

THE EIGHTH AMENDMENT’S TIME TO SHINE: PREVIEWING FLORIDA’S IMMINENT CONSTITUTIONAL CRISIS IN CAPITAL PUNISHMENT

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Abstract

In April 2023, Florida Governor Ron DeSantis enacted legislation that lowers the jury vote necessary to impose a sentence of death in the state to 8–4. The new statute removes the procedural safeguards that were implemented after the U.S. Supreme Court held in 2016 that Florida's capital sentencing scheme violated defendants' right to jury trial under the Sixth Amendment.

Litigation about the constitutionality and application of the new statute has already started and will likely continue for a while until the full effect of the statute is determined. This Essay previews some of the issues that will be litigated and forecasts that the Eighth Amendment will be the star of the show in this Act of the play on Florida’s constitutional crises in capital punishment.

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This legislative session, the Florida Legislature and Governor Ron DeSantis secured the state's position as the most death-friendly in the country by enacting legislation that makes it much easier to impose a death sentence. The new law lowered the requirement of a jury's unanimous recommendation for death to requiring a jury's vote of only 8–4.¹ Litigation about the constitutionality of the new legislation and its application started immediately. This litigation feels a bit like déjà vu considering the dust just settled from the U.S. Supreme Court's 2016 holding in *Hurst v. Florida*. The Court held that Florida's method of imposing death sentences violated capital defendants' right to jury trial under the Sixth Amendment to the U.S. Constitution.²

While the Sixth Amendment was in the spotlight last time, this Essay forecasts that the Eighth Amendment will be the star of the show this time. Part I sets forth a brief history of the background relevant to the arguments presented, including what happened in 2016 and how it affected Florida's capital sentencing system. Part II canvasses the recently enacted legislation that brought the standard for imposing a death sentence in Florida to the lowest in the country. Part III argues that the new law is unconstitutional under the Eighth Amendment because it creates a significant risk of producing unconstitutionally unreliable death sentences and conflicts with the “evolving standards of decency.”

I. THE SIXTH AMENDMENT'S FORMER LEAD ROLE

Florida has long been a national leader on capital punishment, perhaps for undesirable reasons. It was the first state to reinstitute capital punishment after *Furman v. Georgia*.³ Today, it houses the largest death row population of active death penalty states—states that continue to

1. Also in the spring of 2023, Florida passed a bill that expands capital punishment to non-homicide child sex crimes despite the U.S. Supreme Court's decision in *Kennedy v. Louisiana*, which held that a death sentence is unconstitutional under the Eighth Amendment in such cases. 554 U.S. 407, 446–47 (2008); Kit Maher, *DeSantis Signs Bill Making Child Rapists Eligible for Death Penalty at Odds with US Supreme Court Ruling*, CNN (May 1, 2023, 6:36 PM), <https://www.cnn.com/2023/05/01/politics/desantis-child-rapists-death-penalty-bill-scotus/index.html> [<https://perma.cc/3N5B-6772>]. The sentencing standard set forth in that law also includes the 8–4 jury recommendation threshold but requires that the jury unanimously find that the state proved *two* aggravating factors beyond a reasonable doubt. Fla. H.B. 1297 (2023) (enacted). To the extent the arguments presented herein address the 8–4 jury recommendation threshold, the arguments apply similarly to the capital sex crime law as well. *Id.*

2. *Hurst v. Florida*, 577 U.S. 92, 102–03 (2016).

3. *History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> [<https://perma.cc/8AVU-CRSM>] (last visited July 19, 2023). See generally *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that the death penalty is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

conduct executions.⁴ Indeed, it has led the country in the number of death sentences imposed in recent years.⁵ It is also one of only a few states that actually conduct executions—having already conducted four in 2023 with another scheduled on August 3.⁶

Florida is also not a stranger to constitutional crises in capital sentencing. Most recently, in 2016, the system was thrust into chaos when the U.S. Supreme Court held in *Hurst v. Florida* that Florida's capital sentencing scheme violated capital defendants' right to jury trial under the Sixth Amendment.⁷ To contextualize the discussion in Parts II and III, this Part briefly outlines (A) the Supreme Court's decision in *Hurst v. Florida* and Florida's post-*Hurst* statute that increased the procedural protections afforded to capital defendants by implementing unanimity and (B) the Florida Supreme Court's 2019 reversal that opened the door to the new legislation.⁸

A. *Hurst v. Florida Ushers in Unanimity*

The Supreme Court's 2002 decision in *Ring v. Arizona* was the predecessor to *Hurst v. Florida* in 2016.⁹ In *Ring*, the Court held that the

4. "Death Row USA," DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview/death-row-usa> [<https://perma.cc/RQ4L-WCKG>] (last updated Oct. 1, 2022). As of October 2022, California had the most incarcerated individuals on death row followed by Florida, but California has since placed a moratorium on the death penalty. *Id.*; *States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums*, BRITANNICA PROCON.ORG, <https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/> [<https://perma.cc/SPD4-N6MU>] (last updated Apr. 24, 2023).

5. Melanie Kalmanson & Maria DeLiberato, *Opinion: Facts and Politics Collide in Debate over This Year's Death Penalty Overhaul*, CITY & STATE FLA. (Mar. 10, 2023), <https://www.cityandstatefl.com/opinion/2023/03/opinion-facts-and-politics-collide-debate-over-years-death-penalty-overhaul/383811/> [<https://perma.cc/9WWX-ZX5M>].

6. *Execution List 2023*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/2023> [<https://perma.cc/F79B-LNKJ>] (last updated June 16, 2023).

7. *Hurst*, 577 U.S. at 102–03.

