

ARTICLES

CAPITAL PUNISHMENT: AN EXAMINATION OF CURRENT ISSUES AND TRENDS AND HOW THESE DEVELOPMENTS MAY IMPACT THE DEATH PENALTY IN FLORIDA

Hon. O.H. Eaton, Jr.*

I. INTRODUCTION

When John Spinkelink was executed on May 25, 1979,¹ death-penalty advocates were satisfied that Florida's statutory death-penalty scheme² was constitutionally bulletproof. After all, the proponents of the new scheme had read the tea leaves provided in the *Furman v. Georgia*³ decision, and the protections against arbitrary application of the death penalty contained in the scheme addressed all of the conflicting concerns that the majority Justices expressed in their individual opinions.⁴ The new scheme was lauded by the Florida Legislature and the bench.⁵ With obvious self-satisfaction, the Florida Supreme Court approved the scheme and stated, "Thus the inflamed emotions of

* © 2005, The Honorable O.H. Eaton, Jr. All rights reserved. B.S.B.A, J.D., University of Florida.

The Author is a judge in Florida's 18th Judicial Circuit. He currently is a member of the Florida Bar Criminal Law Section Executive Council. He is a past chair of The Florida Bar Criminal Procedure Rules Committee and is the chair of the Supreme Court Criminal Steering Committee.

1. Ken Driggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of Florida's Electric Chair*, 22 Stetson L. Rev. 1169, 1169 (1993).

2. Fla. Stat. § 921.141 (2003).

3. 408 U.S. 238 (1972).

4. *Id.*

5. David Von Drehle, *Among the Lowest of the Dead: The Culture of Death* Row 401 (Times Books 1995).

jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.”⁶

As will be seen, the new scheme has not proved to be easy to administer. Nor is it inexpensive.⁷ Death-penalty cases absorb enormous amounts of judicial resources at both the trial and appellate levels.⁸ The Florida Supreme Court estimates that death-penalty cases amount to 3% of the caseload but take nearly 50% of the Court’s time.⁹ The Justices have found that application of the scheme to the facts of a case is difficult.¹⁰ Many death-penalty cases have resulted in split decisions because the justices cannot reach a consensus on basic principles¹¹ and the federal courts keep interfering with the orderly process.¹² To make matters worse, the legislature adds aggravating circumstances in response to particular cases¹³ and enacts procedural rules that are the exclusive prerogative of the Florida Supreme Court, thereby causing additional confusion and conflict between the legislature and the courts.¹⁴ In order to understand these problems it is nec-

6. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973).

7. One estimate puts the cost of the average execution in Florida at \$3.2 million. David Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, Miami Herald 12A (July 10, 1988).

8. *Id.*

9. Frank Davies, *Death Penalty System Called Highly Flawed: Two-Thirds of U.S. Cases Overturned*, Miami Herald 1A (June 12, 2000).

10. Much of the difficulty in applying the scheme to the facts of a case involves the Florida Legislature’s policy of “widening the net” by bringing defendants with relatively low levels of culpability into the definition of first-degree murder. For instance, the definitions of robbery and burglary have been broadened significantly beyond their common-law roots. See Fla. Stat. §§ 812.13, 810.02. When these crimes are combined with the felony-murder rule, Florida Statutes § 782.04, and the abolition of the distinction between principles in the first and second degree, Florida Statutes § 777.01, it is possible for negligent conduct to be elevated to the level of first-degree murder and subject the defendant to the death penalty. See *Stephens v. State*, 787 So. 2d 747 (Fla. 2001) (imposing death penalty for a death that occurred as a result of kidnapping).

11. An example of a recent disagreement among the Supreme Court Justices arose in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). In a 4-3 decision, the Court upheld the trial court’s ability to override jury recommendations in capital cases. *Id.* at 539–540. Mills was subsequently given a new penalty phase hearing and was sentenced to life imprisonment by the Author. *State v. Mills*, 788 So. 2d 249, 250–251 (Fla. 2001).

12. See *infra* nn. 82–93 and accompanying text.

13. For example, Florida Statutes § 921.141(5)(l), which was enacted in 1997, provides an aggravating circumstance if “[t]he victim of the capital felony was a person less than 12 years of age.”

14. Article V, § 2(a) of the Florida Constitution provides that the Supreme Court “shall adopt rules for the practice and procedure in all courts.” In addition, § 2(a) provides for the Legislature to repeal a rule of procedure “by general law enacted by two-thirds vote of the

essary to review just how the death penalty has evolved in Florida and elsewhere since the *Furman* decision.

II. FROM FURMAN TO RING—A SHORT REVIEW OF THE EVOLUTION OF THE DEATH PENALTY SINCE 1972

In 1972, the United States Supreme Court struck down all of the death-penalty statutes existent in the several states.¹⁵ The Court held that vesting the sentencer (juries in those days) with unbridled discretion to determine whether the death penalty should be imposed was both “cruel and unusual,” as Justice Potter Stewart observed, “in the same way that being struck by lightning is cruel and unusual.”¹⁶ Unfortunately, there was no clear majority holding in *Furman*, and the states began to reenact death-penalty statutes based upon their interpretations of the various opinions in *Furman*.¹⁷ Today, thirty-eight states and the federal government provide for capital punishment as a possible penalty for the most serious crimes.¹⁸ One other state, Massachusetts, is considering enacting a death-penalty law.¹⁹

Trials in capital cases differ from other criminal trials because, after the defendant is found guilty of a capital offense, the jury participates in a post-verdict hearing to determine whether the death penalty should be imposed.²⁰ These hearings are some-

membership of each house of the legislature.” An example of the conflict that enactment of procedural statutes can cause is seen in the recent legislative attempt to streamline death-penalty procedures through the Death Penalty Reform Act. 2000 Fla. Laws ch. 2000-3. The Act created a “dual tracking system” and repealed Florida Rules of Criminal Procedure 3.850, 3.851, and 3.852. *Id.* The Florida Supreme Court declared the Act unconstitutional as a violation of the separation-of-powers doctrine and reenacted Rules 3.850, 3.851, and 3.852. *Allen v. Butterworth*, 756 So. 2d 52, 67 (Fla. 2000).

15. *Furman*, 408 U.S. at 239–240.

16. *Id.* at 309 (Potter, J., concurring).

17. *See infra* nn. 23–25 and accompanying text (discussing various statutes enacted after *Furman*).

18. Mass. Citizens against the Death Penalty, *Map of Death Penalty States*, <http://www.mcadp.org/images/dpmap.gif> (last updated May 5, 2004). Twelve states and the District of Columbia do not have a death-penalty statute. *Id.*

19. Governor Mitt Romney of Massachusetts has a committee of legal and forensic experts to help draft death-penalty legislation in Massachusetts. Pam Belluck, *Push in Massachusetts for a Death Penalty*, 153 N.Y. Times A14 (Sept. 23, 2003). His announced goal is to establish a “standard of certainty” so “that only the guilty will suffer the death penalty.” *Id.*

20. *See e.g.* Fla. Stat. § 921.141 (providing procedures for determining a sentence in a capital case).

times referred to as the “penalty phase” or “presentence hearing.”²¹

While the procedure used to determine the penalty differs from state to state, arriving at that decision is the most difficult task presented to a judge or jury. And, due to the finality and severity of the death penalty, no decision receives more judicial scrutiny. Judicial review takes place in both state and federal courts, and it is not unusual for these courts to review a single case a number of times. For instance, the following courts considered or reviewed Charles William Proffitt’s case the number of times indicated: Florida Circuit Court (four times); Florida Supreme Court (four times); United States District Court (two times); United States Circuit Court of Appeals (11th Circuit) (three times); United States Supreme Court (two times).²²

A. Death-Penalty Schemes in the United States

After the *Furman* case, various states began to enact new death-penalty schemes. The United States Supreme Court ultimately approved three basic schemes, and every state that has the death penalty follows one of those schemes. The schemes are known as the Florida scheme,²³ the Georgia scheme,²⁴ and the Texas scheme.²⁵

1. The Florida Scheme²⁶

Florida was the first state to reenact the death penalty after the dust settled from the *Furman* case.²⁷ Two other states, Alabama and Delaware, follow the Florida scheme.²⁸ The Florida

21. Compare *Gregg v. Ga.*, 428 U.S. 153, 154 (1976) (referring to a “presentence hearing”) with *Henyard v. State*, 689 So. 2d 239, 251 (Fla. 1996) (referring to the “penalty phase”).

22. *Proffitt v. State*, 510 So. 2d 896, 897 (Fla. 1987). Ironically, in this last case, Proffitt’s death sentence was reduced to life imprisonment without possibility of parole for twenty-five years. *Id.* at 898.

23. *Proffitt v. Fla.*, 428 U.S. 242, 242 (1976).

24. *Gregg*, 428 U.S. at 153–154.

25. *Jurek v. Tex.*, 428 U.S. 262, 262 (1976).

26. Fla. Stat. § 921.141.

27. *Driggs*, *supra* n. 1, at 1207.

28. See Ala. Code § 13A-5-45 (Westlaw current through 2003 Reg. Sess.) (implementing similar statutory schemes as Florida); Del. Code Ann. tit. 11, § 4209 (Westlaw current through 2003 Reg. Sess.) (implementing similar statutory schemes as Florida). Indiana was a Florida-statutory-scheme state; however, the Indiana Legislature amended the

scheme requires the jury to unanimously find a defendant guilty of first-degree murder.²⁹ Then, the same jury—unless the defendant waives a jury—hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating circumstances.³⁰ The aggravating factors need not be listed in the indictment³¹ but must be established beyond a reasonable doubt.³² The fact-finder must only be “reasonably convinced” as to the existence of mitigating factors.³³

If the jury finds one or more aggravating circumstances and determines that these circumstances are sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances and, based upon these considerations, recommend whether the defendant should be sentenced to life imprisonment or death.³⁴ However, even if the aggravating circumstances are found to outweigh the mitigating circumstances, the jury is never required to return a recommendation for death and must be so instructed.³⁵ A simple majority of the jury is necessary for recommendation of the death penalty.³⁶ It is not necessary for the jury to list on the verdict the aggravating and mitigating circumstances it finds or to disclose the number of jurors making such findings.³⁷ With rare exceptions, the judge must give the jury recommendation “great weight,” but the judge makes the final decision as to the penalty.³⁸ The judge has the authority to override a jury recommendation of a life sentence in limited circumstances,³⁹

death-penalty statute to make Indiana a Georgia-statutory-scheme state in 2002. Ind. Code § 35-50-2-9 (2003).

29. Fla. R. Crim. P. 3.440.

30. Fla. Stat. § 921.141.

31. *Sireci v. State*, 399 So. 2d 964, 970 (Fla. 1981).

32. *Stand. Jury Instrs. In Crim. Cases—NO.96-1*, 690 So. 2d 1263, 1268 (Fla. 1997).

33. *Id.*

34. *Id.*

35. *Henryard*, 689 So. 2d at 250.

36. Florida and Delaware are the only states that allow the jury to recommend the death penalty by simple majority. Del. Code Ann. tit. 11, § 4209; Fla. Stat. § 921.141. Alabama requires at least ten jurors to recommend the death penalty. Ala. Code § 13A-5-45.

37. *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003).

