FLORIDA'S STATUTORY SENTENCING PROVISIONS, THE SIXTH AMENDMENT, AND THE PROVINCE OF THE JURY: A STUDY IN CONSTITUTIONAL CONFORMITY

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I. INTRODUCTION

As Robert Frost once famously observed, "A jury consists of twelve persons chosen to decide who has the best lawyer."[1] Among its other important duties, however, is deciding, as a representative sample of a local community, whether a criminal defendant is guilty of the crime charged against him or her and, in some cases, whether he or she deserves to live or die. While some scholars question the wisdom of randomly selecting laypersons to make such decisions,[2] a defendant's right to a jury trial is a

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1. Beth Swan, *Defoe and the Criminal Lawyer: Eighteenth Century Ideologies of Justice*, *in* SITES OF DISCOURSE, PUBLIC AND PRIVATE SPHERES, LEGAL CULTURE: PAPERS FROM A CONFERENCE HELD AT THE TECHNICAL UNIVERSITY AT DRESDEN, DECEMBER 2001 139, 147 (Uwe Böker & Julie A. Hibbard eds., 2002).

2. Commentators have "viewed the institution of jury trial as a prime source of unreasonable delay in the American system of adversarial litigation, as well as a major reason why criminal defendants forfeited their right to have their cases heard by accepting plea bargains." Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477, 478 (2007). Much of this criticism arises out of the conception that lay jurors "not only underst[and] the law poorly, but also [are] less able than experienced judges to resolve difficult factual issues." *Id.* To that effect, Professor Yale Kamisar considers the "administration of the criminal law in all the states in the Union [to be] a disgrace to our civilization." Yale Kamisar, *Strong Criticism of the American Jury System*, 38 LAW QUADRANGLE NOTES, no. 3, Fall/Winter 1995, at 23, https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1686&context=articles. In reaching this conclusion, he compared the American legal system to the English legal system. *Id.* The critical distinction between the two paradigms that is at the heart of his disdain pertains to the role and function of the jury in criminal prosecutions. He posited three specific reasons why the way the English system apportions decision-making authority between the judge and jury is superior to that of the American system. *Id.* First, he claimed, "English judges have retained the complete control over the method by which counsel try the case, restraining them to the points at issue and preventing them from diverting the minds of the

hallmark of our legal system and is guaranteed by the United States Constitution.

The Sixth Amendment established the critical safeguards that are postured to protect criminal defendants against unjust infringement upon their liberty. Its text can be understood to have created three discrete rights, each one protecting a group of related interests.[3] The Sixth Amendment[4] guarantees criminal defendants the right to a speedy trial,[5] a public trial, and a fair[6] trial. The "public" trial interests encompass the Sixth Amendment safeguard that is the focus of this Article: the criminal defendant's right to a "trial by an impartial jury" of his or her peers.[7]

The historical foundation of the jury's role as trier of fact and arbiter of criminal culpability is deeply rooted in the common law.[8] Importantly, the jury acts as a shield. It protects both the integrity

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jury to inconsequential and irrelevant circumstances and considerations." *Id.* Exactly how these judicial functions differ from those prescribed by Federal Rules of Evidence 401, 402, 403, and their state counterparts, however, remains unclear. Second, Professor Kamisar argued that "the English judges have reserved the power to aid the jury by advising them how to consider the evidence and expressing an opinion upon it." *Id.* The third problem he identified was the "difficulty of securing jurors properly sensible of the duty which they are summoned to perform." *Id.* According to Professor Kamisar, this problem occurs because "state legislatures . . . allow peremptory challenges to the defendant far in excess of those allowed to the state." *Id.*

3. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO L.J. 641, 642 (1996).

4. The Sixth Amendment reads,

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

U.S. CONST. amend. VI.

5. "[T]he basic right to a *speedy* trial" protects three sub-interests: (1) a physical liberty interest; (2) "a mental liberty and reputational interest"; and (3) a reliability interest. Amar, *supra* note 3, at 642.

6. The fair trial rights include the defendant's right "to be informed of the nature and cause of accusation," to confront witnesses who testify against him or her, to "compel the production of defense witnesses," and to acquire the assistance of counsel. *Id.*; U.S. CONST. amend. VI.

7. U.S. CONST. amend. VI. Professors Kamin and Marceau suggest that the jury's role in sentencing, especially capital sentencing, is crucial "not because of the jury's fact-finding prowess, but because the jury plays an indispensable role in expressing the conscience of the community." 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, 532 (2011).

8. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

of the process by which the government prosecutes an individual and the system of ordered liberty that is the cornerstone of our society.[9] Jury trials "require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'"[10] Simply put, the purpose of the jury is to prevent government tyranny. To that end, the English common law distributed minimal discretion to judges in criminal sentencing.[11] Because criminal offenses were "sanction-specific," once a jury of the defendant's peers determined that the crown had proven the elements of the charged offense beyond a reasonable doubt, the judge only *pronounced* the judgment.[12] The punishment associated with the proven guilt of the accused was "not [the court's] determination or sentence, but the determination and sentence of the law."[13]

Over the course of the last few decades, the Supreme Court has, on several occasions, interpreted the "right to a jury trial" provision of the Sixth Amendment as it applies to criminal sentencing. And in some of these cases, the Court thwarted statutory sentencing regimes and procedures that abrogated the function of the jury. Ultimately, each of these decisions further defined a defendant's right to be punished for criminal wrongdoing only after the government has convinced the "community" that each element of the charged offense has been proven.

In *Hurst v. Florida*, the Supreme Court struck down Florida's capital punishment sentencing regime because the procedure[14] it prescribed required a judge to independently weigh the aggravating and mitigating factors surrounding a particular homicide.[15] However, the *Hurst* decision did not end Florida's

9. *Id.*

10. *Id.* (quoting 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769)); Blakely v. Washington, 542 U.S. 296, 301–02 (2004).

11. *See Apprendi*, 530 U.S. at 479 (explaining that in England during the eighteenth century, trial judges had little "explicit discretion in sentencing").

12. *Id.* at 479–80.

13. *Id.* at 480 (quoting 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *396 (1769)).

14. The statutory provisions that together comprised Florida's unconstitutional sentencing scheme were Florida Statute Section 775.082(1)(a) (2012) and Florida Statute Section 921.141 (2012).

15. 136 S. Ct. 616, 624 (2016).

practice of blurring the lines between the province of a sentencing judge and that of a sentencing-phase jury.

The essential problem with Florida's former capital punishment procedure was that it deprived defendants of their "right to a . . . public trial, by an impartial jury."[16] While the Court has determined the unconstitutionality of Florida's former death penalty sentencing scheme, there are other procedures within Section 775.082—subsections (1)(a) and (10)—that similarly authorize sentencing judges to make critical findings that affect the length and nature of a defendant's sentence.

This Article argues that Sections 775.082(1)(b) and (10) are unconstitutional in light of *Hurst* and other seminal Supreme Court cases that interpret the Sixth Amendment in the context of criminal sentencing. Part II explains the specific contributions of these landmark cases. Part III details Section 775.082(1)(b)'s historical context and describes its purpose. Then, it argues that the provision is unconstitutional because it contradicts both the role of the jury as envisioned by the framers of the Sixth Amendment and the Court's reasoning in *Hurst* (and its predecessors). Lastly, it illustrates, through recommended legislative revision, how sentencing under Section 775.082(1)(b) can be constitutionally administered. Part IV discusses how state courts had interpreted Section 775.082(10) before the Supreme Court decided *Hurst*. It also demonstrates that Section 775.082(10), like Section 775.082(1)(b), is unconstitutional and explains how rewriting the provision and drafting appropriate jury instructions can correct the problem. This Article concludes by predicting the potential impact the remedial measures proposed within will have on the preservation of the right to a jury trial as it applies to sentencing.

II. HISTORICAL CONTEXT

While the controversy surrounding the constitutionality of Florida's sentencing schemes came to a head in *Hurst*, it is important to understand the predecessor Sixth Amendment cases that paved the way for Florida's sentencing overhaul. The genesis of the Court's interpretation of the Sixth Amendment's mandates

16. U.S. CONST. amend. VI.

illustrates not only the Court's attitude toward the rights of the accused, but also the relationship between the judiciary and the public. Once this contextual landscape has been established, understanding the necessity of the *Hurst* decision and why a legislative restructuring of Sections 775.082(1)(b) and (10) is imperative will come into focus. Thus, this Part analyzes and explains how the Court's Sixth Amendment jurisprudence regarding the role of the jury in sentencing was influenced and modified by some of the Court's seminal decisions.