8. By no means is this Part meant to be an exhaustive history of the constitutional issues that have been litigated related to capital punishment in Florida. For more in-depth discussion of *Hurst v. Florida* and the fallout, see generally Craig Trocino & Chance Meyer, *Hurst v. Florida's Ha'p'orth of Tar: The Need to Revisit Caldwell, Clemons, and Proffitt*, 70 U. MIAMI L. REV. 1118 (2016) (discussing Eighth Amendment concerns in light of *Hurst v. Florida*); Melanie Kalmanson, *Storm of the Decade: The Aftermath of Hurst v. Florida & Why the Storm Is Likely to Continue*, 74 U. MIAMI L. REV. CAVEAT 37 (2020) [hereinafter Kalmanson, *Storm of the Decade*] (discussing the fallout from the U.S. Supreme Court's decision in *Hurst v. Florida* in Florida and potential future issues); Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After Hurst v. Florida*, 74 U. MIAMI L. REV. 990 (2020) (discussing how the Florida Supreme Court's post-*Hurst* framework affected the almost 400 people on Florida's death row when *Hurst* was decided); Melanie Kalmanson & Nathan Molina, *Ring and Hurst Retroactivity: Deconstructing Divergent Doctrines*, 22 CONN. PUB. INT. L.J. 94, 94 (2023) (discussing jurisprudence regarding the retroactivity of *Ring* and *Hurst*).

9. See generally *Ring v. Arizona*, 536 U.S. 584 (2002).

Sixth Amendment guarantees “[c]apital defendants, no less than noncapital defendants . . . a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”¹⁰

When *Ring* was decided, Florida’s capital sentencing scheme required only that a majority of the twelve-member jury vote (7–5) to recommend death.¹¹ The trial judge would then review the aggravation and mitigation and determine the appropriate sentence.¹²

Despite *Ring* and strong disagreement by other justices on the Court, the Supreme Court of Florida remained steadfast that Florida’s capital sentencing statute could withstand constitutional scrutiny.¹³ As a result, Florida continued sentencing people to death under its 7–5 statute—and remained a national leader in doing so.¹⁴

Fourteen years later, the Supreme Court confirmed in *Hurst v. Florida* that Florida’s capital sentencing statute was, in fact, unconstitutional.¹⁵ The way Florida imposed death sentences violated capital defendants’ right to jury trial—as Arizona’s statute at issue in *Ring* had.¹⁶ The Court reiterated that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”¹⁷ Although the Supreme Court originally granted certiorari on a question that included the Eighth Amendment,¹⁸ its decision was based only in the Sixth Amendment.¹⁹

On remand, the Florida Supreme Court held in *Hurst II*—based on the Sixth Amendment and Florida’s independent right to jury trial under Article I, Section 22, of the Florida Constitution—that “*Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found

10. *Id.* at 589.

11. FLA. STAT. § 921.141 (2002).

12. *Id.*

13. See generally *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (holding the defendant was not entitled to relief under *Ring*); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (holding the defendant was not entitled to relief under *Ring*).

14. See *Outlier Counties: Non-Unanimous Jury Verdicts Highlight Systemic Flaws in Pinellas County, Florida Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 7, 2016), <https://deathpenaltyinfo.org/news/outlier-counties-non-unanimous-jury-verdicts-highlight-systemic-flaws-in-pinellas-county-florida-death-penalty> [<https://perma.cc/BD3F-U8MX>] (“The five death sentences imposed in Pinellas between 2010 and 2015 also place it, along with three other Florida counties, among the 16 U.S. counties with the highest number of new death sentences in the country.”).

15. See generally *Hurst v. Florida*, 577 U.S. 92 (2016).

16. See generally *id.*

17. *Id.* at 94.

18. *Hurst v. State (Hurst II)*, 202 So. 3d 40, 48 n.4 (Fla. 2016) (“The question posed by the Supreme Court in granting certiorari review also included reference to the Eighth Amendment, but the Court did not decide the case of Eighth Amendment grounds.”).

19. See *Hurst*, 577 U.S. at 102–03.

unanimously by the jury.”²⁰ Further, “based on Florida’s requirement for unanimity in jury verdicts, and under the Eighth Amendment,” the court held that “the jury’s recommended sentence of death must be unanimous.”²¹ As a result, the Florida Legislature revised Florida’s capital sentencing statute to follow this demand—requiring that the jury unanimously determine (1) that the State proved beyond a reasonable doubt at least one aggravating factor, which makes the defendant eligible for death; (2) that the aggravation is sufficient for a sentence of death; (3) that the aggravation outweighs the mitigation; and (4) that death is the appropriate sentence.²²

Hurst caused chaos for Florida’s capital sentencing system. For the approximately 400 people who were on Florida’s death row at the time, Florida’s courts had to wade through hundreds of claims seeking relief based on the new rule.²³ Ultimately, as a result of *Hurst*, approximately 100 people were granted new penalty phase proceedings.²⁴

As to new cases, Florida has remained a national leader in capital sentencing since the post-*Hurst* statute was implemented, imposing the highest number of death sentences for the past several years.²⁵ That being said, research suggests that the post-*Hurst* unanimity standard has required juries to deliberate more thoroughly to reach a unanimous determination.²⁶

B. *Setting the Stage for Non-Unanimity*

In 2020, in *State v. Poole*—after changes on both the U.S. Supreme Court and the Florida Supreme Court—the Florida Supreme Court reversed its decision in *Hurst II*.²⁷ The court held that the only constitutional requirement under the Sixth Amendment and, therefore, *Hurst v. Florida* is that the “jury . . . unanimously find the existence of a

20. *Hurst II*, 202 So. 3d at 44.

21. *Id.*

22. FLA. STAT. § 921.141 (2017). For further discussion on the changes in the post-*Hurst* statute, see Kalmanson, *Storm of the Decade*, *supra* note 8, at Part I.A.1.

23. *See, e.g.*, *Asay v. State*, 210 So. 3d 1, 20 (Fla. 2016) (stating that there were “386 inmates currently residing on death row” at the time).