38. *Muhammad v. State*, 782 So. 2d 343, 362 (Fla. 2001). The court may give the jury recommendation less than “great weight” if the defendant refuses to allow mitigation to be presented to the jury, and the trial court fails to provide an alternative means to present such mitigation. *Id.*

39. See generally *Zakrzewski v. State*, 717 So. 2d 488, 494 (Fla. 1998) (holding that the

but, “in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”⁴⁰

After the jury renders its recommendation, the judge must give both sides an opportunity to present additional evidence or argument.⁴¹ A comprehensive sentencing order, complete with findings and conclusions of law, is required if the death penalty is imposed.⁴² The sentencing judge must assign weight to each of the aggravating and mitigating factors supported by the evidence—a subjective process that the Florida Supreme Court will not disturb absent an abuse of discretion on the part of the trial judge.⁴³

The Florida Supreme Court automatically reviews death sentences,⁴⁴ and the Court is required to perform a “proportionality review” by comparing the case on appeal with other cases.⁴⁵ The Court reserves the death penalty “for the most aggravated and least mitigated of first-degree murders.”⁴⁶

trial court was correct in overriding the jury recommendation).

40. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). Does this mean that all twelve jury members were “reasonable” enough to convict the defendant of first-degree murder, but at least six jury members subsequently became “unreasonable” and unable to recommend a life sentence? Most cases involving a jury override have been reversed. See e.g. *Keen v. State*, 775 So. 2d 263 (Fla. 2000); *San Martin v. State*, 717 So. 2d 462 (Fla. 1998); *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997); *Jenkins v. State*, 692 So. 2d 893 (Fla. 1997); *Boyett v. State*, 688 So. 2d 308 (Fla. 1996); *Strausser v. State*, 682 So. 2d 539 (Fla. 1996); *Caruso v. State*, 645 So. 2d 389 (Fla. 1994); *Parker v. State*, 643 So. 2d 1032 (Fla. 1994); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994). A recent case sustaining a jury override is *Zakrzewski*, 717 So. 2d at 494. However, as the dissenting opinion points out, the case is probably not reliable as precedent because the defendant received death sentences for the killing of his wife and son, but received life for the killing of his daughter. *Id.* at 496 (Anstead, J., concurring in part and dissenting in part).

41. *Spencer v. State*, 615 So. 2d 688, 690–691 (Fla. 1993).

42. See *Ferrell v. State*, 653 So. 2d 367, 370–371 (Fla. 1995) (granting a new sentencing hearing due to inadequate written findings in sentencing order); *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (holding that the sentencing court must include all findings of mitigating circumstances in its sentencing order).

43. See *Lugo v. State*, 845 So. 2d 74, 115 (Fla. 2003) (stating that weighing mitigating circumstances is in the discretion of the court); *Floyd v. State*, 850 So. 2d 383, 402–403 (Fla. 2002) (holding that the sentencing judge did not err in giving little weight to mitigating circumstances); *Griffin v. State*, 820 So. 2d 906, 917 (Fla. 2002) (holding that the judge did not err in giving little or no weight to mitigating circumstances).

44. Fla. Stat. § 921.141(4).

45. See *Rimmer v. State*, 825 So. 2d 304, 331 (Fla. 2002) (finding that a court, when determining whether a sentence of death is appropriate, should compare the totality of the circumstances in the case at hand to another death-penalty case to ensure proportionality).

46. *Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998).

2. *The Georgia Scheme*⁴⁷

The Georgia scheme is similar to the Florida scheme. However, the two schemes differ because, under the Georgia scheme, the prosecutor is not limited to presentation of evidence establishing statutory aggravating factors.⁴⁸ Once the prosecutor establishes a statutory aggravating factor, he or she may present all relevant evidence of aggravation.⁴⁹ The jury must state in its verdict the aggravating factors found beyond a reasonable doubt, and if the death penalty is unanimously recommended, the court must impose the death penalty.⁵⁰ The fact that the jury determines the sentence instead of the judge is another difference between the Florida and Georgia schemes. All but four of the death-penalty states have a version of the Georgia scheme.⁵¹

3. *The Texas Scheme*⁵²

The Texas scheme has a different approach than both the Florida and Georgia schemes, and no similar scheme exists in any other state. In Texas, the jury is required to answer three interrogatories.⁵³ The interrogatories must be answered either “yes” or “no.”⁵⁴ The first two interrogatories must be answered “yes” unanimously or “no” by a vote of at least ten to two.⁵⁵ The last interrogatory must be answered “no” unanimously or “yes” by a vote of at least ten to two.⁵⁶ The interrogatories are as follows:

- (1) [W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;⁵⁷

47. Ga. Code Ann. § 17-10-30 (LEXIS 2003).

48. *Id.*

49. *Id.*

50. *Id.* at § 17-10-31.

51. Florida, Alabama, Delaware, and Texas do not follow the Georgia scheme. *See e.g.* Ala. Code § 13A-5-45; Del. Code Ann. tit. 11, § 4209; Fla. Stat. § 921.141; Tex. Crim. P. Code Ann. Art. 37.071 (West 2004).

52. Tex. Code Crim. P. Ann. art. 37.071.

53. *Id.*

54. *Id.* at § (2)(c).

55. *Id.* at § (2)(d)(2).

56. *Id.* at § (2)(f)(2).

57. *Id.* at § (2)(b)(1).

- (2) [W]hether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken;⁵⁸
- (3) 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 that a sentence of life imprisonment rather than a death sentence be imposed.⁵⁹

If the first two interrogatories are answered "yes" and the last interrogatory is answered "no", the court must impose the death penalty.⁶⁰ If the jury cannot answer any question with an appropriate number of jurors, the defendant will receive a life sentence.⁶¹

The United States Supreme Court originally approved all three schemes on Eighth and Fourteenth Amendment grounds in the cases of *Gregg v. Georgia*,⁶² *Proffitt v. Florida*,⁶³ and *Jurek v. Texas*.⁶⁴

B. Florida Appellate Review of Death-Penalty Sentences

Death-penalty cases are unusually complex and contain constitutional, evidentiary, and procedural issues. They are routinely reversed by the appellate courts. To illustrate this point, the Florida Supreme Court reversed 42% (eight cases) of the death-penalty cases it decided on plenary appeal in 2000.⁶⁵ The affirmation rates for 2001 improved. Of the twenty-two plenary appeals that the Court decided in 2001, 63% (fourteen cases) were affirmed, 5% (one case) received a life sentence, 14% (three cases) were awarded a new trial, and 18% (four cases) received a new

58. *Id.* at § (2)(b)(2).

59. *Id.* at § (2)(e)(1).

60. *Id.* at § (2)(f).

61. *Id.* at § (2)(g).

62. 428 U.S. 153.

63. 428 U.S. 242.

64. 428 U.S. 262.

65. Off. St. Cts. Adminstr., Ct. Servs., *Supreme Court of Florida: Capital Case Dispositions: Initial Appeals for the Period 1998 thru 2003*, (unpublished graph, February 17, 2004) (on file with *Stetson Law Review*).

penalty-phase hearing.⁶⁶ In 2003, the statistics continued to improve. Of the twenty-five plenary appeals that the Court decided in 2003, 80% were affirmed, 8% (two cases) were awarded a new trial, and 12% (three cases) received a new penalty-phase hearing.⁶⁷

It is impossible to pinpoint the reason or reasons for the improved affirmation rates involving death-penalty appeals in Florida in the past few years because of the many variables involved, such as the county in which the murder occurred, the facts of the particular cases, the quality of the evidence presented at trial, developments in the law, and changes in judicial personnel on the Supreme Court. However, since 1997, the Florida Supreme Court has required trial judges to attend intense, continuing-judicial-education programs involving the trial of capital cases and to have at least minimal criminal-trial experience before being assigned to a capital case.⁶⁸ That requirement may have contributed to the improved statistics in recent years.

The Florida Supreme Court has made a number of efforts to “streamline” the death-penalty process, such as requiring the chief judges of the twenty judicial circuits to provide quarterly status reports on death-penalty cases,⁶⁹ and forming the Criminal Court Steering Committee to address procedural problems in death cases.⁷⁰ The Court has also created a special postconviction-relief rule that requires postconviction motions to be filed within one year from the date the death sentence becomes final and provides for the appointment of counsel for death-row inmates.⁷¹ Additionally, the Court has provided a rule governing procedures after a death warrant is issued that allows the trial judge to hold hearings throughout the State in order to expedite last-minute motions.⁷²

The Florida Legislature has provided a central repository for public records needed to process postconviction motions⁷³ and has

66. *Id.*

67. *Id.*

68. Fla. R. Jud. Admin. 2.050(b)(10).

69. *Id.* at 2.050(b)(7).

70. S. Ct. Fla. Admin. Or. No. AOSC02-29 (Sept. 3, 2003) (available at <http://www.flcourts.org/sct/clerk/adminorders/2002/sco2-29.pdf>).

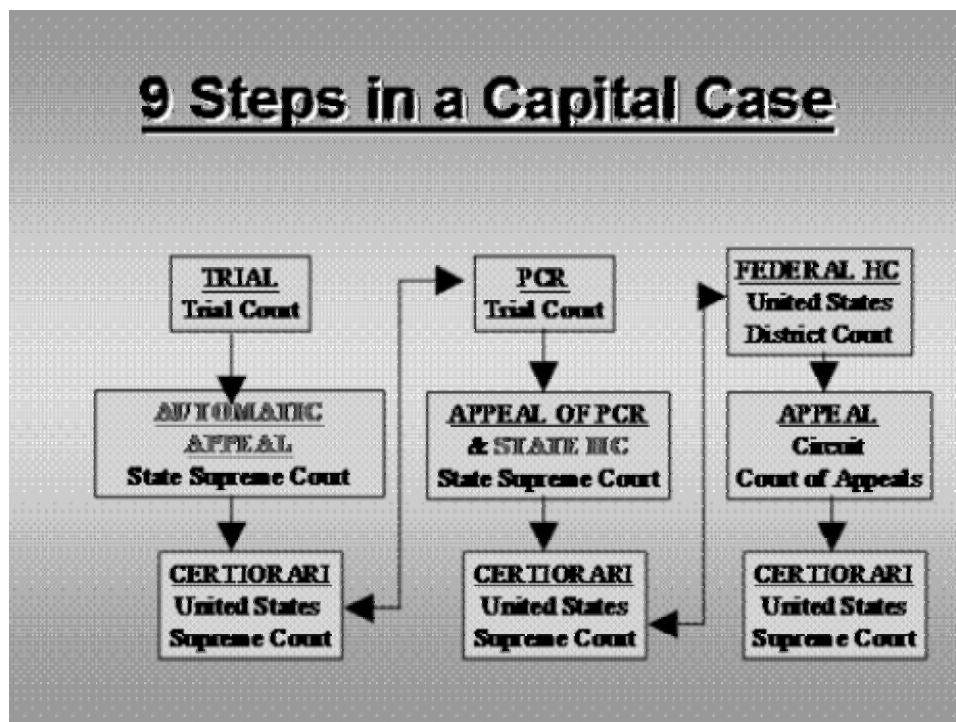
71. Fla. R. Crim. P. 3.851.

72. *Id.* at 3.851(h)(4).