A. Apprendi v. New Jersey

In *Apprendi*, the Supreme Court was tasked with resolving the issue of "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from ten to twenty years be made by a jury on the basis of proof beyond a reasonable doubt."[17] The case dealt with a New Jersey statute that made it a crime to "possess[ ] a firearm for an unlawful purpose" (unlawful possession).[18] Because this offense was classified as a second-degree felony, a defendant convicted of unlawful possession could be sentenced to a term of "imprisonment for 'between five years and ten years'"[19] based on conviction alone. However, under a separate statute,[20] a defendant could receive a sentence of up to twenty years if a trial judge found[21] that the unlawful purpose motivating the defendant's possession of the firearm was "to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[22]

When an African-American family "moved into a previously all-white neighborhood in Vineland, New Jersey," Petitioner Charles C. Apprendi fired numerous .22 caliber bullets into his

17. 530 U.S. at 469.

18. *Id.* (citing N.J. STAT. § 2C:39-4(a) (1995)).

19. *Id.* at 468 (quoting N.J. STAT. § 2C:39-4(a)(2)).

20. N.J. STAT. § 2C:44-3(e) (2000). The Supreme Court of New Jersey referred to this sentencing provision as the "'hate crime' law." *Apprendi*, 530 U.S. at 468.

21. The judge only had to find that the defendant acted in accordance with the prohibited purpose by a preponderance of the evidence. *Id.* (citing N.J. STAT. § 2C:44-3(e)). This burden of proof is lower than that required for a conviction, i.e., beyond a reasonable doubt. *See generally* Stephen E. Feinberg, *Misunderstanding, Beyond a Reasonable Doubt*, 66 B.U. L. REV. 651 (1986) (discussing the standards for evaluating evidence).

22. *Apprendi*, 530 U.S. at 469 (quoting N.J. STAT. § 2C:44-3(e)).

new neighbors' home.[23] Apprendi subsequently admitted that he targeted the house because of the family's race.[24] Following an "evidentiary hearing on the issue of Apprendi's 'purpose' for the shooting," the trial judge found that racial animus motivated Apprendi's actions. The judge's conclusion made the ten-year sentencing extension applicable to Apprendi's conviction.[25]

In deciding whether New Jersey's sentencing scheme violated the "jury trial guarantees of the Sixth Amendment,"[26] the Supreme Court acknowledged its prior pronouncement in *Jones v. United States*.[27] In *Jones*, the Court considered "whether a provision of the federal carjacking statute, 18 U.S.C. § 2119(2), dealing with serious bodily injury was an element of the offense or merely a sentencing factor."[28] The Court held that "'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'"[29] So for sentencing purposes, "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone"[30] violates the Sixth Amendment. On the other hand, "[m]ere sentencing provisions . . . need generally be proven only to a judge and only by a preponderance of the evidence."[31]

The *Apprendi* Court applied *Jones* to the state statute at issue through the due process clause of the Fourteenth Amendment. Accordingly, the Court held that New Jersey's sentencing scheme under the hate-crime law violated the Sixth Amendment because it allowed a judge to find a fact that exposes the defendant to "a penalty exceeding the [statutory] maximum."[32] The Court reasoned that "[t]o impose a sentence greater than the statutory maximum, in effect, would be to convict a defendant of a lesser

23. *Id.*
24. *Id.*
25. *Id.* at 470–71.
26. *Id.* at 476.
27. 526 U.S. 227, 243 (1999).
28. Kamin & Marceau, *supra* note 7, at 538; *Jones*, 526 U.S. at 229.
29. *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).
30. *Id.* at 482–83 (emphasis added).
31. Kamin & Marceau, *supra* note 7, at 539.
32. *Apprendi*, 530 U.S. at 482.

crime, yet sentence her for a greater one."[33] Moreover, *Apprendi* made the *Jones* rule[34] applicable to state statutory sentencing regimes.

B. Ring v. Arizona

In *Ring*, the Court determined the constitutionality of Arizona's capital punishment sentencing procedure.[35] Following a trial, a guilt-phase jury found Timothy Ring guilty of first-degree felony murder for his involvement in the armed robbery of an armored van that resulted in the death of its driver.[36] "Under Arizona law," however, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made."[37] At the time, Arizona's sentencing regime compelled "the trial judge, sitting alone, [to] determine[ ] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty."[38] Based on the *Apprendi* rule,[39] the Court struck down Arizona's sentencing

33. R. Craig Green, Apprendi's *Limits*, 39 U. RICH. L. REV. 1155, 1157 (2005). In *Apprendi*, four Justices dissented. *Id.* at 1158. They had three major concerns. *Id.* "First, the dissenters worried over the *Apprendi* Court's reference to facts that alter a defendant's range of possible sentences."
Id. Second, they feared *Apprendi* might prohibit any sentencing enhancements that are within the range allowed by the Federal Sentencing Guidelines and predicated upon judicially determined facts. *Id.* at 1159. This apprehension turned out to be unfounded because the *Apprendi* rule operated based on the maximum statutory penalty that is applicable to a given offense, and "[t]he Guidelines always prescribe a sentence lower than the statutory maximum." *Id.* at 1161. The dissenters' third concern was that under *Apprendi*'s holding, Arizona's capital punishment scheme, which the Court had previously upheld, could no longer be considered constitutional. *Id.* "Although the *Apprendi* majority claimed that its decision did not affect the Arizona death penalty, the same Justices reversed course two years later in *Ring v. Arizona*." *Id.* at 1161–62; Ring v. Arizona, 536 U.S. 584, 619 (2002).

34. "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6.

35. *Ring*, 536 U.S. at 609.

36. *Id.* at 591.

37. *Id.* at 592.

38. *Id.* at 588. Arizona's sentencing regime was substantially similar to the one employed by Florida. *Id.* at 598. Arizona law, however, did not mandate an advisory jury verdict recommending a sentence of either life or death. *See* Hurst v. Florida, 136 S. Ct. 616, 620 (2016) (discussing that Florida's sentencing procedure included the use of an advisory jury).

39. As mentioned above, *Apprendi* held that "the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if

scheme as unconstitutional because Arizona law "allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[40]

To reach this result, the Court had to expressly overrule *Walton v. Arizona*,[41] a pre-*Apprendi* case in which the Court upheld Arizona's capital sentencing scheme. Arizona's scheme was able to survive constitutional scrutiny in *Walton* because the Court categorized the statutory aggravation factors as "sentencing considerations" and not "'element[s] of the offense of capital murder.'"[42] *Apprendi*'s holding rendered such a distinction irrelevant.[43] Under *Apprendi*, a judge may not find *any* facts that cause a defendant to be subjected to a sentence that is greater than the statutory maximum.[44] These facts do not necessarily have to be elements of the substantive offense.[45]

Since *Walton*'s holding was irreconcilable with *Apprendi*, the Court concluded that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[46] Thus, the Court held that Arizona's sentencing scheme violated the Sixth Amendment.[47]

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punished according to the facts reflected in the jury verdict alone.'" *Ring*, 536 U.S. at 588–89.

40. *Id.* at 609.

41. 497 U.S. 639 (1990).

42. *Ring*, 536 U.S. at 588 (quoting *Walton*, 497 U.S. at 649).

43. Interestingly, the *Apprendi* dissenters had expressed concern that the majority's holding would conflict with *Walton* and render Arizona's capital sentencing procedure unconstitutional. Green, *supra* note 33, at 1161–62. While the majority claimed its holding would not affect Arizona's capital sentencing scheme, Apprendi v. New Jersey, 530 U.S. 466, 496–97 (2000), the same Justices overturned Arizona's scheme two years later in *Ring*. 536 U.S. at 609.

44. *See id.* at 587–89. ("[*Apprendi*] held that the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'").

45. *See id.* at 589 (finding that the Sixth Amendment is violated "even if the State characterizes the additional findings made by the judge as 'sentencing factor[s]'").

46. *Id.* at 589.

47. After the *Ring* decision, the Arizona state legislature drafted SB 1001, which was eventually enacted into law. This bill set forth a new scheme to replace the one the *Ring* Court held unconstitutional. Under the new capital sentencing procedure, if the sentencing-phase jury returns a unanimous verdict concluding that the death penalty is not an appropriate sentence, the sentencing judge still has the authority to impose a death sentence. Daren S. Koudele, Note, *Unraveling* Ring v. Arizona*: Balancing Judicial Sentencing Enhancements with the Sixth Amendment in Capital Punishment Schemes*, 106 W. VA. L. REV. 844, 869 (2004). It seems that Arizona's replacement scheme is

Ring made two very important contributions to the Court's Sixth Amendment sentencing jurisprudence. First, it applied the *Apprendi* rule to *capital* sentencing schemes.[48] Second, *Ring* emphasized that a judge cannot find *any* facts that increase a defendant's sentence beyond the statutory maximum. Importantly, the Sixth Amendment's jury trial safeguards are not limited to findings regarding the statutory elements of a crime. As long as the legislature of a particular state conditions the increase of a sentence on certain factual conclusions, only a jury may determine the existence of those facts. Therefore, if a certain sentence is only applicable to a convicted defendant when the commission of his or her crime involves aggravating factors, the Sixth Amendment requires the trier of fact to conclude the existence of those aggravators.