24. *See Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR. (Jan. 23, 2020), <https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst> [<https://perma.cc/4PZB-MGWR>].

25. Kalmanson & DeLiberato, *supra* note 5.

26. *See* Dan Sullivan, *How Do Florida Juries Decide if Someone Deserves the Death Penalty?*, TAMPA BAY TIMES, Apr. 7, 2023 (“Research suggests juries take longer, and their discussions are deeper, when everyone has to agree.”); *see also* Jennifer Eisenberg, Ramos, *Race, and Juror Unanimity in Capital Sentencing*, 55 LOY. L.A. L. REV. 1085, 1095 (2022) (“Because dissenting votes are often those of non-white jurors, unanimity allows for all opinions to be heard—both in criminal convictions and in capital sentencing.”).

27. *State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020).

statutory aggravating circumstance beyond a reasonable doubt.”²⁸ As to the jury’s final recommendation for death, the court held that the Florida Constitution’s “prohibition on cruel and unusual punishment, article I, section 17”—which must be interpreted “in conformity with decisions of the Supreme Court interpreting the Eighth Amendment”—“does not require a unanimous jury recommendation—or any jury recommendation—before a death sentence can be imposed.”²⁹

Poole opened the door for the Legislature to remove the unanimity standard in the post-*Hurst* statute. After *Poole*, despite speculation that the Legislature would walk away from unanimity,³⁰ Florida retained the unanimity statute for several years.

II. NEW LEGISLATION CASTS THE SUNSHINE STATE IN ITS ROLE AS THE MOST EXTREME DEATH PENALTY STATE

The State’s commitment to unanimity quickly changed in late 2022 when the Parkland shooter did not receive a jury’s unanimous recommendation for death.³¹ The outcome of the trial, which drew national attention, sparked outrage.³² As a result, efforts to lower the standard in Florida’s capital sentencing scheme began.

In the spring of 2023, Florida passed a new law that significantly lowers the standard for imposing a death sentence in the state.³³ Under the new law, for a capital defendant to be sentenced to death, (1) the jury must unanimously find that the State proved beyond a reasonable doubt at least one aggravating factor, which makes the defendant eligible for death; and (2) at least eight of the twelve jurors must vote to recommend death.³⁴ Once the jury votes by at least 8–4 to recommend a sentence of death, the law gives the trial judge discretion to either follow the jury’s recommendation or, instead, sentence the defendant to life imprisonment without parole.³⁵ If at least eight jurors do not vote for death, then the

28. *Id.*

29. *Id.* at 505.

30. See, e.g., Emily L. Mahoney, *Florida Supreme Court Says Unanimous Jury Not Needed for Death Penalty in Major Reversal*, TAMPA BAY TIMES, <https://www.tampabay.com/florida-politics/buzz/2020/01/23/florida-supreme-court-says-unanimous-jury-not-needed-for-death-penalty-in-major-reversal/> [<https://perma.cc/6UMQ-QTPQ>] (updated Jan. 24, 2020).

31. See, e.g., Matthew Impelli, *Parkland Parents Praise Ron DeSantis’ New Death Penalty Law*, NEWSWEEK (Apr. 20, 2023, 4:06 PM), <https://www.newsweek.com/parkland-parents-praise-ron-desantis-new-death-penalty-law-1795763> [<https://perma.cc/7HT2-ZXXP>].

32. See, e.g., Manuel Bojorquez & Tori B. Powell, “Justice Wasn’t Served”: Parkland Families Outraged as Shooter Is Spared Death Sentence by Florida Jury, CBS NEWS (Oct. 14, 2022, 1:28 PM), <https://www.cbsnews.com/news/parkland-families-outraged-shooter-spared-death-sentence-florida-jury/> [<https://perma.cc/9CSX-BX6V>].

33. FLA. STAT. § 921.141 (2023).

34. *Id.*

35. *Id.*

judge must impose a sentence of life imprisonment without parole.³⁶

This 8–4 recommendation requirement is the lowest standard in the country for sentencing someone to death.³⁷ The only other state that retains the death penalty and does not require a jury's unanimous recommendation for death is Alabama, where the necessary jury vote is 10–2.³⁸ Both Alabama and Florida “rank in the top five states with the most prisoners on death row.”³⁹

III. NOW IN THE SPOTLIGHT, THE EIGHTH AMENDMENT ILLUMINATES THE NEW LEGISLATION'S CONSTITUTIONAL FLAWS

Enacting the new legislation, Florida plunges itself into another constitutional crisis in capital punishment just seven years after *Hurst v. Florida* turned the state's then-outlier capital sentencing system upside down. The effect of the new statute on capital sentencing proceedings across the state—especially those cases in which a *Hurst* resentencing was pending or underway—is unclear. Litigation on these issues has already begun and will likely continue until the full impact of the new legislation has been determined. For *Hurst*, that took years.

While *Hurst* focused on the Sixth Amendment, this Essay predicts that the Eighth Amendment will be front and center in the litigation surrounding the constitutionality of the new statute.⁴⁰ The Eighth Amendment protects against “[e]xcessive bail” and “cruel and unusual punishments.”⁴¹ The Amendment proscribes “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.”⁴² The “protection against excessive or cruel and unusual punishments flows from the basic ‘precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.’”⁴³

“The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective

36. *Id.*

37. *E.g., Florida Legislature Rescinds Unanimous – Jury Requirement in Death Sentencing*, DEATH PENALTY INFO. CTR. (Apr. 18, 2023), <https://deathpenaltyinfo.org/news/florida-legislature-rescinds-unanimous-jury-requirement-in-death-sentencing> [<https://perma.cc/DQ38-PWRV>].

38. *Id.*

39. Eisenberg, *supra* note 26, at 1087.

40. While this Essay focuses on the Eighth Amendment concerns posed by Florida's new statute, it does not mean to posit that the statute does not pose concerns based on other constitutional provisions. For a discussion on why unanimity is required under the Sixth Amendment, see generally Eisenberg, *supra* note 26.