73. Fla. Stat. § 119.19.

established a registry of attorneys who are assigned postconviction cases.⁷⁴ Of course, the federal courts are not subject to scrutiny by the Florida Supreme Court, and they process state death-penalty cases on habeas corpus according to their own procedures and timetables. As illustrated by figure 1, judicial review of a death-penalty case in Florida is a nine-step process, with each step presenting the opportunity to return the case to an earlier step for further action.⁷⁵

Figure 1



74. *Id.* at § 27.710 (West 2003 & Supp. 2004).

75. The author is indebted to Judge Philip J. Padovano, Judge on Florida's First District Court of Appeal, for this diagram. The initials "HC" stand for habeas corpus and "PCR" stands for post-conviction relief.

Assuming the death-penalty decision is affirmed at each of the nine steps and the governor signs a death warrant in a timely manner, the process can be squeezed into nine years, a record set by Ted Bundy's case.⁷⁶ The average stay on death row is 12.01 years.⁷⁷ One Florida inmate has been on death row for thirty years.⁷⁸

The Florida Supreme Court and the federal courts regularly render decisions that have a significant impact on the way these cases are tried. Some decisions invoke major procedural changes,⁷⁹ while others affect a broad category of cases on constitutional grounds.⁸⁰ These decisions can contribute to the delay in processing capital cases and sometimes result in the removal of whole classes of defendants from death row.⁸¹ The legal landscape of capital punishment changes regularly and rapidly, and requires constant attention from judges, prosecutors, and defense counsel.

The United States Supreme Court has rendered a number of decisions that add both substantive and procedural requirements in death-penalty cases. For instance, the sentencing court cannot be given unbridled discretion to impose the death penalty,⁸² nor can its discretion be withheld.⁸³ The death penalty cannot be imposed for "ordinary" murder,⁸⁴ for the rape of an adult woman,⁸⁵ or for a felony murder unless the defendant possessed a sufficiently

76. Von Drehle, *supra* n. 5, at 401.

77. Fla. Dept. Corrections, *Death Row Fact Sheet*, <http://www.dc.state.fl.us/oth/deathrow/index.html> (accessed Apr. 8, 2004).

78. *Id.*

79. See *Spencer*, 615 So. 2d at 690–691 (requiring a separate hearing before the judge for additional matters to be presented).

80. See *Ring v. Ariz.*, 536 U.S. 584, 609 (2002) (ruling that aggravating circumstances must be determined by the jury and established beyond a reasonable doubt); *Atkins v. Va.*, 536 U.S. 304, 321 (2002) (concluding that execution of the mentally retarded violates the Eighth Amendment).

81. See *e.g. Ring v. Ariz.*, 536 U.S. 584, 620–621 (2002) (O'Connor, J., dissenting) (noting that 629 inmates in five separate states are likely to challenge their sentences based on this ruling).

82. *E.g. Furman*, 408 U.S. at 239–240 (reversing the lower court's imposition of the death sentence on Eighth and Fourteenth Amendment grounds).

83. *E.g. Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (upholding the court's role in death-penalty cases through individualized sentencing procedures); *Woodson v. N.C.*, 428 U.S. 280, 303 (1976) (noting that the judiciary must have power to review death sentences).

84. *Godfrey v. Ga.*, 446 U.S. 420, 428–429 (1980).

85. *Coker v. Ga.*, 433 U.S. 584, 600 (1977).

culpable state of mind.⁸⁶ Additionally, the Supreme Court has prohibited the execution of an insane⁸⁷ or mentally retarded person.⁸⁸ The Supreme Court has required the sentencing court to consider all mitigating circumstances, not just those listed in a particular state statute.⁸⁹ Most recently, the Supreme Court held, in *Ring v. Arizona*,⁹⁰ that the relatively unimportant *Apprendi v. New Jersey*⁹¹ decision applies to capital cases.⁹² The Court's decision in *Ring*, as described below,⁹³ may have far-reaching effects on states that follow the Florida scheme and has had significant effects on states (Arizona, Colorado, Idaho, Nebraska, Nevada) that allow (or allowed) a judge or a panel of judges to determine the existence of aggravating factors, and merits further discussion.

III. RING AND THE FLIGHT TO "APPRENDI-LAND"⁹⁴

A. *Spaziano v. Florida* and *Hildwin v. Florida*

As has been previously stated,⁹⁵ *Proffitt*, which approved Florida's capital-punishment scheme,⁹⁶ was decided on strictly Eighth and Fourteenth Amendment grounds.⁹⁷ *Proffitt* held that capital punishment is not cruel and unusual for Eighth Amendment purposes,⁹⁸ and the procedures devised under the three schemes passed constitutional muster under the due-process provision of the Fourteenth Amendment.⁹⁹ There was no Sixth Amendment right-to-jury-trial claim presented in *Proffitt*; however, the United States Supreme Court did consider Sixth

86. *Enmund v. Fla.*, 458 U.S. 782, 801 (1982).

87. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

88. *Atkins*, 536 U.S. at 321.

89. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

90. 536 U.S. at 589.

91. 530 U.S. 466 (2000).

92. *Ring*, 536 U.S. at 589.

93. *Infra* nn. 155–180 and accompanying text.

94. Justice Antonin Scalia coined this curious phrase in his concurring *Ring* opinion, 536 U.S. at 613 (Scalia, J., concurring).

95. *Supra* n. 63.

96. 428 U.S. at 259–260.

97. *Id.* at 247.

98. *Id.*

99. *Id.*

Amendment challenges to the Florida scheme in *Spaziano v. Florida*¹⁰⁰ and *Hildwin v. Florida*.¹⁰¹

In *Spaziano*, the issue was whether the trial judge had the power to override a jury recommendation of life imprisonment.¹⁰² The Court approved that practice and noted that a capital-sentencing proceeding is like a trial on guilt or innocence in many respects.¹⁰³ “Because the ‘embarrassment, expense and ordeal’ . . . faced by a defendant at the penalty phase of a . . . capital murder trial . . . are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial,” the Court concluded that double-jeopardy principles barred the state from repeated efforts to obtain the death penalty.¹⁰⁴ However, “[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in the respects significant to the Sixth Amendment’s guarantee of a jury trial.”¹⁰⁵ The Court concluded that “the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.”¹⁰⁶ *Spaziano* did not address the question of whether the jury was required to find aggravating circumstances.

In *Hildwin*, the issue was more focused. The per curiam opinion opened with the following statement: “This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida.”¹⁰⁷ The Court stated that

[if] the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.¹⁰⁸

100. 468 U.S. 447, 464 (1984).

101. 490 U.S. 638, 638 (1989).

102. 468 U.S. at 449.

103. *Id.* at 458.

104. *Id.* (quoting *Green v. U.S.*, 355 U.S. 184, 187 (1957)).

105. *Id.* at 459.

106. *Id.* at 462–463.

107. 490 U.S. at 638.

108. *Id.* at 640. After the trial, the jury returned a unanimous advisory sentence of

The Court further held that “the existence of an aggravating factor here is not an element of the offense but instead is ‘a sentencing factor that comes into play only after the defendant has been found guilty.’”¹⁰⁹

A plain reading of *Proffitt*, *Spaziano*, and *Hildwin* leads to the inescapable conclusion that the Florida scheme is constitutionally valid on Sixth, Eighth, and Fourteenth Amendment grounds, and that a jury need not take part in determining whether to impose a death sentence. The State of Arizona took comfort in these rulings and confidently defended its capital-punishment statute before the Court in 1990¹¹⁰—one year after the *Hildwin* decision.

B. *Walton v. Arizona*

Until recently, Arizona required the trial judge to preside over the penalty phase without a jury and to make the findings determining whether to impose the death penalty.¹¹¹ In *Walton v. Arizona*,¹¹² Jeffrey Alan Walton made a direct Sixth-Amendment challenge to this procedure before the United States Supreme Court.¹¹³ He lost.¹¹⁴ The Court rejected the arguments that a jury, instead of a judge, should make every finding of fact underlying the sentencing decision, and that a jury must decide which aggravating and mitigating circumstances are present in a given case.¹¹⁵ The Court stated, “[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.”¹¹⁶ The Court specifically mentioned *Proffitt*, *Hildwin*, and *Spaziano*, and repeated the previous conclusion that “the Sixth Amendment does not require that the specific findings authorizing the imposition of

death. *Id.* at 639.

109. *Id.* (quoting *McMillan v. Pa.*, 477 U.S. 79, 79–80 (1986)).

110. *Walton v. Ariz.*, 497 U.S. 639, 655–656 (1990).

111. *Id.* at 643.

112. 497 U.S. 639.

113. *Id.* at 647–648.

114. *Id.* at 649.

115. *Id.*

116. *Id.* at 647 (citing *Clemons v. Miss.*, 494 U.S. 738, 745 (1990)).

the sentence of death be made by the jury.”¹¹⁷ The Court then remarked, “[a] Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”¹¹⁸ The Court also rejected Walton’s argument that “aggravating factors” are “elements of the offense,” and, quoting from *Poland v. Arizona*,¹¹⁹ stated, “[a]ggravating circumstances are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.”¹²⁰

C. Post-Walton Cases

After *Walton*, all seemed well and stable in the capital punishment arena, but a surprise attack was looming on the far right flank.

In *Almendarez-Torres v. United States*,¹²¹ the United States Supreme Court addressed the problem of enhanced penalty due to prior conduct—a deportation.¹²² Hugo Almendarez-Torres was indicted for illegally returning to the United States after being deported for aggravated felony convictions.¹²³ The statute in question allowed for an enhanced sentence due to the prior deportation.¹²⁴ The Court ruled that prior record or recidivism is a “sentencing factor” and not an element of the offense charged.¹²⁵ This seemingly innocuous ruling was revisited the next year in a different context.

In *Jones v. United States*,¹²⁶ the Court was faced with a federal statute that defined carjacking and provided separate maximum penalties where three elements were met: (1) at the time of the crime, the person was in possession of a firearm (penalty of not more than fifteen years); (2) serious injury resulted (penalty of not more than twenty-five years); and (3) death resulted (pen-

117. *Id.* at 647–648.

118. *Id.* at 648 (emphasis added).

119. 476 U.S. 147 (1986).

120. *Walton*, 497 U.S. at 648–649.

121. 523 U.S. 224 (1998).

122. *Id.* at 226.

123. *Id.* at 227.

124. *Id.*

125. *Id.* at 235, 247.

126. 526 U.S. 227 (1999).

alty any number of years up to life).¹²⁷ The Court held that the statute established three separate offenses and that the facts (elements) that enhanced the penalties must be alleged in the indictment and proven beyond a reasonable doubt.¹²⁸

Then came *Apprendi*.

D. *Apprendi v. New Jersey*

In New Jersey, the legislature decided to increase the maximum penalty for certain offenses if they qualified as “hate crimes.”¹²⁹ Possession of a firearm for “unlawful purposes” is a second-degree offense,¹³⁰ punishable by a term of imprisonment between five and ten years.¹³¹ However, a separate statute provided for an “extended term of imprisonment” between ten and twenty years¹³² if the trial judge found, by a preponderance of the evidence, that “[t]he defendant in committing the crime acted . . . with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”¹³³

Charles C. Apprendi, Jr., was prosecuted under this statute after he admittedly “fired several .22-caliber bullets into the home of an African-American family that had recently moved into [his] previously all-white neighborhood.”¹³⁴ The indictment did not mention the hate-crimes statute.¹³⁵ Apprendi entered into a plea bargain in which “the State reserved the right to request the court to impose a higher ‘enhanced’ sentence” and Apprendi “reserved the right to challenge the hate crime sentence enhancement on the ground that it violate[d] the United States Constitution.”¹³⁶ The trial judge imposed a twelve-year sentence,¹³⁷ two

127. *Id.* at 230.

