighth Amendment that the Court launched modern capital punishment jurisprudence as states responded to *Furman*'s critiques.²²⁸ It was in the Eighth Amendment that the Court found and imposed many constitutional limits for the death penalty: a death sentence must not be arbitrary or random, and the punishment of death must not be grossly disproportionate to the severity of the crime.²²⁹ Eighth Amendment capital jurisprudence should similarly be brought to bear to protect a criminal defendant from being sentenced to death by a judge's determination.²³⁰

224. See *Ring*, 536 U.S. at 614–16; see also *Harris v. Alabama*, 513 U.S. 504, 517–18 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 477–81 (1984) (Stevens, Brennan & Marshall, JJ., concurring in part and dissenting in part), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616 (2016); cf. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

225. See *Gregg*, 428 U.S. at 184, 207.

226. *Ring*, 536 U.S. at 614–16 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)) (further citation omitted).

227. See discussion *supra* Section III.A.

228. Kamin & Marceau, *supra* note 9, at 534–35.

229. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the death penalty may not be imposed on intellectually disabled criminal defendants); *Enmund v. Florida*, 458 U.S. 782, 797–98 (1982) (holding that the Eighth Amendment prohibits death for aiders and abettors of a felony murder); *Coker v. Georgia*, 433 U.S. 584, 597–600 (1977) (holding that the death penalty is disproportionate punishment for rape); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (holding that the death penalty may not be the mandatory punishment for violating a criminal statute).

230. See Bowers et al., *supra* note 13, at 1003; Kamin & Marceau, *supra* note 9, at 586 ("The Court should take up the call of Justices Breyer and Stevens and hold that the Eighth Amendment requires that juries determine the ultimate sentence . . ."); Stevenson, *supra* note 9, at 1152 (dis-

The Constitution uses broad language, cruel and unusual, to describe the Eighth Amendment's punitive prohibitions.²³¹ The Supreme Court has stated time and again that what constitutes "cruel and unusual" cannot be fixed or static.²³² Rather, courts must look to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are . . . cruel and unusual."²³³ In turn, the Court derived "two essential touchstones for defining the evolving standards of decency that are at the core of the Eighth Amendment's prohibition against cruel and unusual punishments: (1) objective indicia of contemporary values" seen in death penalty legislation and jury verdicts "and (2) . . . whether the death penalty comports with the basic concept of human dignity at the core of the Amendment."²³⁴

Although the Sixth Amendment's jury trial guarantee almost surely prohibits Alabama's judicial override,²³⁵ the Alabama statute also runs afoul of the Eighth Amendment's prohibition on cruel and unusual punishment. The statute cannot withstand the two-part test that the Supreme Court has set forth for evaluating the evolving standards of decency that delineate constitutional punishments from cruel and unusual ones.²³⁶

On the national scale, American opposition to capital punishment is at its highest point since *Furman*.²³⁷ After *Ring* and *Hurst*, Alabama now stands alone as the only state with a complete judicial override.²³⁸ In other words, there is a national consensus against judicial override. The Supreme Court has regularly found a national consensus against forms of the death penalty on much less objective indicia than this.²³⁹ For exam-

plaining how the Court's Eighth Amendment jurisprudence already includes the right to a capital jury in sentencing decisions and that this right should be preserved).

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

232. See *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

233. See *id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

234. *Stevenson*, *supra* note 9, at 1139 (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181–82 (1976) (plurality opinion)); see also *Roper*, 543 U.S. at 563–64; *Atkins*, 536 U.S. at 311–12.

235. See discussion *supra* Section III.C.

236. See, e.g., *Atkins*, 536 U.S. at 312 ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002))); *Coker v. Georgia*, 433 U.S. 584, 592–97 (1977) (discussing jury determinations and legislation for evaluating death penalty as the punishment for the crime of rape under Eighth Amendment).

237. See Niraj Chokshi, *Death Penalty Loses Majority Support for First Time in 45 Years*, N.Y. TIMES (Oct. 3, 2016), <http://www.nytimes.com/2016/10/04/us/death-penalty-loses-majority-support-for-first-time-in-45-years.html> (discussing the findings of a Pew Research Center survey of Americans between August and September 2016).

238. Alabama's sole companion, Delaware, recently overturned its own judicial override statute. See *Rauf v. State*, 145 A.3d 430, 433–35 (Del. 2016) (per curiam); see also discussion *supra* Section III.B. Florida's legislature replaced the judicial override with jury sentencing in light of *Hurst*. FLA. STAT. § 921.141(2), (3) (2016) ("If the jury has recommended a sentence of . . . Life imprisonment without the possibility of parole, the court shall impose the recommended sentence."), held unconstitutional by *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016) (per curiam).