41. U.S. CONST. amend. VIII.

42. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002)).

43. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

jurisdictions may invoke its protection.”⁴⁴ The Eighth Amendment applies “to the States through the Fourteenth Amendment.”⁴⁵

The Florida Constitution also has its own right against cruel and unusual punishment.⁴⁶ However, under the Conformity Clause in that provision, the right must be “construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.”⁴⁷

This Part argues that the new legislation is unconstitutional for two reasons: (A) the 8–4 standard will produce unconstitutionally unreliable sentences of death and (B) the 8–4 standard is inconsistent with the “evolving standards of decency.”⁴⁸

A. *A Cue for Unreliability*

Due to the gravity and finality of death, the U.S. Supreme Court has directed that the Eighth Amendment inures a “heightened ‘need for reliability in the determination that death is the appropriate punishment in a specific case.’”⁴⁹ As illustrated by this Section, Florida’s move to unanimity in 2017 improved the reliability of death sentences imposed in the state. Backtracking, Florida’s new legislation strips the state’s capital sentencing scheme of the reliability that is necessary to meet the Eighth Amendment’s demands.

1. Increased Likelihood of Death Row Exonerations

A death-row exoneration offers the quintessential example of an unreliable death sentence. Indeed, the worst possible outcome of a capital case is the execution of an innocent person. Even before the new legislation, Florida was responsible for the highest number of death row exonerations in the country.⁵⁰ In almost all of those cases, at least one

44. *Id.* at 412.

45. *Id.* at 419.

46. FLA. CONST. art. I, § 17.

47. *Id.*

48. This Part does not aim to present an exhaustive set of arguments why the new statute may be unconstitutional. That discussion would be more appropriately suited for a longer piece.

49. *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *Woodson*, 428 U.S. at 305 (“This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

50. *State v. Poole*, 297 So. 3d 487, 515 (Fla. 2020) (Labarga, J., dissenting) (“Florida holds the shameful national title as the state with the most death row exonerations.”); *Florida*, DEATH

juror voted for a sentence of life in prison without parole; the jury's recommendation for death was not unanimous.⁵¹

By moving again away from unanimity, Florida risks wrongfully convicting and sentencing someone to death.⁵² In 2020, the Death Penalty Information Center, after analyzing data related to death row exonerations from across the country, concluded that “[c]apital sentencing schemes that permit judges to impose a death sentence despite the votes of one or more jurors for life create a heightened risk that an innocent person will be wrongfully convicted and sentenced to death.”⁵³ Specifically, the study found “that one or more jurors had voted for life in more than 90% of the death-row exonerations in states that permitted judges to impose death sentences based on a jury’s non-unanimous sentencing recommendations or allowed them to override jury votes for life.”⁵⁴ Further, the three states that allowed non-unanimous jury recommendations at the time—Florida, Alabama, and Delaware—“collectively account[ed] for one-fifth of all the death-row exonerations since capital punishment resumed in the United States in 1972.”⁵⁵

This effect is likely due to the fact that non-unanimous schemes reduce the amount of deliberation conducted by the jury before reaching its final recommendation.⁵⁶ Without a unanimity requirement, the jury need not engage with the evidence or discuss the case as thoroughly.⁵⁷

Ultimately, this legislation will result in more death sentences⁵⁸ and an increased likelihood of sentencing an innocent person to death. Such an outcome cannot be squared with the Eighth Amendment’s reliability requirements.

PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> [<https://perma.cc/L2RW-GMP5>] (last visited July 6, 2023) (“Florida has had 30 exonerations from death row, more than any other state.”).

51. See *FL Innocence List*, FLORIDIANS FOR ALTS. TO DEATH PENALTY, <https://www.fadp.org/fl-innocence-list/> [<https://perma.cc/NN5L-4ECX>] (last visited July 6, 2023); *DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (Mar. 13, 2020) [hereinafter *DPIC Exoneration Data*], <https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions> [<https://perma.cc/FR25-HKLU>].

52. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–1401 (2020) (discussing the discriminatory origins of nonunanimous jury requirements and the reasons for requiring jury unanimity).

53. *DPIC Exoneration Data*, *supra* note 51.

54. *Id.*

55. *Id.*

56. See, e.g., Sullivan, *supra* note 26.

57. See *id.*

58. *DPIC Exoneration Data*, *supra* note 51 (“Prior studies have shown that the availability of judicial override and death sentences imposed by judges based on non-unanimous jury votes produce disproportionately large numbers of death sentences.”).

2. Inadequate Procedural Safeguards

Without unanimity, Florida's statute is now without sufficient procedural safeguards to ensure the reliability required under the Eighth Amendment. Since Florida reinstituted capital punishment after *Furman*,⁵⁹ the Florida Supreme Court had long engaged in what is known as "proportionality review," where the court, on direct appeal, conducted a qualitative analysis of each death sentence to confirm the sentence was proportionate when compared to other death cases.⁶⁰ The purpose of the analysis was to ensure that death was saved for only the most aggravated and least mitigated of crimes,⁶¹ or the "worst of the worst"⁶²—as required by the Eighth Amendment.⁶³ In several instances, proportionality has led the Florida Supreme Court to reverse a sentence of death where it determined that the sentence was not proportionate in light of circumstances of the crime or the defendant's life.⁶⁴

However, in 2020—mirroring *Poole*, where Justice Canady's dissent from a prior decision became the new majority—the court erased the protections afforded by proportionality when it held in *Lawrence v. State* that proportionality review is not required under the Eighth Amendment and, therefore, improper under the Florida Constitution.⁶⁵ Accordingly, the court did away with proportionality and "eliminate[d]

59. See generally *Furman v. Georgia*, 408 U.S. 238 (1984) (holding that "the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."); Charles W. Ehrhardt et al., *Florida's Legislative Response to Furman: An Exercise in Futility?*, J. CRIM. L. & CRIMINOLOGY 2, 10 (1973) ("Less than six months [after the *Furman* decision], Florida became the first state to enact a post-*Furman* capital punishment statute.").