128. *Id.* at 252.

129. N.J. Stat. Ann. § 2C:44-3(e) (West 1995) (superseded 2000).

130. *Id.* at § 2C:39-4(a) (West 1995).

131. *Id.* at § 2C:43-6(a)(2).

132. *Id.* at § 2C:44-3(e).

133. *Apprendi*, 530 U.S. at 468, 469.

134. *Id.* at 469.

135. *Id.* at 469–470.

136. *Id.* at 471 (quoting N.J. Stat. Ann. § 2C:44-3(e)).

137. *Id.* at 470.

years more than the maximum allowed without the “enhancement.”¹³⁸

On appeal, Apprendi argued “that the Due Process Clause of the United States Constitution require[d] that the finding of bias upon which his hate crime sentence was based [had to] be proved to a jury beyond a reasonable doubt.”¹³⁹ The Appellate Division of the Superior Court of New Jersey, relying upon the decision of *McMillan v. Pennsylvania*,¹⁴⁰ upheld the statute.¹⁴¹ The court ruled that the hate-crime enhancement was merely “a ‘sentencing factor,’ rather than an element of [the] underlying offense.”¹⁴² The New Jersey Supreme Court affirmed.¹⁴³ The Court reasoned that due process requires the State only to prove the elements of an offense beyond a reasonable doubt.¹⁴⁴ The Court stated that “the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor.”¹⁴⁵ The dissenters believed that the case turned on two critical concepts: (1) “a defendant’s mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof;”¹⁴⁶ and (2) “the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate” means that the purpose “must be treated as a material element [that] must be found by a jury beyond a reasonable doubt.”¹⁴⁷ The United States Supreme Court reversed and noted that

[t]he historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a

138. *Id.* at 471.

139. *Id.*

140. 477 U.S. 79 (1986).

141. *Apprendi*, 530 U.S. at 471.

142. *Id.* (quoting *McMillan*, 477 U.S. at 88).

143. *State v. Apprendi*, 731 A.2d 485, 497 (N.J. 1999), *rev’d*, *Apprendi v. N.J.*, 530 U.S. 466 (2000).

144. *Id.* at 491.

145. *Id.* at 494–495.

146. *Id.* at 498 (Stein, J., dissenting).

147. *Id.*

penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.¹⁴⁸

Thus, the Court held that, “[o]ther than the fact of a prior conviction, any 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.”¹⁴⁹ Justice Clarence Thomas filed a concurring opinion, suggesting that the continued validity of *Walton* could be called into question by the *Apprendi* decision.¹⁵⁰

Most state courts, post-*Apprendi*, took the position that the decision did not pertain to capital cases because the maximum penalty in those cases already is death, and therefore, it is unnecessary for the jury to make findings of aggravation and mitigation beyond a reasonable doubt.¹⁵¹ The Florida Supreme Court has ruled on numerous occasions that *Apprendi* does not apply to the Florida scheme.¹⁵² After publication of the *Apprendi* case, the United States Supreme Court accepted certiorari in *Ring*.¹⁵³ At the same time, the United States Supreme Court stayed executions for two Florida death-row inmates, Linroy Bottoson and Amos Lee King.¹⁵⁴

E. *Ring v. Arizona*

On November 28, 1994, Timothy Ring and two others robbed a Wells Fargo van in Glendale, Arizona, and killed the driver.¹⁵⁵ The evidence at the guilt phase of the trial failed to prove that Ring “was a major participant in the armed robbery or that he actually murdered [the victim].”¹⁵⁶ However, between Ring’s trial

148. *Apprendi*, 530 U.S. at 482–483 (emphasis in original).

149. *Id.* at 490.

150. *Id.* at 522–523 (Thomas, J., concurring).

151. See *Borchardt v. State*, 786 A.2d 631, 638–645 (Md. 2001) (providing an excellent review of these cases and this argument).

152. E.g. *Hurst v. State*, 819 So. 2d 689, 702–703 (Fla. 2002) (rejecting the argument that *Apprendi* is applicable in interpreting Florida’s death-penalty scheme); *Mills v. Moore*, 786 So. 2d 532, 536–537 (Fla. 2001) (ruling that *Apprendi* does not apply to death-penalty statutes whose constitutionality has already been upheld).

153. 536 U.S. at 596.

154. *Bottoson v. Moore*, 534 U.S. 1121, 1121 (2002), cert. denied, 537 U.S. 1070, 1070 (2002); *King v. Fla.*, 534 U.S. 1118, 1118 (2002).

155. *Ring*, 536 U.S. at 589.

156. *State v. Ring*, 25 P.3d 1139, 1152 (Ariz. 2001).

and his sentencing hearing, one of the codefendants accepted a second-degree plea bargain and agreed to cooperate with the prosecution against Ring.¹⁵⁷ The codefendant testified that Ring actually killed the victim and was the leader in the escape.¹⁵⁸ The trial judge entered the “special verdict” required by Arizona law¹⁵⁹ and sentenced Ring to death.¹⁶⁰ The United States Supreme Court accepted the case for review on certiorari.¹⁶¹

In an opinion by Justice Ruth Bader Ginsberg, the Court noted that, under Arizona law, “a defendant . . . cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty.”¹⁶² Accepting that proposition to be the law in Arizona, the Court concluded that it was “persuaded that *Walton*, in relevant part, cannot survive *Apprendi*’s reasoning.”¹⁶³

Justice Scalia, joined by Justice Thomas, filed a concurring opinion,¹⁶⁴ that may be more important than the majority opinion. Justice Scalia would have overruled *Furman*, but he did not have the votes.¹⁶⁵ He agreed with Chief Justice William Rehnquist’s dissenting opinion in *Gardner v. Florida*,¹⁶⁶ in which then-Justice Rehnquist stated that “[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.”¹⁶⁷

Justice Scalia is apparently of the opinion that jury verdicts finding aggravating circumstances must be unanimous. He stated,

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant re-

157. *Ring*, 536 U.S. at 593.

158. *Id.*

159. Ariz. Rev. Stat. § 13-703(D)-(E) (2001).

160. *Ring*, 25 P.3d at 1144–1145.

161. *Ring v. Ariz.*, 534 U.S. 1103 (2002).

162. *Ring*, 536 U.S. at 603.

163. *Id.*

164. *Id.* at 610–613 (Scalia, Thomas, JJ., concurring).

165. *Id.* at 610.

166. 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting).

167. *Id.*

ceives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.¹⁶⁸

Traditionally, proof beyond a reasonable doubt requires a unanimous verdict.¹⁶⁹ Justice Scalia admitted that the Sixth Amendment claim in *Walton* “was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*.”¹⁷⁰ However, if the issue had been “put with greater clarity” at the time *Walton* was decided, he “still would have approved the Arizona scheme—I would have favored the States’ freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.”¹⁷¹

Since *Walton*, Justice Scalia says that he has “acquired new wisdom.”¹⁷² He now realizes two things: “First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.”¹⁷³ Second,

our people’s traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of

168. *Ring*, 536 U.S. at 610 (Scalia, Thomas, JJ., concurring).

169. *Patton v. U. S.*, 281 U.S. 276, 288 (1930). A jury trial under the Sixth Amendment must contain the following elements: “(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.” *Id.* at 288. The Court has upheld state statutes that authorize less-than-unanimous verdicts. See e.g. *Apodaca v. Or.*, 406 U.S. 404, 412 (1972) (finding that a unanimous decision by a jury was not necessary to impose the death penalty); *Johnson v. La.*, 406 U.S. 356, 360 (1972) (approving a statute that allowed a less-than-unanimous (nine to three) verdict in criminal cases). The validity of those cases is in doubt. Additionally, the Court abrogated *Patton* when it approved the six-person jury used in Florida. *Williams v. Fla.*, 399 U.S. 78, 86 (1970). *Patton* was recognized as being overruled in *U.S. v. Spiegel*, 604 F.2d 961, 965 (5th Cir. 1979), when the court ruled that defense counsel could not later complain when he agreed to excuse a juror and proceed with the remaining eleven. *Spiegel*, 604 F.2d at 966. *Patton* is cited because Justice George Sutherland’s vision of the Sixth Amendment jury is still the vision seen by most federal judges because unanimous verdicts are required in federal courts.

170. *Ring*, 536 U.S. at 611 (Scalia, Thomas JJ., concurring).

171. *Id.*

172. *Id.*

173. *Id.*

the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.¹⁷⁴

Finally, Justice Scalia decided to take a jab at Justice Stephen Breyer in order to make the most important point of his opinion, and perhaps the most important point in the entire case. Justice Scalia disagreed with Justice Breyer's belief that the Sixth Amendment requires jury sentencing in capital cases.¹⁷⁵ Justice Scalia stated,

today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.¹⁷⁶

Apparently, Justice Scalia believes that a bifurcated trial with a penalty phase is not necessary to a capital-punishment scheme. As long as the jury finds an aggravating factor, the states are free to devise procedures—including post-verdict procedures by the judge alone—to determine whether the death penalty is appropriate. All of the aggravating factors listed in the Florida statute, except two, are developed during the guilt phase of the trial. The exceptions are the aggravators involving the existence of a prior felony. However, as is plainly stated in *Almendarez-Torres*, the fact of a prior record does not need to be submitted to the jury.¹⁷⁷ The court can consider the presence or absence of a prior record.¹⁷⁸ Under Justice Scalia's view, and, presumably the view of the rest of his "happy band," the court could consider mat-

174. *Id.* at 611–612 (emphasis in original).

175. *Id.* at 612.

176. *Id.* at 612–613 (emphasis in original).

177. 523 U.S. at 243–244.

178. *Id.* at 242.

ters of mitigation without further jury involvement in determining the ultimate sentence.¹⁷⁹

Ring is probably the most significant death-penalty case that the United States Supreme Court has decided in thirty years.¹⁸⁰

F. The Impact of *Ring* and *Apprendi*

What is the impact of *Ring* and *Apprendi* on the Florida death-penalty scheme? The United States Supreme Court did not provide any hints. In fact, Florida's scheme was mentioned only in the context of *Walton* in the *Ring* opinion.¹⁸¹ *Proffitt*, *Spaziano*, and *Hildwin* are still the law of the land, but there is no doubt that the validity of the procedure used to impose the death penalty in Florida has been called into question. Based upon the holdings of *Ring* and *Apprendi*, the following defects in the Florida scheme will no doubt be argued:

- (1) The penalty-phase death-recommendation assumes the jury found at least one aggravating factor beyond a reasonable doubt, but that finding is advisory only and not binding upon the court.
- (2) Unlike the Georgia-scheme states, Florida does not require the jury verdict to contain interrogatories requiring a unanimous finding of at least one aggravating circumstance. (In fact, in Florida, assuming several available aggravating factors, seven jurors could each individually believe a different aggravating factor exists to the exclusion of all others and recommend a death sentence. This would mean only one juror in twelve believed a particular aggravating factor existed.)
- (3) Unlike many states, in Florida, the aggravating circumstances are not required to be set forth in the indictment.¹⁸²
- (4) The trial judge has the authority, limited as it may be, to override the jury recommendation for life imprisonment.