C. Blakely v. Washington

After *Ring* came *Blakely*. In *Blakely*, the Supreme Court had occasion to apply *Apprendi*'s holding to a Washington statute[49] that was phrased differently than New Jersey's hate crime law[50] but was of similar constitutional dimension.[51] "Petitioner Ralph Howard Blakely, Jr., [pled] guilty to the kidnapping of his estranged wife [Yolanda,]"[52] who described the kidnapping at his sentencing hearing.[53] "The facts [he] admitted in his guilty plea, standing alone, supported a maximum sentence of [fifty-three] months."[54] Nevertheless, the sentence Blakely actually received

unconstitutional in light of *Hurst* because its procedures are almost identical to those struck down by the *Hurst* Court.

48. Kamin & Marceau, *supra* note 7, at 530. *Blakely v. Washington* added a caveat to the *Apprendi* rule. 542 U.S. 296 (2004). The *Blakely* Court held that "under *Apprendi* a judge may impose any sentence authorized 'on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" Hurst v. Florida, 136 S. Ct. 616, 622–23 (2016) (quoting *Blakely*, 542 U.S. at 303).

49. 542 U.S. at 301, 313; *see* 9 WASH. REV. CODE § 9.94A.535(3)(h)(iii) (2004) (the Washington statute analyzed in *Blakely*).

50. *See supra* text accompanying note 20 (explaining that the Supreme Court of New Jersey referred to New Jersey's sentencing provision as the "'hate crime' law").

51. Green, *supra* note 33, at 1171.

52. *Blakely*, 542 U.S. at 298; Jason Amala & Jason Laurine, *An Exceptional Case: How Washington Should Amend Its Procedure for Imposing an Exceptional Sentence in Response to* Blakely v. Washington, 28 SEATTLE U. L. REV. 1121, 1126 (2005).

53. *Blakely*, 542 U.S. at 300.

54. *Id.* at 298.

exceeded the prescribed statutory maximum by more than three years.[55]

The trial court sentenced Blakely in accordance with a Washington statute[56] that identified the aggravating and mitigating factors sufficient to warrant a departure from Washington's sentencing guidelines. This statute distinguished "deliberate cruelty" as an aggravating factor trial judges may consider when determining whether an exceptional sentence—one that exceeds the otherwise applicable maximum—would be appropriate.[57]

In deciding whether the "deliberate cruelty" aggravator applied to Blakely's offense, the Court considered "Yolanda's description of the kidnapping."[58] After she had filed for divorce, Blakely "abducted her from their orchard home[,] . . . [bound] her with duct tape[, forced] her at knifepoint into a wooden box in the bed of his pickup truck[,] . . . [and] implored her to dismiss the divorce suit and related trust proceedings."[59] Then, when the "couple's [thirteen]-year-old son Ralphy returned home from school, [Blakely] ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so."[60] Ralphy managed to "escape[ ] and [seek] help when they stopped at a gas station, but [Blakely] continued on with Yolanda to a friend's house in Montana" where he was eventually arrested.[61]

The State recommended a sentence within the applicable guideline range.[62] Nevertheless, the sentencing court "imposed an

55. *Id.*
56. 9 WASH. REV. CODE § 9.94A.535(3)(h)(iii).
57. *Id.*
58. *Blakely*, 542 U.S. at 300.
59. *Id.* at 298.
60. *Id.*
61. *Id.*
62. *Id.* at 300. In Washington, second-degree kidnapping is a class B felony. *Id.* at 298 (citing 9 WASH. REV. CODE § 9A.40.030(2003)). "Washington's Sentencing Reform Act specifies, for [Blakely's] offense of second-degree kidnapping with a firearm, a 'standard range' of [forty-nine] to [fifty-three] months." *Id.*; 9 WASH. REV. CODE § 9.94A. The State argued, however, "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not [fifty-three] months, but the [ten]-year maximum for class B felonies in § 9A.20.021(1)(b)." *Blakely*, 542 U.S. at 303. The Court responded by explaining that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* (citing Ring v. Arizona, 536 U.S. 584, 602 (2002) (emphasis added)). Therefore, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found

exceptional sentence of [ninety] months—[thirty-seven] months beyond the standard maximum"—because it found Blakely "had acted with 'deliberate cruelty.'"[63] Blakely objected to the "unexpected increase . . . in his sentence."[64] Accordingly, "[t]he judge . . . conducted a [three]-day bench hearing featuring testimony from [Blakely], Yolanda, Ralphy, a police officer, and medical experts."[65] Standing by his initial "deliberate cruelty" determination,[66] the judge concluded:

> [Blakely's] methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order.[67]

Hence, the Supreme Court had to resolve "whether this [upward departure] violated [Blakely's] Sixth Amendment right to trial by jury."[68]

The trial court relied on *State v. Gore*[69] to justify its departure from the standard range that was available under Washington's sentencing guidelines.[70] In *Gore*, the Supreme Court of Washington held "that the factual basis for an exceptional sentence upward need not be charged, submitted to the jury, and proved beyond a reasonable doubt."[71] *Gore* further held, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense."[72] But

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all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* at 304 (internal citation omitted).

63. *Blakely*, 542 U.S. at 300.
64. *Id.*
65. *Id.*
66. *Id.* at 301.
67. *Id.* (internal quotation marks omitted).
68. *Id.* at 298.
69. 21 P.3d 262 (Wash. 2001).
70. *Blakely*, 542 U.S. at 299.
71. *Gore*, 21 P.3d at 277.
72. *Id.*

"[w]hen a judge imposes an exceptional sentence, he must set forth findings and conclusions of law supporting it."[73]

The facts the sentencing court used to justify the enhancement of Blakely's sentence "were neither asserted by the prosecution to convict [Blakely] of kidnapping in the second degree, nor . . . admitted to by [Blakely]" himself.[74] Instead, they came from the sentencing-phase testimony of the victim and other witnesses.[75] The only relevant facts Blakely admitted were "the elements of second-degree kidnapping and the domestic-violence and firearm allegations."[76]

Relying on the constitutional rule established in *Apprendi*,[77] the *Blakely* Court reversed the Washington Court of Appeal and remanded the case.[78] The Court held the enhancement of Blakely's sentence beyond the fifty-three month maximum, which was based on the sentencing judge's independent determination regarding the "deliberate cruelty" aggravator, violated his Sixth Amendment right to a jury trial.[79] Moreover, the majority acknowledged that under *Apprendi*, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[80] The sentencing court violated this right when it decided for itself that Blakely exhibited "deliberate cruelty" during the kidnapping, even though he admitted no relevant facts from which such a conclusion could be drawn.

73. *Blakely*, 542 U.S. at 299. "A reviewing court will reverse [an exceptional] sentence [only] if it finds that 'under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing [the] sentence.'" *Id.* at 299–300.

74. Amala & Laurine, *supra* note 52, at 1126; *Blakely*, 542 U.S. at 303.

75. *Blakely*, 542 U.S. at 298–301.

76. *Id.* at 300. Initially, "the State charged [Blakely] with first-degree kidnapping." *Id.* at 298 (citing 9 WASH. REV. CODE § 9A.40.020(1) (2000)). Pursuant to a plea agreement, however, Blakely pled guilty to "second-degree kidnapping involving domestic violence and use of a firearm." *Id.* at 298; *see also* 10 WASH. REV. CODE § 10.99.020(p) (2000).

77. The *Apprendi* Court held, "Other than a fact of prior conviction, any fact that increases the penalty of a crime beyond prescribed statutory maximum must be submitted to jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

78. *Blakely*, 542 U.S. at 314.

79. *Id.* at 305.

80. *Id.* at 313.