60. E.g., *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (explaining that after *Furman*, roughly two-thirds of States "promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results," but that in some states, such as Florida, "the appellate court performs proportionality review despite the absence of a statutory requirement").

61. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); see *Yacob v. State*, 136 So. 3d 539, 549–50 (Fla. 2014) (discussing Florida's proportionality review).

62. *Glossip v. Gross*, 576 U.S. 863, 916 (2015) (Breyer, J., dissenting) (explaining that "[t]he Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to . . . 'the worst of the worst'").

63. E.g., *Roper*, 543 U.S. at 568 ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."); *Pulley*, 465 U.S. at 50. See generally *Furman*, 408 U.S. at 239–40 (holding that "the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

64. See, e.g., *Yacob*, 136 So. 3d at 550–52 (discussing cases where the Florida Supreme Court has reversed a death sentence).

65. See generally *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (holding that the proportionality review violates the Conformity Clause of the Florida Constitution).

comparative proportionality review from the scope of [its] appellate review” of death sentences in the state.⁶⁶ The court relied on *Pulley v. Harris*, where the U.S. Supreme Court held that a state’s decision not to employ comparative proportionality review “cannot be successfully challenged under *Furman*” so long as the jury is required to find one aggravating factor beyond a reasonable doubt, which finding “limits the death sentence to a small subclass of capital eligible cases.”⁶⁷ Explaining the significance of *Lawrence*, Justice Labarga wrote in his dissenting opinion that the majority took its “most consequential step yet in dismantling the reasonable safeguards contained within Florida’s death penalty jurisprudence,” and that was after *Poole*.⁶⁸

Despite *Pulley*, a finding of one aggravating factor in Florida, where the capital sentencing statute now includes sixteen aggravating factors,⁶⁹ double the number that could trigger death since Florida enacted its sentencing regime post-*Furman*,⁷⁰ should not be sufficient to satisfy the Eighth Amendment. As vaguely and broadly as Florida’s aggravating factors have been applied⁷¹—despite Eighth Amendment jurisprudence directing the opposite⁷²—the sad truth is that a jury would be hard-pressed to not find at least one aggravating factor.⁷³

From an Eighth Amendment reliability perspective, the new statute is even worse than Florida’s pre-*Hurst* statute. At least before *Hurst*, Florida conducted proportionality review. Now—where defendants are sentenced to death in a system where an aggravating factor is essentially

66. *Id.* at 552. The court’s decision in *Lawrence* was consistent with Justice Canady’s concurring in part and dissenting in part opinion in *Yacob*, from which the *Lawrence* court receded. *Yacob*, 136 So. 3d at 557 (Canady, J., concurring in part and dissenting in part).

67. *Pulley*, 465 U.S. at 53.

68. *Lawrence*, 308 So. 3d at 552 (Labarga, J., dissenting).

69. FLA. STAT. § 921.141(6) (2022).

70. *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (approving Florida’s new capital sentencing procedures and noting its then “eight aggravating factors”).

71. Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 927–28 (2007) (“It appears that instead of creating a ‘narrow class of persons eligible for the death penalty,’ as the Supreme Court has required, [Florida’s] list of aggravating factors has turned the death penalty into the default, instead of the exception. . . . Moreover, in their vagueness, these aggravating factors have offered judges and juries little in terms of guidance. For example, in some states, it is an aggravating factor if the murder is cold, calculated, and premeditated.”).

72. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.”).

73. See Frank R. Baumgartner, *Guest Column: Study Shows Racial Bias in Death Penalties in Florida*, FLA. TIMES-UNION (Feb. 5, 2016, 9:07 AM), <https://www.jacksonville.com/story/opinion/columns/mike-clark/2016/02/05/guest-column-study-shows-racial-bias-death-penalties-florida/15698846007/> [https://perma.cc/QN43-DCV7] (“Florida’s death penalty statute is so broad that the vast majority of homicides could be charged as first-degree murders eligible for the death penalty and that decision is completely up to the discretion of the local prosecutor.”).

inescapable, the jury vote threshold for death is the lowest in the country, and the court no longer performs proportionality review—Florida’s system cannot meet the demands of the Eighth Amendment. This is especially concerning in the state responsible for the highest number of exonerations.⁷⁴

3. Insufficient Jury Responsibility

While the *Hurst* discussion focused on the Sixth Amendment’s requirement that the jury actually make the sentencing determination, the Eighth Amendment also provides certain protections related to the jury’s role in capital sentencing.⁷⁵ In *Caldwell v. Mississippi*, the U.S. Supreme Court held that the jury must have an adequate awareness of its responsibility in rendering a sentencing recommendation; if not, “there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences.”⁷⁶ The constitutional concern arises when the jury does not sufficiently understand its role in the capital sentencing process, or is given the impression that its decision is merely advisory and will be reviewed by the trial judge or an appellate court.⁷⁷

Despite Florida’s pre-*Hurst* jury instructions telling the jury numerous times throughout the process that its sentencing recommendation was only “advisory,” the Supreme Court of Florida did not discuss *Caldwell* in the post-*Hurst* cases until after-the-fact—after it was raised by the U.S. Supreme Court.⁷⁸ In several dissenting opinions from the Supreme

74. See *DPIC Exoneration Data*, *supra* note 51; see also *State v. Poole*, 297 So. 3d 487, 515 (Fla. 2020) (Labarga, J., dissenting) (“Given [Florida’s] history [with exonerations], there is every reason to maintain reasonable safeguards for ensuring that the death penalty is fairly administered.”).

75. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (“[T]he proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature.”).

76. 472 U.S. 320, 330 (1985); see also *Reynolds v. Florida*, 139 S. Ct. 27, 34 (2018) (Sotomayor, J., dissenting) (“Where a sentencing jury is encouraged to proceed without” proper “awareness” of its responsibility in rendering a sentencing recommendation, “*Caldwell* suggests that ‘there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences.’”).

77. See *Caldwell*, 472 U.S. at 328–29; see also, e.g., *Nicks v. Alabama*, 487 U.S. 1241, 1241–42 (1988) (Marshall, J., dissenting) (writing that the prosecutor telling the jury at the penalty phase that their decision was “only an advisory opinion” violated *Caldwell*); *Moore v. Blackburn*, 476 U.S. 1176, 1177 (1986) (Marshall, J., dissenting); *Busby v. Louisiana*, 474 U.S. 873, 874 (1985) (Marshall, J., dissenting) (writing that the death sentence should have been vacated under *Caldwell* because the prosecutor told the jury during sentencing that it would be giving a “recommendation”).

78. See *Reynolds v. State*, 251 So. 3d 811, 818 (Fla. 2018) (“To date, we have not expressly addressed a *Caldwell* challenge to Standard Jury Instruction 7.11 brought under *Hurst* . . .”). For more discussion on the Florida Supreme Court’s delay in addressing this issue, see Kalmanson, *Storm of the Decade*, *supra* note 8. For more discussion on the *Caldwell* issue in the *Hurst* context, see Trocino & Meyer, *supra* note 8, at Part I.

Court's denials of certiorari issued in late 2017 and early 2018, Justice Sotomayor flagged the Florida Supreme Court's failure to address *Caldwell* after *Hurst*—notwithstanding it being briefed to the Court.⁷⁹

Eventually, in April 2018 (over two years after *Hurst v. Florida*), the Florida Supreme Court addressed this issue in *Reynolds v. State*.⁸⁰ After an extensive review of the history of relevant caselaw, the court denied the *Caldwell* claim wholesale, focusing on the idea that the claims were induced by *Hurst*.⁸¹

Although the U.S. Supreme Court denied a petition for writ of certiorari in *Reynolds*, it was not without comment. In a statement respecting the denial, Justice Breyer wrote that “[m]any of the Florida death penalty cases in which” the Court had “denied certiorari in recent weeks”—i.e., *Hurst*-related cases—“involve[d] . . . three important issues regarding the death penalty as it is currently administered.”⁸² In the third issue, Justice Breyer wrote that, although the Florida Supreme Court had treated the *Hurst* errors (i.e., the Sixth Amendment errors) as harmless, Florida’s pre-*Hurst* capital sentencing scheme “required the judge to make the ultimate decision to impose the death penalty,” and “the jury was repeatedly instructed that its recommended verdict would be advisory.”⁸³ In his view, “[b]ecause juries are better suited than judges to ‘express the conscience of the community on the ultimate question of life or death,’” the sentences stood in violation of the Eighth Amendment, which “demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence.”⁸⁴ Justice Thomas dismissed this concern in his concurring opinion based on facts specific to the *Reynolds* case.⁸⁵

Justice Sotomayor expressed a concern similar to Justice Breyer’s in her dissenting opinion. She explained that Florida’s pre-*Hurst* legislation “placed the final responsibility with the trial judge,” and “[j]uries were instructed accordingly.”⁸⁶ Therefore, she contended Florida’s pre-*Hurst* legislation ran afoul of *Caldwell*, which undermined the Florida Supreme

79. *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973 (2018) (Sotomayor, J., dissenting) (“I have thrice dissented from this Court’s unwillingness to intervene in the face of the Supreme Court’s failure to address this important issue.”); *Truehill v. Florida*, 138 S. Ct. 3, 4 (2017) (Sotomayor, J., dissenting) (“With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.”).

80. 251 So. 3d 811, 818 (Fla. 2018).

81. *See generally id.*

82. *Reynolds v. Florida*, 139 S. Ct. 27, 27–28 (2018).

83. *Id.* at 28.

84. *Id.* at 29–30.

85. *Id.* at 31–32 (Thomas, J., concurring).

86. *Id.* at 34 (Sotomayor, J., dissenting).

Court's *Hurst* harmless error analysis.⁸⁷ She suggested that the *Caldwell* error "provides strong reasons to doubt that a jury would have reached the same decision had it been instructed that its role was not advisory."⁸⁸ Thus, Justice Sotomayor determined there was a "need for further engagement with th[e] issue."⁸⁹ It seems the time has come for that further discussion.

While it may be premature to fully analyze this issue because the outcome could depend on the wording of the jury instructions implementing the new statute, the new statute itself poses concern. For purposes of a *Caldwell* analysis, the new statute is substantially the same as Florida's pre-*Hurst* statute. Under both frameworks, the jury's sentencing recommendation is by a vote of much less than unanimous,⁹⁰ which lessens the need for thorough deliberation and, likewise, the jury's sense of responsibility in issuing its final recommendation.⁹¹

Also, under both frameworks, even if the jury recommends a sentence of death, the judge can still independently consider the aggravation and mitigation and determine the appropriate sentence.⁹² If the judge disagrees with the jury's recommendation for death, the judge can instead sentence the defendant to life imprisonment without parole.⁹³ In fact, this portion of the legislation was a sticking point in the legislative process; legislators were keen on making sure that judges who "override" the jury's recommendation are required to explain their reasons for doing so.⁹⁴ As a result, the new statute requires judges to enter a written order explaining any deviation from the jury's recommendation.⁹⁵ Depending on how the jury instructions are written, this aspect of the statute raises serious *Caldwell* concerns.⁹⁶

Ultimately, under both frameworks, the jury's recommendation is merely advisory. As a result, the new statute almost certainly serves to diminish the jury's responsibility. In turn, the statute creates the risk of the jury not fully understanding the impact of its role and the weight of its decision, resulting in "substantial unreliability as well as bias in favor of death sentences."⁹⁷

87. *Id.* at 35 (Sotomayor, J., dissenting).