239. See, e.g., *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313–15.

ple, the Court found a national consensus against the death penalty for juveniles when thirty states prohibited the execution of children.²⁴⁰ Likewise only twenty-one states prohibited the death penalty for the intellectually disabled when the Supreme Court found a national consensus against that form of punishment.²⁴¹

Even before Alabama became the only state with a judicial override statute, it stood out among its peers as the only state to regularly disregard the entire purpose of the judicial override.²⁴² Instead of granting judges the power to quell too-punitive juries—likely the result of strong emotions among jury members—by overriding death sentences with life, Alabama judges have routinely done the exact opposite.²⁴³ Between 1976’s reinstatement of the death penalty and 2011, Alabama judges overrode the jury 107 times.²⁴⁴ In 98 cases—almost 92% of the time—the judge ignored the jury’s mercy and imposed death.²⁴⁵ In startling contrast, the judge only granted a more merciful sentence than the jury in 9 of those cases—barely 8% of the time.²⁴⁶

The second part of the Eighth Amendment test consists of the justice’s own judgment.²⁴⁷ The Supreme Court has held that “in cases involving a consensus [such as in the case of judicial overrides], our own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”²⁴⁸ In *Atkins v. Virginia*, in which the Court held that the Eighth Amendment barred death sentences for intellectually disabled defendants, the justices’ own judgment found no such disagreement, finding that “the execution of [intellectually disabled] criminals will [not] measurably advance the deterrent or the retributive purpose of the death penalty.”²⁴⁹

Bringing their own judgment to bear, judges should be troubled by another aspect of judicial imposition of the death penalty: the effect of political pressure on the judiciary in a tough-on-crime nation.²⁵⁰ While better qualified to understand and apply the law, a judge is a single state actor, and many judges are subject to political pressure which should

240. *Roper*, 543 U.S. at 564.

241. *Atkins*, 536 U.S. at 313–15.

242. See EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 9–13 (2011) (discussing how Delaware and Florida only rarely used the judicial override and more often than not the judge overrode the jury’s decision of death to impose life instead).

243. *Id.* at 24–26.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

248. *Id.* (citation omitted).

249. *Id.* at 321.

250. *Harris v. Alabama*, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) (“Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.” (citation omitted)).

have no place in determining individual capital sentences.²⁵¹ Former Chief Justice Rose Bird of the California Supreme Court represents the danger of such political pressure to judges.²⁵² After overturning every death penalty case she heard on the court, her political opponents ran a successful campaign against her retention on the court based in large part on these death penalty rulings.²⁵³ At the same time, the state's governor threatened and ultimately opposed another two justices, whom he thought did not uphold enough death penalty cases.²⁵⁴ After filling their seats with new justices, California's highest court dramatically shifted to upholding nearly 97% of death penalty cases thereafter.²⁵⁵

These political pressures affect trial judges as well. A study of Alabama's judicial override by the Equal Justice Initiative revealed that "30% of death sentences were imposed by [judicial] override" in 2008, compared to "just 7% in 1997."²⁵⁶ A key difference between these two years is that 2008 was an election year and 1997 was not.²⁵⁷ The combination of tough-on-crime judges and a judicial override capital sentencing regime has led to disturbing results in Alabama, a practical reversal of the merciful purpose of judicial override.²⁵⁸

Although she authored the majority opinion in *Harris I*,²⁵⁹ which upheld Alabama's judicial override in 1995,²⁶⁰ Justice Sandra Day O'Connor has long led the push to end the election of judges, arguing that "[i]n many states" they are merely "politicians in robes."²⁶¹ Justice Stevens, in his *Harris I* dissent, gave a thorough and powerful argument for why judges should not be the ultimate capital sentencing authority.²⁶² He cited the United States' long history of requiring a jury to pass a sentence of death, the fact that judges "are far more likely than juries to impose the death penalty" due to political pressure, and that the judicial

251. See Bowers et al., *supra* note 13, at 989–91, for a discussion of the political pressures on elected judges in hybrid states with regard to reviewing and passing capital sentences.

252. Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES (Dec. 5, 1999), <http://articles.latimes.com/1999/dec/05/news/mn-40743>; Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES (Dec. 6, 1999), <http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html>.

253. See Dolan, *supra* note 252; Purdum, *supra* note 252.

254. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760–61 (1995).

255. *Id.*

256. See EQUAL JUSTICE INITIATIVE, *supra* note 242, at 8.

257. *Id.*

258. See *supra* notes 213–15 and accompanying text; see also Woodward v. Alabama, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.").

259. 513 U.S. 504 (1995).

260. *Id.* at 515.

261. Annemarie Mannion, *Retired Justice Warns Against "Politicians in Robes,"* CHI. TRIB. (May 30, 2013), http://articles.chicagotribune.com/2013-05-30/news/chi-retired-justice-warns-against-politicians-in-rob-20130530_1_o-connor-bias-judges.