D. Hurst v. Florida

In *Hurst*, the Supreme Court considered whether Florida's capital punishment sentencing regime was constitutional in light of *Apprendi*, *Blakely*, and *Ring*.[81] After a four-day trial, "[a] Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison."[82] Her body was found "in the freezer of the restaurant where she" and Hurst worked.[83] Harrison had been "bound, gagged, and stabbed over [sixty] times, [and] [t]he restaurant safe was unlocked and open, missing hundreds of dollars."[84] Pursuant to the trial court's instructions, the jury found Hurst guilty of first-degree murder.[85] However, the jury did not specify which of the two available first-degree murder theories[86] it believed.[87]

At the time, Florida law granted judges the authority to impose a death sentence upon defendants "who ha[d] been convicted of a capital felony."[88] Before doing so, however, sentencing courts were required to "conduct a separate sentencing proceeding to determine" the propriety of the death penalty versus a term of life imprisonment.[89]

During the first step of the proceeding, the sentencing judge would hold an evidentiary hearing in front of a penalty-phase jury.[90] The jury would then "rende[r] an 'advisory sentence' of life or death without specifying the factual basis of its recommendation."[91] Irrespective of the jury's recommendation, the sentencing judge would then proceed to independently weigh the

81. Hurst v. Florida, 136 S. Ct. 616, 619 (2016).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 619–20.
86. The trial court "instructed the jury that it could find Hurst guilty of first-degree murder under two theories: premeditated murder or felony murder for an unlawful killing during a robbery." *Id.* at 619.
87. *Id.* at 620.
88. FLA. STAT. § 775.082(1)(a) (2017). In Florida, first-degree murder is considered a capital felony. *See id.* (establishing first-degree murder as a capital felony punishable by death); *Hurst*, 136 S. Ct. at 620. And "[u]nder state law, the maximum sentence a capital felon may receive on the basis of conviction alone is life imprisonment." *Hurst*, 136 S. Ct. at 620 (citing FLA. STAT. § 775.082(1)(a)).
89. FLA. STAT. § 921.141(1) (2017).
90. *Hurst*, 136 S. Ct. at 620 (citing FLA. STAT. § 921.141(1)).
91. *Id.* (citing FLA. STAT. § 921.141(2)).

aggravating and mitigating circumstances.[92] Based on this judicial analysis, the sentencing judge would make his or her own sentencing determination and enter either a life sentence or a death sentence.[93] If the sentencing court then decided to impose a death sentence, it would have been required to produce written findings justifying its decision.[94] While sentencing judges were instructed (by statute)[95] to give weighty consideration to the jury recommendation,[96] "the sentencing order [had to] 'reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors.'"[97]

The *Hurst* Court ruled that the *Ring* analysis applied equally to both Florida's and Arizona's sentencing schemes because the fact that "Florida incorporates an advisory jury verdict that Arizona lacked . . . is immaterial" to the essential requirements of the Sixth Amendment.[98] Accordingly, the Court held that Florida's capital punishment sentencing procedure violated the Sixth Amendment.

In doing so, the Court overruled two of its prior cases (*Spaziano v. Florida*[99] and *Hildwin v. Florida*[100]) that had upheld Florida's sentencing regime.[101] In *Spaziano*, the Court could not identify any characteristics of Section 775.082(1)(a) that implicated the Sixth Amendment.[102] And in both *Spaziano* and *Hildwin*, the Court "conclude[d] that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'"[103] Dissenting from the majority's opinion in *Hurst*, Justice Alito expressly stated that he

92. *Id.* (citing FLA. STAT. § 921.141(3)).
93. *Id.*
94. *Id.*
95. FLA. STAT. § 921.141(1).
96. *Hurst*, 136 S. Ct. at 620 (citing Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (per curiam)).
97. *Id.* (quoting Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003) (per curiam)).
98. *Id.* at 621–22.
99. 468 U.S. 447 (1984).
100. 490 U.S. 638 (1989).
101. *Hurst*, 136 S. Ct. at 623.
102. Brendan Ryan, Note & Comment, *The* Evans *Case: A Sixth Amendment Challenge to Florida's Capital Sentencing Statute*, 67 U. MIAMI L. REV. 933, 941 (2013).
103. *Hurst*, 136 S. Ct. at 623 (quoting *Hildwin*, 490 U.S. at 640–41).

"would not [have] overrule[d] *Hildwin* and *Spaziano*."[104] The remaining eight Justices disagreed.

Ultimately, the *Hurst* decision invalidated the arbitrary distinction that Florida courts had relied on in justifying the sentencing scheme.[105] *Hurst* made clear that the advisory jury recommendation a sentencing court could reject did not distinguish Florida's sentencing regime from Arizona's, which had no such advisory procedure.[106]

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104. *Id.* at 625 (Alito, J., dissenting); Lyle Denniston, *Opinion Analysis: Juries Control the Death Penalty*, SCOTUSBLOG (Jan. 12, 2016, 11:48 AM), http://www.scotusblog.com/2016/01/opinion-analysis-juries-control-the-death-penalty/.

105. *Hurst*, 136 S. Ct. at 622. A new bill designed to replace the capital punishment sentencing regime that *Hurst* ruled unconstitutional was signed into law by Governor Rick Scott on March 7, 2016. Mark Berman, *Florida Death Penalty Officially Revamped After Supreme Court Struck It Down*, WASH. POST (Mar. 7, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/07/florida-death-penalty-officially-revamped-after-supreme-court-struckitdown/?postshare=3551457369401551&tid=ss_tw; *see* Sentencing for Capital Felonies, H.R. 7101 (Fla. 2016), *available at* https://www.flsenate.gov/Session/Bill/2016/7101/BillText/er/PDF. The new sentencing scheme "require[d] the jury to find the aggravating factors unanimously and to specify which aggravating factors have been found unanimously." Perry v. State, 210 So. 3d 630, 636 (Fla. 2016) (citing FLA. STAT. § 921.141(2)(b) (2016)). Furthermore, "[t]he revised statute [stated] that if the jury [did] not unanimously find at least one aggravating factor, the defendant [was] 'ineligible for a sentence of death.'" *Id.* (quoting FLA. STAT. § 921.141(2)(b) (2016)). The new scheme also did not require or allow a judge to independently weigh the aggravating and mitigating circumstances surrounding a homicide, or make his or her own determination concerning whether the death penalty was appropriate. *Id.* at 637 (citing FLA. STAT. § 921.141(2)(b)(2) (2016)). Under the new procedure, a defendant convicted of first-degree murder could, however, receive the death penalty if at least ten members of a sentencing-phase jury recommend capital punishment. *See id.* (citing FLA. STAT. § 921.141(2)(c) (2016)). But on remand from the United States Supreme Court, the Florida Supreme Court held in *Hurst v. State*: "[B]ased on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, [in] order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." 202 So. 3d 40, 44 (Fla. 2016). Applying this holding in *Perry*, the Florida Supreme Court struck down the amended Florida death penalty statute. 210 So. 3d at 640 ("[T]he Act's 10-2 jury recommendation requirement renders the Act unconstitutional."). The statute's current version requires that the jury decision whether to recommend a death sentence be unanimous. *See* FLA. STAT. § 921.141(2)(c) (2017).

106. *Id.* While *Hurst*'s retroactivity is an important and related issue, it is outside the scope of this Article. Asay v. State, 210 So. 3d 1, 15–17 (Fla. 2016) (considering *Hurst* v. *Florida*'s retroactivity).

III. THE PROCEDURE PRESCRIBED BY SECTION 775.082(1)(B) IS UNCONSTITUTIONAL IN LIGHT OF THE SUPREME COURT'S SIXTH AMENDMENT SENTENCING JURISPRUDENCE BUT CAN BE SALVAGED BY LEGISLATIVE MODIFICATION

Although the Florida Legislature enacted a new sentencing provision to replace the one struck down in *Hurst* v. *Florida* and *Perry v. State*, [107] Section 775.082 remains constitutionally problematic. Specifically, two subsections within Section 775.082—(1)(b) and (10)—employ the same type of judicial fact finding that was outlawed in *Hurst*. This Part discusses the constitutional pitfalls of Section 775.082(1)(b) and proposes a legislative solution that preserves the jury's role in sentencing while still facilitating the purpose of Section 775.082(1)(b).

A. The Court's Decision in *Miller v. Alabama*[108] Prompted the Enactment of Section 775.082(1)(b)

In *Miller*, the Supreme Court reiterated its previously stated proclamation—"children are constitutionally different from adults for purposes of sentencing."[109] The Court explained, "Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.'"[110] Based on this rationale, it held that sentencing schemes mandating "life in prison without possibility of parole for juvenile offenders" violate the Eighth Amendment.[111]

Graham v. Florida, another landmark juvenile sentencing case, helped lay the ideological foundation for *Miller*. In *Graham*, the Supreme Court held that the Eighth Amendment prohibits courts from imposing a sentence of life without parole on juveniles who have been convicted of *nonhomicide* offenses.[112] The Court qualified its holding by specifying that "[a] state is not required to

107. *See supra* text accompanying note 106 (discussing considerations of retroactivity).

108. 567 U.S. 460 (2012).

109. *Id.* at 471 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

110. *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

111. *Id.* at 479.