88. *Id.* (Sotomayor, J., dissenting).

89. *Id.* at 34 (Sotomayor, J., dissenting).

90. Compare FLA. STAT. § 921.141 (2015), with Fla. S.B. 450 (2023) (enacted).

91. See, e.g., Sullivan, *supra* note 26.

92. Compare FLA. STAT. § 921.141 (2015), with Fla. S.B. 450 (2023) (enacted). For further discussion on the significance of aggravation and mitigation in the capital sentencing process, see Melanie Kalmanson, *Death After Dobbs: Addressing the Viability of Capital Punishment for Abortion*, 29 WM. & MARY J. RACE, GENDER, & SOC. JUST. 545, 585–92 (2023).

93. Fla. S.B. 450 (2023) (enacted).

94. *Id.*

95. *Id.*

96. See Trocino & Meyer, *supra* note 8, at 1139.

97. Reynolds v. Florida, 139 S. Ct. 27, 34 (2018) (Sotomayor, J., dissenting).

B. *Inconsistent with the “Evolving Standards of Decency”*

Since before *Furman* reset modern capital punishment,⁹⁸ the U.S. Supreme Court has directed that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁹⁹ As the language of the standard suggests, the U.S. Supreme Court has explained that this standard is “not static.”¹⁰⁰ Instead, this standard may develop over time as society matures.¹⁰¹ Put another way, the Eighth Amendment “stands to assure that” the State’s power to impose punishment is “exercised within the limits of civilized standards.”¹⁰²

In reviewing whether a governmental act comports with this standard, the Court looks to various sources, including legislation across the country, model legislation, scientific information, and other sources.¹⁰³ Regardless of the angle from which it is viewed, Florida’s new statute fails to comport with the “evolving standards of decency.”¹⁰⁴

1. National Standard of Unanimity

Primarily, the U.S. Supreme Court has stated that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”¹⁰⁵ A review of legislation across the country indicates that this new scheme makes Florida an extreme outlier for purposes of capital sentencing.¹⁰⁶ The national standard is

98. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)). See generally *Furman*, 408 U.S. at 238.

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

100. *Id.*

101. *Id.* (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); see, e.g., *Weems v. United States*, 217 U.S. 349, 378 (1910) (“The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

102. *Trop*, 356 U.S. at 100. For a more in-depth discussion on the “evolving standards of decency” standard, see Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689, 1728–30 (2022).

103. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (“As discussed in *Gregg v. Georgia*, . . . indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations.” (footnotes omitted)); see also Freedman, *supra* note 102, at 1730–31.

104. For a recent argument on why the federal death penalty is also contrary to the “evolving standards of decency” in application, see generally Freedman, *supra* note 102.

105. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting source omitted); accord *Woodson*, 428 U.S. at 294–95 (“As we have noted today in *Gregg v. Georgia*, . . . legislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency.”).

106. See, e.g., *State v. Poole*, 297 So. 3d 487, 515 (Fla. 2020) (Labarga, J., dissenting)

clearly unanimity.¹⁰⁷ Every state that retains the death penalty, except one, requires a jury's unanimous recommendation for death before a death sentence may be imposed. The only state that retains the death penalty and does not require unanimity is Alabama, which requires a jury's vote of 10–2.¹⁰⁸

Unanimity has long been the national standard, and Florida has long been an outlier. When *Hurst* was decided in 2016, only three states in the country (Alabama, Delaware, and Florida) retained the death penalty and did not require a jury's recommendation for death.¹⁰⁹ After *Hurst*, the Delaware Supreme Court held that its capital sentencing statute was unconstitutional; the State has not reenacted a new statute.¹¹⁰ That leaves only Alabama and Florida.

Indeed, model legislation is consistent with this national standard. In 2015, the American Bar Association (ABA) House of Delegates adopted a resolution urging all jurisdictions that retain capital punishment “to require that before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence, and the jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty.”¹¹¹

Similarly, the Model Penal Code (by the American Law Institute), until 2009, suggested unanimity as the appropriate standard for a jury's recommendation as to the appropriate sentence in a capital trial.¹¹² In 2009, the American Law Institute voted to remove the capital sentencing provision in the Model Penal Code altogether without replacement.¹¹³

It is undeniable that Florida's new 8–4 standard is out of line with capital punishment legislation across the country.

(“Sadly, this Court has retreated from the overwhelming majority of jurisdictions in the United States that require a unanimous jury recommendation of death. In so doing, this Court has taken a giant step backward and removed a significant safeguard for the just application of the death penalty in Florida.”).

107. See, e.g., *id.*

108. *Florida Legislature Rescinds Unanimous – Jury Requirement in Death Sentencing*, *supra* note 37.

109. *E.g.*, *Hurst v. State*, 202 So. 3d 40, 72 (Fla. 2016) (Pariente, J., concurring).

110. *Rauf v. State*, 145 A.3d 430, 487 (Del. 2016); see *Delaware*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware> [https://perma.cc/HEX9-ELKV] (last visited July 6, 2023) (noting that in 2016, the Delaware Supreme Court held the State's death penalty statute unconstitutional, leaving the State with no valid method to impose death sentences).

111. *ABA Death Penalty Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/?login [https://perma.cc/9CDR-9NEE] (last visited July 6, 2023).

112. MODEL PENAL CODE § 210.6 (AM. L. INST. 2007).

113. *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty*, AM. L. INST. (Apr. 15, 2009).