179. *Ring*, 536 U.S. at 612–613 (Scalia, Thomas, JJ., concurring).

180. *Duest v. State*, 855 So. 2d 33, 57 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part).

181. 536 U.S. at 598.

182. *Supra* n. 31. For years, prosecutors in Florida have made a cruel game out of keeping secret the aggravating factors to be relied upon until the last possible moment. *Ruffin v. State*, 397 So. 2d 277, 282 (Fla. 1981).

Some of the problems with Florida's death-penalty scheme are substantive and not procedural. And, of course, courts "are not at liberty to add words to statutes that were not placed there by the Legislature."¹⁸³ The Florida Supreme Court has taken the position—less than unanimously—that, because *Ring* did not invalidate the Florida scheme specifically, no problem exists.¹⁸⁴ This position is a proper course to follow under our federal system, particularly under the Supremacy Clause contained in Article VI of the United States Constitution. The United States Supreme Court has stated,

The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land. Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, whenever those rights are involved in any suit or proceedings before them. Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights.¹⁸⁵

However, this position is not the only position that courts have taken. Some courts have decided that the handwriting is on the wall and have invalidated procedures that allow judges to determine the existence of aggravating circumstances.¹⁸⁶ The Nevada Supreme Court invalidated the part of Nevada's death-penalty statute that allowed a three-judge panel to find the aggravating circumstances in the event the jury was unable to reach a unanimous penalty decision.¹⁸⁷ The Colorado Supreme Court followed Nevada's lead by declaring the Colorado statute, which required a three-judge panel to find the facts to establish aggra-

183. *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999).

184. *Bottoson v. Moore*, 833 So. 2d 694, 697–698 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002).

185. *State v. Dixon*, 283 So. 2d 1, 23–24 (Fla. 1973) (Boyd, J., dissenting) (citing *Irvin v. Dowd*, 359 U.S. 394 (1959); *Smith v. O'Grady*, 312 U.S. 329 (1941); *U.S. v. Bank of N.Y. & Trust Co.*, 296 U.S. 463 (1936); *Mooney v. Holohan*, 294 U.S. 103 (1935)).

186. See e.g. *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (finding that the Nevada statutory provision that allows a panel of judges to find aggravating circumstances violates the Sixth Amendment).

187. *Id.* at 460.

vating circumstances, unconstitutional.¹⁸⁸ And recently, the Idaho Legislature amended its statute to provide for jury sentencing under the Georgia scheme.¹⁸⁹ Previously, Idaho, like Arizona, provided for a judge to find the existence of aggravating circumstances.¹⁹⁰

The *Ring* decision was released on June 24, 2002, and the United States Supreme Court's 2002 term ended on June 30, 2002.¹⁹¹ The stay of execution for the two Florida death-row inmates, Bottoson and King, was lifted on June 28, 2002,¹⁹² just before the term ended. Florida's governor signed new death warrants on July 1, 2002, and set the first execution for July 8, 2002.¹⁹³ On July 8, 2002, the Florida Supreme Court stayed the executions and set oral arguments in the *Bottoson* and *King* cases for August 21, 2002.¹⁹⁴

Justice Charles T. Wells, in his dissenting opinions to the orders staying the executions, pointed out the likely confusion among Florida's trial judges as a result of the stay.¹⁹⁵ He was concerned that trial judges would consider the stay as a signal

that *Ring* has an effect at present on Florida's capital sentencing statute. Because the Supreme Court has repeatedly upheld Florida's statute and because *Ring* did not overrule any of these decisions, that impression is clearly incorrect. There are twenty-five years of precedent from the Supreme Court repeatedly upholding the constitutionality of Florida's capital sentencing statute, and nothing in *Ring* has affected those decisions.¹⁹⁶

The justices released their opinions in the *Bottoson* and *King* cases on October 24, 2002, and denied relief to both inmates.¹⁹⁷

188. *Woldt v. People*, 64 P.3d 256, 266–267 (Colo. 2003), *cert. denied*, 124 S. Ct. 85 (2003).

189. Idaho Code § 19-2515 (2003).

190. *See Arave v. Creech*, 507 U.S. 463, 467 (1993) (stating that the judge found five statutory aggravating circumstances beyond a reasonable doubt).

191. 536 U.S. at 584.

192. *King v. Moore*, 831 So. 2d 143, 147 (Fla. 2002), *cert. denied*, 537 U.S. 1067 (2002).

193. *Bottoson v. Moore*, 824 So. 2d 115, 117 n. 4 (Fla. 2002).

194. *Id.* at 115; *King v. Moore*, 824 So. 2d 127, 127 (Fla. 2002).

195. *Bottoson*, 824 So. 2d at 127 (Wells, J., dissenting).

196. *Id.*

197. *Bottoson*, 833 So. 2d at 693, 695; *King*, 831 So. 2d at 143, 145.

The seven justices issued eight opinions.¹⁹⁸ The United States Supreme Court declined to intervene.¹⁹⁹ Bottoson was executed on December 9, 2002. King was executed on February 26, 2003.²⁰⁰

Some lawyers and legal scholars believe that, because the United States Supreme Court lifted the stay and allowed the execution of Bottoson and King, there was a signal that the Supreme Court approved of the Florida scheme. They are mistaken. Both Bottoson and King were on certiorari from postconviction relief proceedings.²⁰¹ The United States Supreme Court has held that decisions making constitutional changes in procedure will be applied retroactively only to cases on direct review and not on collateral review.²⁰² There are two narrow exceptions to this rule.²⁰³

The first exception requires retroactive application to a decision that determines that the legislature has criminalized protected conduct, which does not apply to capital litigation.²⁰⁴ The second exception requires the Court to apply a new procedural rule retroactively, if it requires the observance of “those procedures that . . . are ‘implicit in the concept of ordered liberty.’”²⁰⁵ This second exception involves “bedrock procedural elements”—e.g., the right to counsel—necessary to obtain a valid conviction.²⁰⁶ This exception is also illustrated by recalling the following classic grounds for habeas relief: “that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.”²⁰⁷

One court has taken the position that *Ring* falls within the second exception. In *Summerlin v. Stewart*,²⁰⁸ the Ninth Circuit Court of Appeals issued an en banc opinion holding that, if the

198. *Bottoson*, 833 So. 2d at 695; *King*, 831 So. 2d at 145.

199. *Bottoson*, 537 U.S. 1070 (2002); *King*, 537 U.S. 1067 (2002).

200. Fla. Dept. Corrections, *Execution List 1976–present*, <http://dc.state.fl.us/oth/deathrow/execlist.html> (accessed Apr. 7, 2004).

201. *Bottoson*, 833 So. 2d at 694; *King*, 831 So. 2d at 144.

202. *Teague v. Lane*, 489 U.S. 288, 303, 310 (1989).

203. *Id.* at 307.

204. *Id.*

205. *Id.* at 311 (quoting *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937))).

206. *Id.*

207. *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting).

208. 341 F.3d 1082 (9th Cir.2003).

rule in *Ring* was procedural, it met the second exception in *Teague v. Lane*²⁰⁹ because the right to a jury trial is a “bedrock procedural element” and if it is substantive, it should be given retroactive effect.²¹⁰

The United States Supreme Court disagreed in a 5-4 opinion written by Justice Scalia.²¹¹ The Court stated that the decision in *Ring* was procedural rather than substantive and announced no new watershed rule of criminal procedure.²¹² Justice Scalia explained,

New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of “watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding. . . .” That a new procedural rule is “fundamental” in some abstract sense is not enough; the rule must be one “without which the likelihood of an accurate conviction is *seriously* diminished. . . .” This class of rules is extremely narrow, and “it is unlikely that any . . . ‘ha[s] yet to emerge.’”²¹³

In all likelihood, the ruling in *Summerlin* will foreclose successful collateral attack on death sentences. However, the attacks will continue in cases on direct review.

Some of the Florida Supreme Court justices—a slim majority—have taken the view that, so long as “past record” or some aggravating circumstance inherent in the guilt-phase verdict is present, *Ring* does not apply.²¹⁴ This approach ignores several statutory provisions: (1) the jury recommendation does not have to be unanimous; (2) the statutory scheme does not provide for “past record” to be decided by the court alone; and (3) the trial

209. 489 U.S. 288 (1989).

210. *Summerlin*, 341 F.3d at 1116.

211. *Schriro v. Summerlin*, 124 S. Ct. 2519, 2004 WL 1402732 (June 24, 2004).

212. *Id.* at 2524.

213. *Id.* at 2523 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Tyler v. Cain*, 533 U.S. 656, 657, n.7 (2001)) (citations omitted) (emphasis removed).

214. *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003), *cert.denied* 124 S. Ct. 2023 (2004).

judge can find the existence of other aggravating circumstances without assistance from the jury.²¹⁵ In one recent case, *Butler v. State*,²¹⁶ the only aggravating circumstance proven was that the killing was heinous, atrocious, and cruel.²¹⁷ On direct appeal, Justice Barbara Pariente pointed out the fact that the jury did not make a specific finding of the existence of that aggravating circumstance and expressed her concern.²¹⁸ However, the majority of the justices continue to find “safe harbor” in *Spaziano* and *Hildwin*,²¹⁹ although, as Chief Justice Anstead noted, “that harbor may not be so safe.”²²⁰

There have been other assaults on death-penalty procedures in the United States that are worthy of discussion because they may have an impact in Florida. Two federal district court judges, for example, have recently found fault with the Federal Death Penalty Act (FDPA).²²¹

G. The Federal Death Penalty Act

The FDPA provides that the prosecution must notify the defendant “a reasonable time before the trial or before acceptance by the court of a plea of guilty” that it intends to seek the death penalty.²²² The notice must contain all of the aggravating factors that the prosecution intends to prove to justify the death sentence.²²³ The aggravating factors are not required to be contained in the indictment.²²⁴ Information relevant to the sentence, including any mitigating or aggravating factors, “is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”²²⁵

215. Fla. Stat. § 921.141.

216. 842 So. 2d 817 (Fla. 2003).

217. *Id.* at 833.

218. *Id.* at 835 (Pariente, J., concurring in part and dissenting in part).

219. *Bottoson*, 833 So. 2d at 695.

220. *Id.* at 703–704 (Anstead, C.J., concurring in result only).

221. 18 U.S.C.A. §§ 3591–3598 (West 2003); *infra* nn. 227–254 and accompanying text.

222. 18 U.S.C.A. § 3593(a).

223. *Id.* at § 3593(a)(2).

224. *Id.* at § 3593(c).