112. 560 U.S. at 74 (emphasis added).

guarantee eventual freedom to a juvenile offender convicted of a [nonhomicide] crime."[113] A given state is, however, required to afford such offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[114]

Miller's holding, like G*raham*'s, does not completely foreclose a sentencing court's ability to condemn a juvenile homicide offender to a life sentence.[115] Nevertheless, it does require courts to consider "how children are different, and how those differences counsel against . . . sentencing them to a lifetime in prison."[116] Apparently, state courts and legislatures heard *Miller*'s message loud and clear.[117]

B. Florida's Legislative Response to *Miller*

Although the Supreme Court decided *Miller* in 2012, the Florida Legislature did not provide state courts with statutory guidance on how to apply it until 2014.[118] That year, the Legislature introduced House Bill 7035, which amended Section 775.082.[119] "On June 20, 2014, Governor Rick Scott signed into law

113. *Id.* at 75.
114. *Id.*
115. 567 U.S. at 471.
116. *Id.* at 480.
117. Several states have enacted sentencing statutes that comply with *Miller*. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C.L. REV. 553, 557 n.21 (2015). These states include: "Arkansas, Florida, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington." *Id.* at 557 n.21.
118. Megan McCabe Jarrett, *Stifling the Shot at a Second Chance: Florida's Response to* Graham *and* Miller *and the Missed Opportunity for Change in Juvenile Sentencing*, 45 STETSON L. REV. 499, 516 (2016). "In the 2013 legislative session," however, "multiple bills were introduced to amend Florida's sentencing laws to comport with *Graham* and *Miller*." *Id.* at 515; *see* Larry Hannan, *Lawmakers Differ on How to Fix Juvenile Sentencing Laws*, FLA. TIMES-UNION (Apr. 6, 2013, 10:45 PM), http://members.jacksonville.com/news/crime/2013-04-06/story/lawmakers-differ-how-fix-juvenile-sentencing-laws (analyzing the lack of clarity as to whether the legislature will issue guidance regarding sentencing minors). One of these bills allowed a sentencing judge to consider whether the balance of aggravating and mitigating factors justified "sentencing a juvenile offender convicted of homicide to life without parole." Jarrett, *supra* note 118, at 515. If not, the sentencing judge would be forced to impose a minimum sentence of fifty years. *Id.*; Lloyd Dunkelberger, *Lawmakers Committed to Solving Juvenile Sentencing*, SARASOTA HERALD-TRIBUNE (Sept. 29, 2013), http://politics.heraldtribune.com/2013/09/29/lawmakers-committed-to-solving-juvenile-sentencing/.
119. Juvenile Sentencing, H.R. 7035 (Fla. 2014), *available at* http://www.flsenate.gov/Session/Bill/2014/7035/BillText/er/PDF; Jarrett, *supra* note 118, at 516.

House Bill 7035[,]"[120] and the new sentencing provision was codified at Section 775.082(1)(b). This subsection states,

> A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, . . . which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. [121]

In the event that a sentencing court finds life imprisonment to not be an appropriate sentence, it is required to sentence the juvenile defendant to at least forty years in prison.[122]

The sentencing procedure described in Section 921.1401 bears significant likeness to the one struck down in *Hurst*. Under Section 921.1401, the sentencing court is required to take into consideration ten "factors relevant to the offense and the defendant's youth and attendant circumstances."[123] Each of those factors operates as an aggravating or mitigating factor depending on the judge's findings.

Under Section 775.082(1)(b), the maximum sentence available upon a conviction alone is not a term of life imprisonment. Because Section 921.1401 requires the judge to find the existence of the aggravating factors *before* sentencing a juvenile to life in prison, the Legislature has conditioned a life sentence (for juvenile homicide offenders) on the presence of aggravating factors and on the absence of mitigating factors. Therefore, if the judge's findings regarding the ten factors set forth in Section 921.1401 are "facts" within the meaning of *Apprendi*, then Section (1)(b) violates the Sixth Amendment's jury trial guarantee. Part III.C explains why some of Section 921.1401's purported sentencing considerations are actually "facts" that must be submitted to a sentencing-phase jury.

120. Jarrett, *supra* note 118, at 516.
121. FLA. STAT. § 775.082(1)(b) (2017).
122. *Id.*
123. FLA. STAT. § 921.1401(2) (2017).

C. Some of the Sentencing Considerations Designated by Section 921.1401 Are Facts Under *Apprendi* and Its Successors and Should Thus Be Submitted to a Jury, Not Determined by a Sentencing Judge

Bringing Section 775.082(1)(b) within the ambit of Sixth Amendment constitutionality necessarily involves an inquiry into whether each of Section 921.1401's ten statutory factors can be considered "factual findings" for Sixth Amendment purposes.[124] If a Section 921.1401 factor requires a sentencing judge to find a fact that is likely incapable of being "reflected in the jury verdict alone,"[125] then that fact is one "on which the legislature [has conditioned] an increase in [a criminal defendant's] maximum punishment."[126] For that reason, such factors are theoretically ineligible for judicial determination and "'must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'"[127] This sub-part divides the ten factors into two groups: those that must be submitted to a jury and those that may be found by a sentencing judge.

Factor (a): "The nature and circumstances of the offense committed by the defendant."[128]

This determination could be based on the facts found by the jury in rendering the verdict. To the extent that the determination is based on such facts, a judge's conclusions on this factor do not necessarily violate the Sixth Amendment.

Factor (b): "The effect of the crime on the victim's family and on the community."[129]

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124. Section 921.1401(2) lists ten factors "relevant to the offense and the defendant's youth and attendant circumstances" that a court must consider "[i]n determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence." *Id.*

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

126. Ring v. Arizona, 536 U.S. 584, 589 (2002).

127. *Apprendi*, 530 U.S. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 (1999)). However, no state currently requires a jury to find the aggravating factors necessary to subject a juvenile homicide offender to life in prison. Russell, *supra* note 117, at 586. In fact, the only state court of last resort to address the issue regarding the Sixth Amendment constitutionality of post-*Miller* statutes serving the same function as Section 921.1401 was the Supreme Court of Michigan. *Id.* at 585; *see* People v. Carp, 852 N.W.2d 801 (Mich. 2014) (judgment vacated by Davis v. Michigan, 136 S. Ct. 1356 (2016)).

128. FLA. STAT. § 921.1401(2)(a).

129. *Id.* at (2)(b).

The effect of the crime on a victim's family is the type of question that requires a jury determination. It is subjective in nature and compels the party judging the effect to draw on his or her conscience. One of the jury's fundamental responsibilities in a criminal trial is acting as "the conscience of the community"[130] when determining the guilt of the defendant and the egregiousness of his or her crime. Also, the impact of the defendant's crime on the victim's family is too attenuated and nebulous to any conduct that could conceivably be prohibited by a criminal statute, charged in an indictment, and proven beyond a reasonable doubt. As such, the effect of the crime on the victim's family could not be reflected in a verdict. Thus, it is not an appropriate determination for a sentencing judge to make.

Factor (c): "The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense."[131]

All of these attendant circumstances are "facts." Some, such as the defendant's age at the time of the offense, can be established from the face of the record. Others, such as the defendant's maturity, intellectual capacity, and emotional health, require judgments based on subjective evaluation. Because the length of the defendant's sentence is contingent upon these judgments, the Sixth Amendment requires them to be made by a jury of the defendant's peers.

Factor (d): "The defendant's background, including his or her family, home, and community environment."[132]

Because this factor does not require a sentencing judge to measure the *effect* of the defendant's background, home, or community environment on his or her criminal disposition, the judge may find facts pertaining to this factor without violating the Sixth Amendment.

Factor (e): "The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense."[133]

This factor calls for a very fact intensive inquiry and is not within the province of the sentencing judge, especially when the

130. Kamin & Marceau, *supra* note 7, at 532.
131. FLA. STAT. § 921.1401(2)(c).
132. *Id.* at (2)(d).
133. *Id.* at (2)(e).

defendant could potentially lose decades of liberty as a result of the judge's conclusion. Additionally, each of the qualities listed under this consideration are emotional characteristics[134] of the defendant, not attributes of the crime. It is highly unlikely that a jury would undertake inquiries of this nature during the guilt phase of a criminal trial. Accordingly, it is equally as unlikely that these facts would be reflected in a jury verdict. So, this factor should be submitted to a jury, not found by a sentencing court.

Factor (f): "The extent of the defendant's participation in the offense."[135]

This factor clearly calls for a determination of degree. There may be conflicting opinions regarding this factor, and the defendant should enjoy the benefit of a communal determination of his or her participation in the offense.

Factor (g): "The effect, if any, of familial pressure or peer pressure on the defendant's actions."[136]

Again, this factor calls for a fact intensive inquiry concerning a highly intangible characteristic—the effect of familial or peer pressure on the defendant's actions. Such findings implicate speculative judgment calls that do not involve any "legal" reasoning. This factor should thus be submitted to a jury.