262. *Harris*, 513 U.S. at 516–26 (Stevens, J., dissenting).

override in particular undermines the jury's role, responsibility, and legitimacy.²⁶³

Improper political pressure is not the only problem with the judicial override from life to death. In Alabama, judicial override "is characterized by arbitrariness and error."²⁶⁴ Whether or not a defendant is subject to judicial override seems largely dependent on the county in which the defendant is convicted.²⁶⁵ Errors have led to reversal of sentences or convictions for a startling number (37%) of those sentenced by life-to-death override.²⁶⁶

Given the Alabama legislature's history of refusing to comply with federal court orders,²⁶⁷ the legislature—and perhaps even the judiciary—will likely not overturn the law without a clear federal court mandate and perhaps not even then. The Supreme Court should force hesitant states such as Alabama to recognize constitutional requirements by declaring that it is the role of a jury to serve as the community's representative and voice in the administration of criminal defense.²⁶⁸ Since the death penalty is the ultimate punishment and has its own unique requirements, it should

263. *Id.* at 516–23; see also Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 330 (1997) (discussing how Justice Stevens has stated that "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases" (alteration in original) (quoting Justice John Paul Stevens, Opening Assembly Address at the American Bar Association Annual Meeting (Aug. 3, 1996))). Political pressure on judges due to single, unpopular decisions has been in the news again recently. In California, Judge Aaron Persky outraged many in the country when he gave a Stanford athlete, Brock Turner, a mere six-month jail sentence for raping an unconscious woman; this decision has led to a petition to remove Persky from his position on the bench, the support for which "swelled to over 1.2 million signatures[.] . . ." Christine Hauser, *Judge in Stanford Sexual Assault Trial Will No Longer Hear Criminal Cases*, N.Y. TIMES (Aug. 26, 2016), <http://www.nytimes.com/2016/08/27/us/judge-in-stanford-sexual-assault-trial-will-no-longer-hear-criminal-cases.html>. As of August 26, 2016, Judge Persky has requested and been granted a transfer to a civil docket. *Id.* In Colorado, an online petition to remove Boulder District Judge Patrick Butler garnered thousands of supporters after Butler sentenced a University of Colorado student to probation and work release for raping an unconscious woman. Boulder Daily Camera, *Petition Seeks Recall of Judge in Austin Wilkerson Case, but Judges Can't Be Recalled in Colorado*, DENV. POST (Aug. 12, 2016, 2:08 PM), <http://www.denverpost.com/2016/08/12/colorado-petition-recall-judge-austin-wilkerson-case>.

264. EQUAL JUSTICE INITIATIVE, *supra* note 242, at 17.

265. See *id.* ("Just three of Alabama's 67 counties account or nearly half of the life-to-death overrides statewide. . . . Mobile and Montgomery's override rates are higher even than their overall death sentencing rates.").

266. *Id.* at 22.

267. See discussion *supra* Section III.C.205

268. See U.S. CONST. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("The founders of the American Republic were not prepared to leave [the criminal justice system] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."); see also Bowers et al., *supra* note 13, at 962–63, 971–72 (discussing empirical evidence showing that, in hybrid states, a judge's ultimate sentencing responsibility leads to juries being more likely to feel less responsible for sentencing and being more likely to misunderstand sentencing instructions).

be the jury's role to determine, impose, and take responsibility for each death sentence.²⁶⁹

Going forward, the Supreme Court should recognize this capital sentencing limitation as required by both the Sixth and Eighth Amendments. These Amendments, standing together, will serve as twin bulwarks against the unjust administration of death, reminding state legislatures, courts, and juries that death is different and the death penalty should be hard to impose and carry out.

CONCLUSION

In conclusion, the Court should recognize the Sixth and Eighth Amendments as twin guarantees that a jury pass the sentence of death in every particular case. This can be achieved by using the *Apprendi*, *Ring*, and *Hurst* decisions to require that a jury make all fact-finding determinations required to make a defendant death eligible, including finding mitigating circumstances and the subsequent weighing determination. In addition, the Eighth Amendment's ban on cruel and unusual punishment requires the jury, reflecting and expressing the "conscience of the community," to determine and impose a sentence of death—it would be improper for a trial judge, a state actor, to impose the ultimate penalty. Each of these Amendments might suffice by itself, but taken together, they can ensure that the death penalty, should a state employ it, undergo the most rigorous constitutional review.

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269. See Bowers et al., *supra* note 13, at 1006 ("The law should not subject judges to undue pressures to compromise judicial neutrality, especially not when it also weakens jurors' conscientiousness and sense of responsibility and even more so when the defendant's life is at stake.").

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