225. *Id.*

H. United States v. Fell and Crawford v. Washington

In *United States v. Fell*,²²⁶ the defendant challenged the constitutionality of the FDPA on two grounds: (1) the FDPA's failure to require aggravating circumstances to be submitted to the grand jury and included in the indictment upon probable cause; and (2) the FDPA's failure to comply with the Sixth-Amendment due-process requirements by allowing otherwise inadmissible evidence (hearsay) to be considered in determining whether an aggravating circumstance has been proven beyond a reasonable doubt.²²⁷

In his opinion, Judge William Sessions acknowledged that *Ring* did not discuss the question of whether the facts to be relied upon in securing the death penalty had to be included in the indictment.²²⁸ Judge Sessions believed that "the clear implication of the decision, resting as squarely as it does on *Jones*, is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply."²²⁹ Unfortunately for *Fell*, the government saw this one coming and amended the indictment.²³⁰

Judge Sessions also found fault with the "relaxed evidentiary standard" included in the FDPA during the penalty phase of the proceedings.²³¹ He does not believe that this standard can "withstand due process and Sixth Amendment scrutiny, given the Supreme Court's concern for heightened reliability and procedural safeguards in capital cases."²³² In *Fell*'s case, the prosecutor intended to introduce into evidence a deceased codefendant's statement, which would not be admissible under the Federal Rules of Evidence.²³³ In discussing the background of the Due Process clause, Judge Sessions stated,

226. 217 F. Supp. 2d 469 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004).

227. *Id.* at 484–485.

228. *Id.* at 483.

229. *Id.*

230. *Id.* at 483–484. Federal prosecutors have begun to accept the proposition that aggravating circumstances are elements of the offense and have included them in indictments. See e.g. *U.S. v. Acosta-Martinez*, 265 F. Supp. 2d 181, 184 (D.P.R. 2003); *U.S. v. Haynes*, 269 F. Supp. 2d 970, 977 (W.D. Tenn. 2003).

231. *Fell*, 217 F. Supp. 2d at 485.

232. *Id.*

233. *Id.*

“[A]s assurance against ancient evils, our country, in order to preserve ‘the blessings of liberty’, wrote into its basic law the requirement, among others, that the forfeiture of the lives . . . of people accused of crime can only follow if procedural safeguards of due process have been obeyed.” *Chambers v. Florida*, 309 U.S. 227, 237, 60 S. Ct. 472, 84 L.Ed. 716 (1940). Although the rights of an accused to confront and cross-examine witnesses are set forth in the Sixth, not the Fifth Amendment, “[t]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). Indeed, “the absence of proper confrontation at trial ‘calls into question the ultimate integrity of the fact-finding process.’” *Ohio v. Roberts*, 448 U.S. 56, 64, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980) (quoting *Chambers*, 410 U.S. at 295, 93 S. Ct. 1038) (internal quotation omitted).²³⁴

Thus, he reasoned that, because the text of the Sixth Amendment’s Confrontation Clause refers to “all criminal prosecutions,” the rights enumerated there are not confined to trial.²³⁵ Judge Sessions went on to observe that “[t]he Sixth Amendment does not operate to exclude all hearsay, [but in] order for hearsay to be admissible, [the proponent] must demonstrate necessity (such as the unavailability of the declarant) and trustworthiness.”²³⁶ Since “[a]n accomplice’s confession that incriminates a defendant does not fall within a firmly rooted hearsay exception, [it] is presumptively unreliable.”²³⁷

Judge Sessions concluded his opinion as follows:

If the death penalty is to be part of our system of justice, due process of law and the fair-trial guarantees of the Sixth Amendment require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous, and constitutional rights and liberties scrupulously protected. To

234. *Id.* at 485–486.

235. *Id.* at 486.

236. *Id.*

237. *Id.*; see *Lilly v. Va.*, 527 U.S. 116, 133 (1999) (holding that an out-of-court statement of an accomplice is inadmissible because such a statement does not fall within a firmly rooted hearsay exception); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (ruling that testimony of a witness at a preliminary hearing is admissible at trial if the witness is unavailable and had been subjected to cross-examination).

relax those standards invites abuse, and significantly undermines the reliability of decisions to impose the death penalty.²³⁸

The Second Circuit Court of Appeals disagreed with Judge Sessions and vacated his judgment.²³⁹ The court reasoned that, because Congress has the authority to “modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution,” it had the authority to substitute a different rule in the FDPA.²⁴⁰ Additionally, the court cited numerous district court cases that have upheld the FDPA standard.²⁴¹

Judge Sessions did have a point. How can the government, using otherwise inadmissible hearsay, prove a fact in issue beyond a reasonable doubt? Even the most obvious issues in a murder trial, such as the fact that the victim is dead, must be proven through admissible evidence. Why should the prosecution be able to use hearsay to establish facts that expose a defendant to the death penalty? And does “a fair opportunity to rebut” improperly shift the burden of proof to the defendant?

Recently, the United States Supreme Court weighed in on the hearsay issue in the case of *Crawford v. Washington*.²⁴² In an opinion by Justice Scalia, the Court held that the test of “adequate ‘indicia of reliability,’” approved in *Ohio v. Roberts*,²⁴³ violated the Sixth Amendment right of confrontation.²⁴⁴ The Court stated, “Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time be-

238. *Fell*, 217 F. Supp. 2d at 491. In *U.S. v. Matthews*, Judge Thomas McAvoy reached the opposite conclusion and upheld the admissibility of hearsay due to other safeguards in the statute. 246 F. Supp. 2d 137, 144 (N.D.N.Y. 2002).

239. 360 F.3d at 146.

240. *Id.* at 142.

241. *Id.* at 146 (citing *U.S. v. Haynes*, 269 F. Supp. 2d 970, 983–987 (W.D. Tenn. 2003); *Battle*, 264 F. Supp. 2d at 1105–1107; *U.S. v. Davis*, No. CR.A.01-282, 2003 WL 1837701 (E.D. La. Apr. 9, 2003); *Johnson*, 239 F. Supp. 2d at 944–946; *Matthews*, 246 F. Supp. 2d 137, at 141–146; *U.S. v. Regan*, 221 F. Supp. 2d 672, 681–683 (E.D. Va. 2002); *U.S. v. Miner*, 176 F. Supp. 2d 424, 435–436 (W.D. Pa. 2001); *U.S. v. Cooper*, 91 F. Supp. 2d 90, 98 (D.D.C. 2000); *U.S. v. Frank*, 8 F. Supp. 2d 253, 267–271 (S.D.N.Y. 1998); *U.S. v. Nguyen*, 928 F. Supp. 1525, 1546–1547 (D. Kan. 1996); *U.S. v. McVeigh*, 944 F. Supp. 1478, 1487 (D. Colo. 1996)).

242. 124 S. Ct. 1354 (2004).

243. 448 U.S. 56, 66 (1980).

244. *Crawford*, 124 S. Ct. at 1364.

ing.”²⁴⁵ The Court held that out-of-court statements that amount to “testimony” are inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.²⁴⁶ Statements such as those made in affidavits and custodial examinations, and statements taken by police officers in the course of interrogations are inadmissible.²⁴⁷ Hearsay statements that were admissible as exceptions to the rule at common law are not included.²⁴⁸ But, as Justice Scalia pointed out, most of those statements were not testimonial in nature, such as business records or statements in furtherance of a conspiracy.²⁴⁹

The question raised by *Crawford* is whether the Sixth Amendment right of confrontation applies to the penalty phase of a capital trial. The safe assumption is that it does. The Court, in *Spaziano*, recognized that a penalty-phase proceeding is “like a trial,” at least for Fifth Amendment double-jeopardy purposes,²⁵⁰ and it logically follows that an accused has the Sixth Amendment right of confrontation if testimony is offered at the “trial.”²⁵¹

A number of states provide that the prosecutor, or both the prosecutor and the defendant, must prove aggravation and mitigation using the rules of evidence.²⁵² These states remain unaffected by the ruling in *Crawford* unless hearsay statements that were inadmissible at common law are admissible in those states.

The Florida Supreme Court has allowed hearsay in the penalty phase so long as the opponent has a “fair opportunity to rebut” the hearsay statements.²⁵³ The “fair opportunity to rebut” requirement precludes statements made by persons who are unavailable, especially if they are deceased, and whose testimony has not been perpetuated (subjected to the opportunity for cross-

245. *Id.* (quoting J. Wigmore, *Evidence* vol. 3, § 1397, 101 (2d ed., 1923)).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 1367 (Thomas & Scalia, JJ., concurring).

250. *Spaziano*, 468 U.S. at 459.

251. *Id.*

252. *E.g.* Arizona (Ariz. Rev. Stat. § 13-703(B)–(C) (2003)); Connecticut (Conn. Gen. Stat. § 53a-46a(c) (2003)); Illinois (720 Ill. Comp. Stat. 5/9-1(e) (2003)); Louisiana (La. Stat. Ann. § 905.2(a) (2004)); and Ohio (Ohio Rev. Code Ann. § 2929.03(D)(1) (Anderson 2004)) (recognizing that the defendant shall be given great latitude in presenting mitigation and has only the burden of going forward).

253. *Zack v. State*, 753 So. 2d 9, 23 (Fla. 2003).

examination) prior to trial.²⁵⁴ So far, that Court has not had the opportunity to consider the applicability of *Crawford* to the penalty phase.

I. *United States v. Quinones*

The ruling in *United States v. Quinones*²⁵⁵ is not an attack on the death penalty from the right—it comes from the other direction. The following issue was presented to Judge Jed S. Rakoff: “whether the death penalty violate[s] due process, and is therefore unconstitutional, because, by its very nature, it cuts off a defendant’s ability to establish his actual innocence.”²⁵⁶ Judge Rakoff determined that it was.²⁵⁷ This ruling is less persuasive in its foundation than the ruling in *Fell*, but the opinion points out some very disturbing aspects of death-penalty litigation.

Judge Rakoff began his analysis with the following:

The Federal Death Penalty Act, 18 U.S.C. §§ 3591–3598, serves deterrent and retributive functions, or so Congress could reasonably have concluded when it passed the Act in 1994. But despite the important goals, and undoubted popularity, of this federal act and similar state statutes, legislatures and courts have always been queasy about the possibility that an innocent person, mistakenly convicted and sentenced to death under such a statute, might be executed before he could vindicate his innocence—an event difficult to square with basic constitutional guarantees, let alone simple justice. As Justice O’Connor, concurring along with Justice Kennedy in *Herrera v. Collins*, 506 U.S. 390, . . . stated: “I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—‘contrary to contemporary standards of decency,’ ‘shocking to the conscience,’ or offensive to a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’—the execution of a legally

254. *Parker v. State*, 873 So. 2d 270, 282 (Fla. 2004).

255. 196 F. Supp. 2d 416 (S.D.N.Y. 2002), *adhered to by* 205 F. Supp. 2d 256, *rev’d*, 313 F.3d 49 (2d Cir. 2002).

256. *Id.* at 419.