Factor (h): "The nature and extent of the defendant's prior criminal history."[137]

These facts can be determined from the face of the record. Also, *Apprendi* and *Jones* exclude "the fact of a prior conviction" from those that are within the province of the jury, even though a prior conviction might "increase[ ] the penalty of a crime beyond the prescribed statutory maximum."[138] Therefore, a sentencing

134. Alternatively, the qualities Section 921.1401(2)(e) compels judges to consider may be dubbed "personality traits" rather than "emotional characteristics." According to Dr. Lloyd I. Cripe, "[p]ersonality is an abstract concept that refers to a person's characteristic[,] habitual and predictable manner of perceiving, thinking, emoting, and acting under similar situations." Lloyd I. Cripe, *Personality Assessment of Brain-Impaired Patients*, *in* CLINICAL NEUROPSYCHOLOGY: THEORETICAL FOUNDATIONS FOR PRACTITIONERS 119, 122 (Mark E. Maruish & James A. Moses, Jr. eds., 1997). Relatedly, Dr. Cripe claims that "[t]he major components of personality are the perception, cognition, emotion, motivation, and action of the person as they interact with various environmental situations." *Id.*

135. FLA. STAT. § 921.1401(2)(f).

136. *Id.* at (2)(g).

137. *Id.* at (2)(h).

138. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (citing Jones v. United States, 526 U.S. 227, 252–53 (1999)).

judge may make conclusions regarding this factor without violating the Sixth Amendment.

Factor (i): "The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment."[139]

Again, this factor calls for a fact intensive inquiry concerning a highly intangible characteristic—the effect of the defendant's youth on the defendant's judgment. Such determinations require the factfinder to make highly speculative judgment calls that do not involve any "legal" reasoning. Accordingly, this factor should be submitted to a jury.

Factor (j): "The possibility of rehabilitating the defendant."[140]

The possibility of rehabilitating the defendant is a speculative prediction. To make such a prediction, a person must draw upon his or her own personal experiences, judgment, morality, and understanding of human nature. As "the conscience of the community,"[141] a jury should decide whether a defendant can be rehabilitated.

D. A Legislative Rewrite of Section 921.1401 Would Render Section 775.082(1)(b) Constitutionally Compliant

Because Section 921.1401 sets out the impermissible judicial considerations identified above, the constitutionally unsound aspects of Section 775.082(1)(b) are quarantined within Section 921.1401. As such, the simplest way to cure the defects of Section 775.082(1)(b) is to amend Section 921.1401. Using the analysis advanced in Part III.C, this sub-part illustrates how Section 921.1401 can be modified to comport with the Court's interpretation of the Sixth Amendment's requirements. The revised version of Section 921.1401 that appears below demonstrates how the provision can be altered to properly apportion fact finding authority between a sentencing judge and a sentencing-phase jury. Much of the rewrite's procedural verbiage has been borrowed from the first amended version of the pre-*Hurst*

139. FLA. STAT. § 921.1401(2)(i).
140. *Id.* at (2)(j).
141. *See supra* text accompanying note 7 (discussing the jury's role in sentencing).

death penalty statute, i.e., the version enacted in 2016.[142] Deletions from the provision are indicated by strikethrough text. Additions are italicized.[143] Section 775.082(1)(b) is also reproduced below to provide the relevant context for the modifications to Section 921.1401.

Florida Statute Section 775.082(1)(b)[144]

> (1) A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence.[145] If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).
>
> (2) A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).
>
> (3) The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(a) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or

142. FLA. STAT. § 921.141 (2016).

143. The modified language has been broken into paragraphs to make the revised statute more readable.

144. The title of Section 775.082 has been omitted for readability.

145. Under the revised sentencing procedure, the sentencing judge still has the final say regarding the defendant's sentence. *See infra* text accompanying note 147 (detailing sentencing for third-degree felonies).

attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

Florida Statute Section 921.1401[146]

(1) Upon conviction or adjudication of guilt of an offense described in s. 775.082(1)(b), s. 775.082(3)(a) 5., s. 775.082(3)(b) 2., or s. 775.082(3)(c) which was committed on or after July 1, 2014, the court may conduct a separate sentencing hearing *before a jury* to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

The proceeding shall be conducted as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of a life sentence. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.

In the proceeding, evidence may be presented as to any matter enumerated in subsection (3). Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against a sentence of life imprisonment.

(2) This subsection pertains to the jury's findings and recommended sentence. It applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury. After hearing all of the evidence presented regarding the factors set forth in subsection (3), the jury shall deliberate and

146. The title of Section 921.1401 has been omitted for readability.

determine if those factors warrant a sentence of life imprisonment or a term of years equal to life imprisonment.

~~(2)~~ *(3)* In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the ~~court~~ *jury* shall consider *the following* factors relevant to the offense and the defendant's youth and attendant circumstances~~, including, but not limited to~~:

~~(a) The nature and circumstances of the offense committed by the defendant.~~

(b) The effect of the crime on the victim's family and on the community.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

~~(d) The defendant's background, including his or her family, home, and community environment.~~

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

(f) The extent of the defendant's participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

~~(h) The nature and extent of the defendant's prior criminal history.~~

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

(4) This subsection pertains to the court's evaluation of the recommended sentence. If the jury recommends a sentence of life imprisonment or a term of years equal to life imprisonment, the court shall consider the factors set forth in subparagraphs (a)–

> *(c) to determine whether such penalty is appropriate.*[147] *If the court determines that the factors set forth in subparagraphs (a)–(c) warrant the imposition of a sentence of imprisonment for a term of 40 years, and not a life sentence or a term of years equal to life imprisonment, then the judge shall impose such sentence. If the court finds the life sentence recommended by the jury to be appropriate, the court may impose a life sentence. The factors the judge shall consider in determining the appropriate term of imprisonment are:*
>
> *(a) The nature and circumstances of the offense committed by the defendant.*
>
> *(b) The defendant's background, including his or her family, home, and community environment.*
>
> *(c) The nature and extent of the defendant's prior criminal history.*

IV. THE PROCEDURE PRESCRIBED BY SECTION 775.082(10) IS UNCONSTITUTIONAL IN LIGHT OF THE SUPREME COURT'S SIXTH AMENDMENT SENTENCING JURISPRUDENCE BUT CAN BE SALVAGED BY LEGISLATIVE MODIFICATION AND CORRESPONDING JURY INSTRUCTIONS

Section 775.082(10) allows a judge to sentence defendants who have been found guilty of a third-degree felony to a state prison sanction if he or she finds the defendant "could present a danger to the public."[148] Absent such a finding, the sentencing judge is only authorized to impose "a nonstate prison sanction."[149] This Part

147. An important facet of the judicial evaluation prescribed in subsection (4) is that the sentencing court can only *decrease* the sentence the jury recommends. Allowing or requiring a sentencing judge to impose a greater sentence than the one recommended by the jury would, in effect, authorize the judge to "increase[ ] the penalty for a crime beyond the prescribed statutory maximum." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Such a procedure would violate the Sixth Amendment in the same manner as the pre-*Hurst* version of Section 775.082(1)(a). *See* Hurst v. Florida, 136 S. Ct. 616, 622–24 (2016) (noting that only a jury can find factors increasing a defendant's sentence). Also, under this subsection, the judge retains his or her authority to determine the appropriate sentence.

148. FLA. STAT. § 775.082(10) (2017).

149. *Id.*; Section 775.082(10) states,

> [I]f a defendant is sentenced for an offense . . . which is a third degree felony . . . the court must sentence the offender to a nonstate prison sanction. However, if

explains why *Hurst* and its predecessors render Section 775.082(10) unconstitutional. Then, it offers a legislative and practical solution that permits judges to impose state prison sanctions on defendants who pose a danger to the public. This solution also preserves the defendants' Sixth Amendment right to a jury trial.

A. Florida Courts Have Either Incorrectly Interpreted Section 775.082 or Expressly Avoided Determining Its Sixth Amendment Constitutionality

Caselaw interpreting Section 775.082(10) is extremely limited.[150] However, at least two Florida intermediate appellate courts have examined the statute in the Sixth Amendment context.[151]

In *Porter v. State*,[152] Florida's Fourth District Court of Appeal addressed a Sixth Amendment challenge to Section 775.082(10) and upheld the provision as constitutional. To resolve the issue of whether a determination regarding the potential danger that a convicted defendant poses to the public[153] must be found by a jury, the Fourth District analyzed the legislative history and purpose of Section 775.082(10). [154]

> the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility[.]

FLA. STAT. § 775.082(10).