2. National Trend Towards Capital Punishment's Curtain Call

Florida's new 8–4 legislation is also contrary to national trends, which have long indicated that society is gradually moving toward abolition.¹¹⁴ Over time, more and more states have abolished capital punishment altogether. Since *Ring* in 2002, eleven states have abolished the death penalty.¹¹⁵ Even for retentionist jurisdictions, the trend has been a continuous narrowing of the death penalty¹¹⁶ and imposing fewer death sentences altogether.¹¹⁷ The frequency of executions has also continued to decrease.¹¹⁸

Consistent with movement in the states, public support for abolition has gradually increased since the late 90s.¹¹⁹ Put another way, since then, public support for the death penalty has declined. A November 2022 report from Rasmussen Reports found that “46% of American Adults favor the death penalty, 28% oppose it, and 26% are undecided.”¹²⁰ In 2019, the same report found that 49% of American Adults favored the

114. Carol S. Steiker & Jordan M. Steiker, *Little Furmans Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1622–23 (2023) (stating that around 2000, death sentences and executions drastically declined nationwide).

115. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [https://perma.cc/86FK-CCX3] (last visited July 6, 2023).

116. See Freedman, *supra* note 102, at 1730 (“Over the last two decades, the Supreme Court has applied these principles to gradually restrict the classes of defendants who may be exposed to the possibility of capital punishment and the classes of offenses for which the penalty may be imposed.”). See generally Melanie Kalmanson, *Steps Toward Abolishing Capital Punishment: Incrementalism in the American Death Penalty*, 28 WM. & MARY BILL RTS. J. 587 (2020) (discussing the incremental changes in American capital punishment since *Furman* and proposing probable future changes that will continue to narrow the death penalty toward abolition); Steiker & Steiker, *supra* note 114, at 1623 (discussing how “intervention by state courts has played an important role in the nationwide decline of the death penalty”).

117. *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report> [https://perma.cc/2P7V-NBG6] (last visited July 6, 2023) (“Death sentences and executions have both fallen dramatically from their peak usage in the 1990s.”).

118. *Id.*

119. Frank R. Baumgartner, *If Biden Abolishes the Federal Death Penalty, He'll Have More Support Than You Think*, WASH. POST (Aug. 3, 2021, 7:00AM), <https://www.washingtonpost.com/politics/2021/08/03/if-biden-abolishes-federal-death-penalty-hell-have-more-support-than-you-think/> [https://perma.cc/JUF3-WV72]; *Less Than Half of Americans Support Death Penalty*, RASMUSSEN REPS. (Nov. 10, 2022), https://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/november_2022/less_than_half_of_americans_support_death_penalty [https://perma.cc/3ANL-J5VP] (last visited July 6, 2023) [hereinafter RASMUSSEN]; *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [https://perma.cc/92JT-TNJT] (last visited Apr. 22, 2023).

120. RASMUSSEN, *supra* note 119.

death penalty; in 2011, that number was 63%.¹²¹

This also holds true among Floridians specifically. Polls conducted in Miami-Dade and Pinellas Counties in 2018, both of which “heavily use[] the death penalty,” indicated that 68% of respondents in both counties “would support a decision by their local prosecutor to reduce or eliminate the use of the death penalty.”¹²²

Likewise, public opinion on the reliability of capital sentencing supports requiring unanimity—a higher, more rigorous standard for imposing the death penalty. A 2021 report from Pew Research Center reported that 78% of respondents felt “there is some risk that an innocent person will be put to death”¹²³ Even in 2021, when only one state in the country continued to impose death sentences without a jury’s unanimous verdict, “only 21% [of respondents thought] there [were] adequate safeguards in place to prevent” a wrongful conviction.¹²⁴ Certainly, Florida’s new legislation only exacerbates that concern.

Florida’s new 8–4 standard is unacceptably low when considered in light of national legislation and trends, which elucidate the modern standard. Even considering that Alabama has a non-unanimous standard, the difference between 10–2 and 8–4 is constitutionally significant; every juror’s vote could be the difference between life and death. Accordingly, Florida’s new statute fails to comport with the “evolving standards of decency” and, therefore, violates the Eighth Amendment’s protection against cruel and unusual punishment.

CONCLUSION

Florida’s new legislation makes it the most death-friendly state in the country with the lowest standard for imposing a death sentence. As a result, Florida’s capital sentencing system is, once again, on the brink of a constitutional crisis. This Essay predicts that the Eighth Amendment will be cast for the lead role this time, replacing the Sixth Amendment.

121. *Id.*

122. *New Polls in Two Florida Counties That Heavily Use the Death Penalty Find Voters Prefer Life Sentences Instead*, DEATH PENALTY INFO. CTR. (Mar. 2, 2018), <https://deathpenaltyinfo.org/news/new-polls-in-two-florida-counties-that-heavily-use-the-death-penalty-find-voters-prefer-life-sentences-instead> [<https://perma.cc/ZWN3-FPYT>]. In 2013, the Death Penalty Information Center reported that “both Miami-Dade and Pinellas were among the 2% of counties that accounted for more than half of all death-row prisoners and executions in the United States.” *Id.* In Miami-Dade County, 75% of respondents “preferred some form of life imprisonment rather than the death penalty as the punishment for people convicted of murder” *Id.* That number was 68% of respondents in Pinellas County. *Id.*

123. *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR., <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/> [<https://perma.cc/5DDJ-9DZQ>] (last visited July 6, 2023).

124. *Id.*

As this Essay explains, Florida's new capital sentencing scheme stands in violation of the Eighth Amendment's protection against cruel and unusual punishment because it fails to utilize adequate safeguards to ensure death sentences are sufficiently reliable, causing an increased risk that innocent Floridians will be sentenced to death and that death sentences will stand in violation of the Eighth Amendment. Further, the statute makes Florida an extreme outlier in capital sentencing and, therefore, fails to comport with the "evolving standards of decency"—making Florida's death penalty a cruel and unusual punishment.