257. *Id.* at 420.

and factually innocent person would be a constitutionally intolerable event.” *Id.* at 419 (citations omitted).²⁵⁸

He then relied upon cases and studies that showed, through new technology such as DNA testing, that many defendants on death rows across the country have been proven innocent, sometimes hours before their scheduled executions.²⁵⁹ Judge Rakoff was unwilling to accept that considerations of deterrence and retribution can constitutionally justify the knowing execution of innocent persons.²⁶⁰ He pointed out several pitfalls in federal practice that can result in unreliable death sentences. For instance, unlike many states, federal practice allows conviction upon the uncorroborated testimony of an accomplice and does not require that circumstantial evidence exclude to a moral certainty other reasonable inferences except guilt.²⁶¹ He also noted that it is “reasonably well established that the single most common cause of mistaken convictions is inaccurate eye-witness testimony.”²⁶²

He concluded,

the unacceptably high rate at which innocent persons are convicted of capital crimes, when coupled with the frequently prolonged delays before such errors are detected (and then often only fortuitously or by application of newly-developed techniques), compels the conclusion that execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings.²⁶³

These cases bring new arguments pointing out possible deficiencies in the Florida scheme. Hearsay evidence, inadmissible under *Crawford*, has been used to provide evidence to establish aggravating circumstances. The high rate of innocent persons being sentenced to death in the United States is well documented.²⁶⁴

258. *Id.* at 416–417 (quoting *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting); 506 U.S. at 407–408 (quoting *Medina v. Cal.*, 505 U.S. 437, 445–446 (1992) (quoting *Patterson v. N.Y.*, 432 U.S. 197, 202 (1977))).

259. *Id.* at 417.

260. *Id.* at 420.

261. *Quinones*, 205 F. Supp. 2d at 267.

262. *Id.*

263. *Id.* at 268. The Second Circuit Court reversed *Quinones* on the grounds that the FDPA does not violate due process. 313 F.3d at 70.

264. James S. Liebman, *A Broken System: Error Rates in Capital Cases, 1973-1995*,

When thirteen death-row inmates in Illinois were recently exonerated, the Governor declared a moratorium on executions.²⁶⁵ A special commission was created to study the entire process from arrest to execution and submit recommendations to improve the reliability of death sentences.²⁶⁶ The commission submitted an extensive report containing some eighty-five recommendations.²⁶⁷ The Illinois legislature failed to act on the commission's recommendations, and the Governor either pardoned outright or commuted the sentences of every death-row inmate.²⁶⁸

IV. THE ILLINOIS COMMISSION ON CAPITAL PUNISHMENT REPORT

The Illinois Commission on Capital Punishment was composed of well-respected judges, lawyers, and business leaders.²⁶⁹ The Commission investigated the Illinois experience with capital punishment and made eighty-five recommendations that were calculated to make death sentences more reliable and to address the issues raised by *Ring*, *Apprendi*, and subsequent cases.²⁷⁰ Some of the recommendations should be considered for adoption in Florida and are discussed below.

A. Pretrial Investigation

Illinois Recommendations 4, 5, and 8 include the following:

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should . . . include . . . the entire interrogation process. Any statements [made] by a homicide suspect [prior to videotaping] should be repeated to the suspect [with any] comments re-

<http://justice.policy.net/cjedfund/dpstudy/> (June 12, 2000).

265. Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?"* 86 *Judicature* 83, 83 (Sept.–Oct. 2002).

266. *Id.*

267. *Id.*

268. *People ex rel. Madigan v. Snyder*, 804 N.E. 2d 546 (Ill. 2004); see Marshall, *supra* n. 265, at 83; Thomas P. Sullivan, *Preventing Wrongful Convictions*, 86 *Judicature* 106 (Sept. 2002).

269. Commn. on Capital Punishment (Ill.), *Report of the Governor's Commission on Capital Punishment* v, http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (Apr. 2002).

270. *Id.* at i.

corded. . . . The [statements of other] significant witnesses in [a] homicide case [should also be recorded].²⁷¹

Trial judges are naturally frustrated when investigators fail to record crucial statements made by a suspect. They are equally frustrated when the recording device is of such poor quality that the recording is partially inaudible. Sometimes the voices on tapes are difficult to hear, and the accuracy of the transcript becomes an issue on appeal.²⁷² Police agencies that accept the responsibility to investigate homicides should invest in state-of-the-art videotaping equipment and provide a suitable, quiet place for interrogations. Equipment of the same quality should be used to videotape and photograph crime scenes.

Videotaping or otherwise recording statements of witnesses, especially suspects, avoids many of the credibility issues investigators seem to acquire, especially when the investigator testifies at trial and repeats a suspect's statement that has not been recorded. The Illinois Commission recognized that problem, and in order to encourage video or audio taping of statements, suggested the following jury instruction:

You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so,] what weight should be given to the statement. In determining the weight to be given a statement, you should consider all of the circumstances under which it was made. *You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.*²⁷³

Illinois Recommendations 51–52 propose the following:

The state should disclose any benefits or promises of benefits of any witness who is a codefendant or an in custody informant prior to trial and the court should make a pretrial ruling deter-

271. *Id.* at 19–20.

272. *See e.g. Martinez v. State*, 761 So. 2d 1074, 1083 (Fla. 2000) (appealing on the grounds that an inaudible videotape was admitted as evidence).

273. Commn. on Capital Punishment, *supra* n. 269, at 32 (emphasis in original).

mining the reliability of this testimony prior to the witness testifying.²⁷⁴ The prosecution should have the burden of proof to establish the witness' testimony is reliable.²⁷⁵

The following factors should be considered by the court:

- (1) The specific statements to which the witness will testify.
- (2) The time and place, and other circumstances regarding the alleged statements.
- (3) Any deal or inducement made by the informant and the police or prosecutors in exchange for the witness' testimony.
- (4) The criminal history of the witness.
- (5) Whether the witness has ever recanted his/her testimony.
- (6) Other cases in which the witness testified to alleged confessions by others.
- (7) Any other known evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.²⁷⁶

Because the death sentence review process takes years to accomplish, it is vital that death sentences withstand the test of time. The post-conviction process usually involves "reinvestigation" of the entire case, so the quality of the initial investigation is often crucial if the death sentence is to withstand review. The testimony of jailhouse informants and codefendants provides fertile grounds to undermine a death sentence.

The commission noted that several of the cases of the thirteen men released from death row prior to the Governor's moratorium on the death penalty involved the testimony of informants.²⁷⁷ The commission recommended that the death penalty should not be available if the guilt of the accused or the establishment of aggravating circumstances depended upon the uncorroborated testimony of an in-custody informant or codefendant.²⁷⁸

274. *Id.* at 30.

275. *Id.*

276. *Id.* at 30-31.

277. *Id.* at 7-8.

278. *Id.* at ii.

The Author has presided over two such cases in which the death penalty was set aside over twenty years after the trial was concluded.²⁷⁹ In Joseph Spaziano's case, the witness recanted his testimony.²⁸⁰ In Gregory Mills's case, the codefendant's testimony was discredited by his contrary statements made years later.²⁸¹ Both cases also involved jury overrides.²⁸² Both cases were reviewed numerous times by the Florida Supreme Court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court,²⁸³ resulting in an enormous waste of money and judicial resources.

Having the trial judge make a pretrial determination of a witness's credibility is a novel suggestion, but would cause more problems than it would solve. After all, credibility issues are traditionally matters for the jury to determine.²⁸⁴ The Illinois legislature wisely did not adopt the recommendation.²⁸⁵ However, that does not mean that the jury should not be instructed on how to weigh the testimony of informants and codefendants. The test for credibility suggested by the Illinois Commission could be the basis for such a jury instruction.

Illinois Recommendations 10–12 include the following:

[T]he person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect. . . . Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.²⁸⁶

The reliability problems of eyewitness testimony are well-known. The Florida Supreme Court has held that exclusion of expert testimony on the reliability of eyewitness testimony is not

279. *State v. Mills*, 788 So. 2d 249 (Fla. 2001); *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997).

280. *Spaziano*, 692 So. 2d at 175.

281. *Mills*, 788 So. 2d at 250.

282. *Mills v. State*, 603 So. 2d 482, 483 (Fla. 1992), *rev'd*, 788 So. 2d 249 (Fla. 2001); *Spaziano*, 692 So. 2d at 175.

283. *Mills*, 788 So. 2d at 249; *Spaziano*, 692 So. 2d at 175.

284. *Watkins v. Sowders*, 449 U.S. 341, 348 (1981).

285. See Commn. on Capital Punishment, *supra* n. 269, at 30 (recommending that the trial judge should make a pretrial determination of witness reliability); see also Ill. Comp. Stat. Ann. § 5/9-1 (West 2002 & Supp. 2003) (listing procedure courts should follow).

286. Commn. on Capital Punishment, *supra* n. 269, at 20.

an abuse of discretion.²⁸⁷ The Court stated that “a jury is fully capable of assessing a witness’ ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.”²⁸⁸ This is true in many cases, especially if the witness knows the defendant or has had significant opportunity to observe him. But the testimony of an eyewitness may be crucial to the case when the witness is not familiar with the defendant and has limited time for observation. Juries should have the assistance of experts, or at least specific instructions on the dangers of eyewitness testimony, in such cases.

B. Eligibility for the Death Penalty

In Illinois Recommendations 27–28, the Illinois Commission recommended that the number of aggravating factors in that state’s statute be reduced from twenty to five:²⁸⁹

- (1) The murder of a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.
- (2) The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
- (3) The murder of two or more persons [including prior murders].
- (4) The intentional murder of a person involving the infliction of torture. For the purpose of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim’s death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
- (5) The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone in-

287. *McMullen v. State*, 714 So. 2d 368, 372–373 (Fla. 1998).

288. *Id.* at 372 (quoting *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983)).

289. Commn. on Capital Punishment, *supra* n. 269, at 23–24.

volved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.²⁹⁰

The Illinois legislature did not adopt this recommendation.²⁹¹ In fact, it added another circumstance to the list to make a total of twenty-one.²⁹²

Florida has a list of fourteen aggravating circumstances.²⁹³ California has the longest list with twenty-two.²⁹⁴ Aggravating circumstances contained in a state's death-penalty scheme "must genuinely narrow the class of persons eligible for the death penalty" and "must reasonably justify the imposition of a more severe sentence . . . compared to others found guilty of murder."²⁹⁵ The list of Florida's aggravating circumstances is typical of other states' lists and is so inclusive that it provides a challenge to imagine a murder that does not contain at least one of them.²⁹⁶ If such a fact situation can be imagined, how often has such a case occurred? Fanciful factual situations do not narrow the class of persons eligible for the death penalty. The Florida Supreme Court has held that the list of aggravating circumstances contained in the statute adequately narrows the class of cases eligible for the death penalty.²⁹⁷ But saying it does not make it so.

Notably absent from the list of aggravating factors suggested by the Illinois Commission is the felony-murder rule. Most scholars agree that the felony-murder rule was conceived by Lord Edward Coke in Lord Dacres's case in 1535, during the reign of Henry VIII.²⁹⁸ The rule has been severely criticized as having no basis in common law, and the British Parliament abolished the rule in 1957.²⁹⁹ For years, the operation of the felony-murder rule in England "did no mischief" because all homicides were capital

290. *Id.* at 24.

291. *See* Ill. Comp. Stat. 5/9-1 (listing the aggravating factors actually adopted).

292. *Id.*

293. Fla. Stat. § 921.141(5).

294. Cal. Penal Code Ann. § 190.2 (West 2004).

295. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

296. Fla. Stat. § 921.141(5).

297. *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997).

298. *See People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980) (referring to Lord Dacres's case as the formal statement of the felony-murder rule).

299. Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, s 1 (1957).

crimes.³⁰⁰ It was not until modern times that commentators began to disparage the felony-murder rule.³⁰¹ For instance,

[f]elony-murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, “a historic survivor for which there is no logical or practical basis for existence in modern law.”³⁰²

In *People v. Phillips*,³⁰³ the court stated,

We have thus recognized that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism.³⁰⁴

Florida has a comprehensive felony-murder statute.³⁰⁵ Any homicide that occurs during the perpetration of, or the attempt to perpetrate any trafficking offense; arson; sexual battery; robbery; burglary; kidnapping; escape; aggravated child abuse; aggravated abuse of an elderly person; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home invasion robbery; aggravated stalking; or murder of another human being is guilty of felony-murder.³⁰⁶ The fact that a murder occurred during the commission of certain felonies is also an aggravating circumstance.³⁰⁷ But the list of felonies is different

300. Roy Moreland, *Kentucky Homicide Law with Recommendations*, 51 Ky. L.J. 59, 82 (1962).

301. See Aaron, 299 N.W.2d at 307–312 (providing a thorough discussion of the history of the felony-murder rule).

302. *Id.* at 307 (quoting Moreland, *supra* n. 300, at 82); see George P. Fletcher, *Reflections on Felony-Murder*, 12 Sw. U. L. Rev. 413, 421 (1980–1981) (describing the history of the felony-murder rule as “tenuous and ill-defined”); Bernard E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L. Forum 565, 586 (1966) (demonstrating how judicial interpretation is used to limit the harshness of the felony-murder rule).

303. 414 P.2d 353 (Cal. 1996), *overruled on other grounds*, *People v. Flood*, 957 P.2d 869 (Cal. 1998).

304. *Id.* at 360.

305. Fla. Stat. § 782.04(1).

306. *Id.* at § 782.04(1)(a)(2).

307. *Id.* at § 921.141(5)(d).

for the felony-murder aggravator.³⁰⁸ The Florida Supreme Court observed that “[a] person can commit felony-murder via trafficking, carjacking, aggravated stalking, or unlawful distribution and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants.”³⁰⁹ While this statement is true as far as it goes, it ignores the fact that homicides occurring during these particular felonies usually involve another aggravating circumstance. Trafficking, carjacking, and unlawful distribution normally involve the motive of pecuniary gain—another element in the felony-murder aggravating-circumstance list.³¹⁰ Aggravated stalking contains within it an element of heightened premeditation, which is usually enough to qualify as “cold, calculated and premeditated.”³¹¹ The presence of that aggravating circumstance takes the crime out of the felony-murder category altogether.

As Justice Anstead has recognized,

a person convicted of felony murder who then has the same felony used against her as an aggravator does *not* become a member of a smaller group. Rather, the felony aggravator used there would make the *entire* larger group of felony murderers *automatically* eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.³¹²

Several state Supreme Courts have stricken the felony-murder aggravator from the list of aggravating circumstances. In *State v. Middlebrooks*,³¹³ the Tennessee Supreme Court struck the felony-murder aggravator from Tennessee’s sentencing scheme.³¹⁴ The Court stated,

Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury

308. *See id.* at § 782.04(3)(a)–(q) (listing acts subject to the felony murder rule).

309. *Blanco*, 706 So. 2d at 12.

310. Fla. Stat. § 921.141(5)(f).

311. *Id.* at § 784.048(3).

312. *Blanco*, 706 So. 2d at 12 (Anstead, J., concurring) (emphasis in original).

313. 840 S.W.2d 317 (Tenn. 1992), *superseded*, Tenn. Code Ann. § 39-13-204(i)(7) (LexisNexis 2003).

314. *Id.* at 346–347.

in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.³¹⁵

In *State v. Cherry*,³¹⁶ the North Carolina Supreme Court remarked,

A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance “pending” for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.³¹⁷

The Wyoming Supreme Court observed that, in Wyoming, the underlying felony of robbery is actually used to aggravate the defendant’s crime in three different ways.³¹⁸ First, the felony provides the basis for a first-degree conviction without proof of premeditation.³¹⁹ Second, it provides the basis for the felony-murder aggravator.³²⁰ Third, it provides the separate aggravating circumstance of pecuniary gain.³²¹ Because this “places the felony murder defendant in a worse position than the defendant convicted of premeditated murder,” the court held it to be “an arbitrary and capricious classification.”³²² To its credit, the Florida Supreme Court has not upheld a single death sentence on the basis of the felony-murder aggravator alone,³²³ although the United States

315. *Id.* at 342 (citing *Engberg v. State*, 686 P.2d 541, 560 (Wyo. 1984)).

316. 257 S.E.2d 551 (N.C. 1979).

317. *Id.* at 567.

318. *Engberg v. Meyer*, 820 P.2d 70, 89 (Wyo. 1991).

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *See Proffitt*, 510 So. 2d at 898 (recognizing appellant’s claim that the Florida Supreme Court has not upheld death sentences where only the aggravating factor was felony murder).

Supreme Court has done so.³²⁴ However, the issue in that case involved the mandatory aspects of the Pennsylvania scheme and not the validity of the felony-murder aggravator.³²⁵

The Florida Supreme Court has upheld the felony-murder aggravator time and time again. However, that does not mean that defense counsel will abandon it as an issue. It is not unusual for death-penalty arguments to be rejected for years before finally being accepted as valid.³²⁶

C. Selecting Who Shall Die

Illinois Recommendations 29–30 suggests that the individual state attorney's decision to seek the death penalty should be reviewed by a state-wide review committee composed of five members: the elected attorney general, or designee; the elected Cook County State Attorney, or designee; the president of the State Attorney's Association; a state attorney chosen by lottery; and a retired judge. While the submission of the decision to seek the death penalty to this committee would not be mandatory, refusal to seek such review would give the governor the presumption that, absent compelling explanation, the death sentence should be commuted.³²⁷

In Florida, the decision to seek the death penalty is left up to the twenty state attorneys, and is not subject to judicial review.³²⁸ The state attorneys have various methods to review cases, and decisions can vary from circuit to circuit. The Governor of Illinois noted that the decision to seek the death penalty in Illinois had more to do with geography than the circumstances of the crime and the defendant.³²⁹

324. See *Blystone v. Pa.*, 494 U.S. 299 (1990).

325. *Id.* at 304.

326. For instance, the Florida Supreme Court disallowed nonstatutory mitigation in *Cooper v. State*, 336 So. 2d 1133, 1139 (Fla. 1976), and a decade later, the United States Supreme Court held that mitigation could not be limited by statute. *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987). The decision caused a number of cases to be remanded for new penalty-phase hearings due to "Hitchcock error." See e.g. *White v. State*, 729 So. 2d 909, 915–916 (Fla. 1999).

327. Commn. on Capital Punishment, *supra* n. 269, at 24–25.

328. *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986).

329. Gov. George H. Ryan (Ill.), Speech, *Death Penalty* (Nw. U., Jan. 11, 2003) (located at <http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm>).

The problem may simply be a matter of perception. A convenience store robbery/murder in a large, urban county is viewed differently than in the smaller, rural counties. Importantly, due to a recent constitutional amendment, the state legislature is going to have to pay the costs of capital prosecutions in the future, instead of mandating such payment from the individual counties.³³⁰ So, if nothing else, there needs to be an element of fiscal responsibility to the selection of death-penalty cases. The Legislature will ultimately have to recognize this problem and address it.

V. RECOMMENDATIONS TO IMPROVE FLORIDA'S CAPITAL PUNISHMENT SCHEME

Capital punishment is part of Florida law, and as long as it is available, it should be applied fairly and in accordance with constitutional principles. It is not necessary to scrap Florida's capital-punishment scheme, along with over twenty-five years of appellate decisions. The scheme should be reviewed to update it and to anticipate the problems that have developed as a result of *Apprendi*, *Ring*, and other recent cases. The following changes need to be made:

- (1) Police and investigative agencies should be specially trained to investigate homicide cases. Interrogations and lineups should be videotaped, and the suspect should be confronted with any off-camera statements he is claimed to have made, and his comments recorded. Lineup procedures should include informing the witness that the suspect may not be in the lineup. Lineups should be conducted by an investigator who does not know the identity of the suspect.
- (2) Aggravating circumstances to be relied upon by the prosecutor should be listed by the grand jury in the indictment upon a finding of probable cause.
- (3) The prosecutor should be required to elect whether to seek the death penalty early in the case, and that decision should be reviewed by a state-wide authority.
- (4) Juries should be specifically instructed on the dangers of accepting the testimony of in-custody informants, co-defendants, and eyewitnesses who are not familiar with the

330. Fla. Const. art. V, § 14.

defendant. The death penalty should not be imposed upon the uncorroborated testimony of these witnesses.

- (5) The Florida Evidence Code should apply to the penalty phase, thereby eliminating inadmissible hearsay evidence from the penalty-phase trial.
- (6) The jury should be required to list the aggravating circumstances it finds beyond a reasonable doubt in the verdict form. The finding of an aggravating circumstance should be unanimous.
- (7) The prior record of the defendant and evidence of mitigation should be submitted to the court without a jury.
- (8) The trial judge should have the ultimate responsibility for determining whether the death sentence should be imposed. Once the jury has determined the existence of one or more aggravating circumstances, matters of mitigation and prior record should be presented to the court. If the court imposes the death penalty, it should be justified in a written sentencing order.
- (9) The list of aggravating circumstances should be reviewed and reduced to provide death-penalty eligibility in only the “most aggravated and least mitigated of cases.” The list of aggravating circumstances recommended by the Illinois Commission should be the model. The felony-murder aggravator should be applicable only in cases where premeditation is proven.

Reliability and finality have long been the goals of the criminal-justice system. Death-penalty cases seem to have trouble fitting into either concept. While the death penalty was determined to be constitutional in *Furman*, the process of getting to execution has met with Sixth, Eighth, and Fourteenth Amendment challenges. The legislature did not predict the holdings in *Apprendi* and *Ring* when it enacted Florida’s death-penalty scheme. It cannot be blamed for that. No one considered the relationship between indictment and verdict at a time when judges and legislators traditionally considered aggravation and mitigation as “sentencing factors.” If Florida is to continue a sentencing scheme that requires the trial judge to make the sentencing decision, the Legislature would be well advised to read the handwriting on the wall and make improvements in Tallahassee before they are made in Washington.

John Spinkelink would probably not be sentenced to death today. His crime just wasn't heinous enough.³³¹ His case is rarely cited, and ignoring it caused one Supreme Court Justice to remark, "What are we going to do with Spinkelink? Dig him up and apologize?"³³² But Spinkelink's case, along with the cases of numerous other defendants who have been sentenced to death and ultimately exonerated or had their sentences reduced, illustrate the need for reliability and finality if the death penalty is to be fairly administered and "the most aggravated and least mitigated" cases are to be selected for the ultimate punishment available to criminal justice.

331. *See Spinkellink v. State*, 313 So. 2d 666, 668, 671 (Fla. 1975) (sentencing defendant to death for shooting a hitchhiker who had forced defendant to have homosexual relations with the victim and playing "Russian Roulette" with the defendant).

332. Parker Lee McDonald, Ret. Fla. Sup. Ct. J., Address, *Death Penalty* (Fla. Commn. on Capital Cases Symposium, 2003).