150. Jones v. State, 71 So. 3d 173, 175 (Fla.1st Dist. Ct. App. 2011).

151. Florida's First District Court of Appeal and Fourth District Court of Appeal upheld Section 775.082(10) in *Jones*, 71 So. 3d at 176, and *Porter v. State*, 110 So. 3d 962, 963–64 (Fla. 4th Dist. Ct. App. 2013), respectively. Almost all appellate decisions regarding Section 775.082(10) decline to address the Sixth Amendment issue implicated by the provision and either reverse or affirm on other grounds. *E.g.*, Ryerson v. State, 189 So. 3d 1047, 1049 (Fla. 4th Dist. Ct. App. 2016); Rodriguez-Aguilar v. State, 198 So. 3d 792, 796 (Fla. 2d Dist. Ct. App. 2016); Reed v. State, 192 So. 3d 641, 644 (Fla. 2d Dist. Ct. App. 2016); Murphy v. State, 161 So. 3d 1282, 1284 (Fla. 1st Dist. Ct. App. 2015). While interning with the Criminal Appeals Division of the Office of the Attorney General of Florida (Tampa), this Article's Author drafted an appellate brief that defends the constitutionality of Section 775.082(10). *See* Answer Brief, Reed v. State, 192 So. 3d 641 (Fla. 2d Dist. Ct. App. 2016).

152. 110 So. 3d 962.

153. Section 775.082(10) requires the sentencing judge's conclusion regarding the defendant's danger to the public to be based on the facts proved by the prosecution. FLA. STAT. § 775.082(10).

154. The *Porter* Court also relied on the reasoning employed by the First District in *Jones v. State*, 71 So. 3d 173, 175 n.4 (Fla. 1st Dist. Ct. App. 2011). *Porter*, 110 So. 3d at 963

The *Porter* decision acknowledged that the 2009 enactment of Section 775.082(10) was an effort to "stem the tide of prison commitments."[155] The Florida Legislature's desire to reduce the number of persons incarcerated in Florida prisons was motivated by "an ever-increasing prison population, the cost of prison building and operation, and the downturn in the economy[.]"[156]

The most critical element of the *Porter* court's reasoning concerning the nature of Section 775.082(10) was its categorization of the provision's operative effect as "mandated mitigation of an otherwise available maximum penalty."[157] According to the Fourth District, "[t]he safety valve to this mandated mitigation was the discretion given to the trial court to adhere to the Criminal Punishment Code in lieu of the mandated mitigation of the defendant's sentence."[158]As such, the court ruled that the statutory maximum penalty applicable to third-degree felonies is a state prison sanction of up to five years imprisonment.[159]

B. Section 775.082(10) Violates the Sixth Amendment

Contrary to the *Porter* holding, the statutory maximum for applicable third-degree felonies is actually a nonstate prison sanction.[160] Under *Apprendi*, criminal defendants "are entitled to a jury determination of any fact on which the legislature [has] condition[ed] an increase in their maximum punishment."[161] While it is true that Section 775.082(3)(e) makes a five-year prison term available, five years is not the statutory maximum because under the doctrine of *in pari materia*,[162] Section 775.082(3)(e) must be read in conjunction with Section 775.082(10).

(acknowledging the *Jones* Court's interpretation of the legislative intent that motivated the enactment of Section 775.082(10)).

155. *Id.* (quoting *Jones*, 71 So. 3d at 175 n.4).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* FLA. STAT. § 775.082(10) (2017) (establishing that a court must sentence applicable third-degree felony offenders to a nonstate prison sanction).

161. Ring v. Arizona, 536 U.S. 584, 589 (2002).

162. "The doctrine of 'in pari materia' requires courts to construe related statutes together so that they will illuminate each other." John J. Dvorske, Elizabeth Williams & Judy E. Zelin, *Provisions in Pari Materia*, 48A FLA. JUR. 2D *Statutes* § 166 (2016); Grant v. State, 832 So. 2d 770, 773 (Fla. 5th Dist. Ct. App. 2002); Zapo v. Gilreath, 779 So. 2d 651, 654 (Fla. 5th Dist. Ct. App. 2001).

When taken together, these provisions dictate that *unless* a defendant convicted of a third-degree felony is determined to be a danger to the public, he *must be sentenced* to a nonstate prison sanction. Under this construction, it is apparent that the legislature has conditioned the availability of an increased sentence of up to five years in prison on a factual finding—whether the defendant poses a danger to the public. Therefore, *Apprendi*'s mandate requires the determination of the defendant's future dangerousness to be submitted to the jury; as it stands, Section 775.082(10) violates the Sixth Amendment.[163]

Moreover, the question of whether a defendant convicted of a third-degree felony is a danger to the public requires a factual determination within the exclusive province of the jury.[164] "Prior to section 775.082(10)'s passage, a court's upward departure based on an offender's danger to the public alone was impermissible."[165] The main "reasoning behind this [prohibition] was that no adequate litmus test existed for assessing public dangerousness."[166] Another drawback of conditioning an increase in punishment on such assessments is arbitrariness.[167] Indeed, "all criminally punishable conduct is 'presumed to be dangerous to the community' to some degree."[168] Although the Florida Legislature seems to have abandoned its measured disposition towards such speculative determinations,[169] a defendant's public dangerousness remains a fact for Sixth Amendment purposes. Because the Legislature has "condition[ed] an increase in [the] maximum punishment"[170] for

163. Section 775.082(10) requires the sentencing judge's written findings articulating his or her reasons for concluding that the defendant is a danger to the public to be based on facts found by the jury. Accordingly, one could conceivably argue that the judge is not making any new factual findings. *See* Blakely v. Washington, 542 U.S. 296, 303 (2004) (holding "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"); *Porter*, 110 So. 3d at 964 (holding that the trial court's written findings on convictions were sufficient for sentencing) (emphasis added).

164. *See* FLA. STAT. § 775.082(10) (restricting the court's sentencing capabilities if it is determined that a nonstate prison sanction could present a danger to the public).

165. Reed v. State, 192 So. 3d 641, 646 (Fla. 2d Dist. Ct. App. 2016); *see, e.g.*, Angle v. State, 604 So.2d 34, 35 (Fla. 2d Dist. Ct. App. 2016) (citing Keys v. State, 500 So. 2d 134, 136 (Fla. 1986) (reasoning that courts have found that a criminal defendant's conduct is the reason for criminal sanctions—not the criminal defendant posing a danger to the public).

166. *Reed*, 192 So. 3d at 646.

167. *Id.*

168. *Id.* (quoting *Keys*, 500 So. 2d at 136).

169. *Id.* at 646.

170. Ring v. Arizona, 536 U.S. 584, 589 (2002).

third-degree felonies on a public dangerousness finding, this issue must be submitted to a jury and proven beyond a reasonable doubt.[171]

C. Section 775.082(10) Can Be Constitutionally Administered While Still Ensuring That Convicted Third-Degree Felons Receive Sentences Commensurate with Their Dangerousness

There are three conflicting interests implicated by Section 775.082(10). The first is the Florida Legislature's desire to reduce overcrowding in Florida prisons.[172] The second interest is the State's need to proportionately punish dangerous criminals. The third interest is the protection of the defendant's right to be sentenced in accordance with the limitations of the Sixth Amendment. Presently, Section 775.082 does not account for the constitutional interest because it authorizes the sentencing judge to determine the existence of a fact that, if found, increases the defendant's sentence beyond the statutory maximum. However, there is a way to advance all three interests simultaneously.

The constitutional problem with Section 775.082(10) stems from the judicial fact finding it authorizes. Thus, the only way to correct it is by submitting the public dangerousness determination to the jury. Because the constitutional defect is in the text of the sentencing provision and not the substantive offense, the best way to return the public dangerousness question to the jury is to appropriately instruct the jury on a case-by-case basis.[173]

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171. *E.g.*, *id.*

172. *Porter*, 110 So. 3d at 963.

173. In *Reed*, Judge Badalamenti of Florida's Second District Court of Appeal explained that the mandated mitigation of Section 775.082(10) applies to all qualifying offenders:

> [I]n order to be eligible for the presumptive nonstate prison sanction in Section 775.082(10), an offender must satisfy three conditions: (1) the offender must be sentenced for a third-degree felony, (2) the offense must be committed on or after July 1, 2009, and (3) the offender must score "22 points or fewer" as determined by the Criminal Punishment Code's (CPC) scoresheet.
>
> The plain language of section 775.082(10) carves out two subclasses of offenders who *cannot* qualify for a less severe "nonstate prison sanction," despite otherwise meeting the three aforementioned conditions. The first subclass consists of offenders convicted of "forcible felonies," as defined in section 776.08, Florida Statutes (2011). Section 776.08 lists as "forcible felonies" treason, murder, manslaughter, sexual battery, arson, burglary, aggravated battery, aggravated assault, carjacking, aggravated stalking, and aggravated assault [sic], to name several. Section 776.08 then provides a catchall "forcible felony" provision to

This would involve two steps. First, the public dangerousness clause would have to be removed from Section 775.082(10). Then, the statute would have to be amended to require trial judges to instruct the jury to make a determination regarding the defendant's potential dangerousness if it finds him or her guilty of a qualifying offense. The modified version of Section 775.082(10) that is displayed below reflects these adjustments. As with Part III.D, deletions are indicated by strikethrough text and additions are italicized.[174] This Subpart also includes sample jury instructions that correspond to the revised version of Section 775.082(10). These instructions are derived from the Florida Standard Jury Instructions for the criminal offense of "fighting or baiting animals,"[175] a qualifying third-degree felony.[176]

1. If Enacted, the Following Modifications Would Render Section 775.082(10) Constitutional

By implementing the following revisions, the Florida Legislature can remedy Section 775.082's constitutional defects without sacrificing its economic or punitive objectives. These revisions account for the Legislature's desire to decrease the population of inmates housed in Florida prisons and adequately punish dangerous criminals.

Florida Statute Section 775.082(10)

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree

include "any other felony which involves the use or threat of physical force or violence against any individual." The second subclass of felony offenders precluded from receiving a nonstate prison sanction under section 775.082(10) are those convicted of a third-degree felony in chapter 810, Florida Statutes. Chapter 810 primarily criminalizes various forms of burglary and trespass.

192 So. 3d at 645.

174. The modified language has been broken into paragraphs to improve the revised statute's readability. Much of the language describing how and when a jury should be empaneled to determine whether a particular defendant poses a danger to the public comes from Section 921.141. FLA. STAT. § 921.141 (2017).

175. FLA. STAT. § 828.122 (2017); SAMANTHA L. WARD ET. AL., FLORIDA STANDARD JURY INSTR. § 29.13(b) (2009).

176. "Any person who knowingly commits any of the" acts prohibited by Sections 828.122(3)(a)–(h) "commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." FLA. STAT. § 828.122(3).

> felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction.
>
> However, ~~if the court makes written findings~~ *before the jury enters into deliberations, the court shall instruct the jury to determine not only whether the defendant is guilty or innocent, but also whether the State has proven beyond a reasonable doubt* that a nonstate prison sanction could pose a danger to the public.
>
> *If the trial jury has been waived, or if the defendant pleaded guilty, a jury shall be empaneled for the limited purpose of determining whether a nonstate prison sanction poses a danger to the public. If the jury determines that a nonstate prison sanction could pose a danger to the public*, the court may sentence the offender to a state correctional facility pursuant to this section.

2. Existing Jury Instructions Associated with Applicable Third-Degree Felonies Can Easily Be Adjusted to Accommodate the Proposed Revisions to Section 775.082(10)

Jury instructions can be separated into two main categories: charging instructions and admonitions.[177] Charging instructions "tell jurors about the law and procedure they are supposed to follow."[178] On the other hand, admonitions "warn jurors that they should not consider some kinds of information in arriving at a verdict."[179] If enacted, the revisions to Section 775.082(10) that are proposed in this Article would affect only the charging instructions that accompany third-degree felonies covered by Section 775.082(10).

Charging instructions are often considered to be the most important type of jury instruction because they "explain the jury's role, describe relevant procedural and substantive law, and provide suggestions on how to organize deliberations and evaluate evidence."[180] Generally, charging instructions come in four

177. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 74 (1990).
178. *Id.*
179. *Id.*
180. *Id.*

varieties: (1) an introductory section that describes the jury's duties, (2) an explanation of the applicable procedural law, (3) guidance on the substantive elements of the relevant law, and (4) "cautionary instructions [that] point out potential problems with certain kinds of evidence."[181] "In almost every jurisdiction," including Florida, "charging instructions now come exclusively from books of approved pattern jury instructions."[182] In some instances, however, counsel may request to have the pattern instructions modified to conform to changes in the law or specific factual circumstances.[183]

The modified jury instructions that appear below are an adaptation of the Florida Standard Jury Instructions for the offense of animal fighting or baiting. Because Section 775.082(10) applies to animal fighting or baiting, the following revisions to Florida's charging instruction for this offense reflect the changes made to Section 775.082(10) in Part III.C.1.

Florida Standard Jury Instructions in Criminal Cases § 29.13(b)[184]

Animal Fighting or Baiting
Florida Statute Section 828.122

> To prove the crime of Animal [Fighting] [Baiting], the State must prove the following [one] [three] element(s) beyond a reasonable doubt . . .

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181. *Id.* at 74–75.

182. *Id.* at 74; *accord* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.–KENT. L. REV. 587, 593 (2002). The early success of the work entitled *The Book of Approved Jury Instructions*, which was "published by the Judges of the Superior Court of Los Angeles in 1938," contributed to the development and implementation of pattern jury instructions in Florida. Kelley & Wendt, *supra* note 182, at 593.

183. Sylvia Walbolt & Christina Alonso, *Jury Instructions: A Road Map for Trial Counsel*, 30 LITIG. ONLINE, Winter 2004, at 29, 31–32, *available at* https://www.carltonfields.com/files/Publication/d12b62a1-2aea-46c2-b92e-aca8c9317b41/Presentation/PublicationAttachment/8833daf5-d4f1-4d4a-a02d-beb9169df18c/LTM30no2online.authcheckdam.pdf (last visited Mar. 12, 2018). Of course, lawyers must "disclose that [their] proposed instruction varies from the standard instruction." *Id.* at 32.

184. WARD, *supra* note 175. For the sake of brevity, only the jury instruction pertaining to Section 828.122(3)(a), which prohibits "baiting, breeding, training, transporting, selling, owning, possessing, or using any wild or domestic animal for the purpose of animal fighting or baiting," has been reproduced below. *Id.*; FLA. STAT. § 828.122(3)(a) (2017).

(Defendant) knowingly

[[baited] [bred] [trained] [transported] [sold] [owned] [possessed] [used] a [wild] [domestic] animal for the purpose of animal [fighting] [baiting].]

. . .

Possession of an animal alone does not constitute a violation.

"Animal fighting" means fighting between roosters or other birds or between dogs, bears, or other animals.

"Baiting" means to attack with violence, to provoke, or to harass an animal with one or more animals for the purpose of training an animal for, or to cause an animal to engage in, fights with or among other animals, including the use of live animals in the training of racing greyhounds.

Give if applicable. See Section (9).[185]

It is a defense to this crime if [any person is simulating a fight for the purpose of using the simulated fight as part of a motion picture which will be used on television or in a motion picture as long as the crime of cruelty to animals is not committed. (Define animal cruelty. See § 828.12, Fla.Stat.)] [any person is using animals to pursue or take wildlife or to participate in hunting regulated or subject to being regulated by the rules and regulations of the Fish and Wildlife Conservation Commission.] [any person is using animals to work livestock for agricultural purposes.] [any person is conducting or engaging in a simulated or bloodless bullfighting exhibition.] [any person is using dogs to hunt wild hogs or to retrieve domestic hogs pursuant to customary hunting or agricultural practices.]

Lesser included offenses

No lesser included offenses have been identified for this offense.

If the jury determines the defendant knowingly [[baited] [bred] [trained] [transported] [sold] [owned] [possessed] [used] a [wild] [domestic] animal for the purpose of animal [fighting] [baiting],]

185. This subsection lists the circumstances under which Section 828.122 does not apply. FLA. STAT. § 828.122(9).

> *then it must determine whether a nonstate prison sanction could pose a danger to the public. In reaching this determination the jury may consider only the evidence that was presented during the trial and the facts that were charged in the [[indictment] [information]].*
>
> *If the defendant [pled guilty] [waived his or her right to a jury trial] and the jury was empaneled for the limited purpose of determining the defendant's public dangerousness, then the jury may only consider facts that are elements of the offense and those that were charged in the indictment when making that determination.*

V. CONCLUSION

The sentencing procedures prescribed by Sections 775.082(1)(b) and 775.082(10) violate the Sixth Amendment. Essentially, they authorize sentencing judges to make critical factual findings that increase a defendant's penalty beyond the statutory maximum. *Apprendi*, *Ring*, *Blakely*, *Hurst*, and other Sixth Amendment cases unequivocally demonstrate that judicial fact finding of this kind violates the Sixth Amendment's jury trial guarantees. However, the amended versions of Sections 775.082(1)(b) and 775.082(10) that were presented in this Article could, if enacted, cure the constitutional deficiencies of these subsections while still furthering their punitive goals. Ultimately, legislative action to this effect is imperative because every criminal defendant has a Sixth Amendment right to a "public trial, by an impartial jury."[186] If courts and legislatures do not protect this right, it will, in all likelihood, deteriorate into non-existence.

186. U.S. CONST. amend. VI.