Death By Jury: Jurisprudential Trends and Hybrid Capital Sentencing Authority

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Spring 2016 | Volume 11 | Issue: 1
Tennessee Journal of Law and Policy 88

ARTICLE

DEATH BY JURY: JURISPRUDENTIAL TRENDS AND HYBRID CAPITAL SENTENCING AUTHORITY

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I. Introduction

American imposition of the death penalty has taken on varying forms in the several states since the invalidation of many state capital punishment procedures in *Furman v. Georgia*.[2] In the process of redrafting capital punishment statutes in an effort to make sentencing more consistent, state legislators grappled with the issue of final punishment and whether the judge or the jury took on the responsibility of that decision.[3] Leading up to the turn of the century, of the thirty-eight states that imposed the death penalty, twenty-nine of them gave sentencing authority to the jury with little or no supervision by the trial judge.[4] Five states left sentencing to the judge, and four states (Florida, Alabama, Indiana, and Delaware) maintained a "hybrid" system, where the jury made the determination on capital punishment subject to a judicial override.[5] Within these "hybrid" states, the jury made the decision at trial whether to impose life imprisonment without parole or death, but the judge could then potentially override the jury decision based on a weighing of "aggravating" and "mitigating"

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[2] *See* Furman v. Georgia, 408 U.S. 238, 240 (1972).
[3] *See* William J. Bowers, Wanda D. Foglia, Jean E. Giles, & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 932 (2006).
[4] *See id.* at 933.
[5] *Id.*

factors.[6] Most notably, the jury did not have a role regarding the presence of aggravating factors or the lack of mitigating factors in this sentencing stage.[7]

It was in this context that the Supreme Court decided *Ring v. Arizona*, a Sixth Amendment challenge to Arizona's capital sentencing scheme.[8] This decision, which extended the jury fact-finding responsibilities articulated by the Court in *Apprendi v. New Jersey*, invalidated outright judge-only sentencing of the death penalty in those five states utilizing that scheme.[9] The question remained, however, regarding the constitutionality of the judicial override in place in the hybrid states.[10] The Supreme Court answered this question in January of 2016 through *Hurst v. Florida*, a direct challenge to Florida's judicial override of jury decisions in a capital punishment case.[11] This recent decision has several implications regarding the jury's role in sentencing, and it may in fact lead to an overall shift in the imposition of the death penalty in the United States.

In this policy note, I will attempt to track the jurisprudential trends within the American courts to better understand the state of capital punishment and its imposition in the future. The key issue at the heart of these recent decisions lies in the sentencing roles of the judge and the jury. I contend that, since *Apprendi* and *Ring*, the courts have shifted from judicial authority in sentencing to an expanded role and increased responsibility for the jury. Moreover, in light of *Hurst*, I will discuss what role the

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[6] ALA. CODE § 13A–5–47 (1981); *see also* DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013), FLA. STAT. § 921.141(3) (2015).

[7] *See* Hurst v. Florida, 136 S. Ct. 616, 620 (2016) (quoting FLA. STAT. § 921.141(3) (2015)).

[8] *See* Ring v. Arizona, 536 U.S. 584, 588 (2002).

[9] *See Ring*, 536 U.S. at 609; *see also* Apprendi v. New Jersey, 530 U.S. 466, 492 (2000).

[10] *See Ring*, 536 at 609 (O'Connor, J., dissenting) (expressing concerns that hybrid schemes remained unresolved by the majority).

[11] *See generally Hurst*, 136 S. Ct. 616.

jury takes on in these hybrid states, specifically in the finding of "aggravating" factors. If the jury is now experiencing nearly total authority in decision-making for capital cases, what does this mean for the death penalty and its imposition in general? I conclude that the expanded role of the jury, coupled with public views on the death penalty indicated by recent polling, may result in fewer defendants sentenced to death, creating a significant shift in American imposition of capital punishment.

II. Development of the Law: The Role of the Jury in Capital Punishment Sentencing

The Supreme Court expressed appreciation for the jury in *Duncan v. Louisiana*, stating that jury trial provisions in federal and state constitutions "reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[12] This position suggests the jury as a buffer, a populist check to the state's ability to impose judgment on private citizens—a tradition going back to common law England.[13] The role of the jury in American courts is thusly situated, with the Bill of Rights ensuring the right to a jury as such a buffer against the will of the state.[14] Unfortunately, the jury's responsibilities as a fact-finder, specifically in capital sentencing schemes, were initially not so clearly defined.[15]

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[12] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
[13] *See* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 3–4 (1989) (noting that Sir Blackstone refers to the English jury as the grand "palladium" of English liberty says that "competent . . . jurymen" are the guardians of public justice.)
[14] *See* U.S. CONST. amend. VI.
[15] *See* White, *supra* note 13, at 4.

The Supreme Court has heard several key cases that dealt directly with sentencing in capital punishment, beginning in the early seventies and continuing to January 2016.[16] In 1970, the Court, in *In re Winship*, ruled that the reasonable doubt standard, applied to those facts found by the jury, was a required element of constitutional due process.[17] Post-*Furman*, the Court heard constitutional challenges to judge-determined sentencing enhancements, most notably *Walton v. Arizona*.[18] In *Walton,* the Court examined the constitutionality of an Arizona statute allowing a judge to determine whether the jury's guilty verdict in a capital murder case should carry a sentence of life imprisonment or death.[19] The statute directed the judge to determine the existence of any aggravating or mitigating circumstances relevant to the imposition of the death penalty.[20] The defendant in *Walton* contended that the jury should make that determination, but the Court disagreed, holding that "aggravating circumstances" constituted a sentencing guide rather than elements of an offense, and thus were not constitutionally required to be heard by a jury.[21]

The Supreme Court in *Apprendi* took this determination a step further, holding that any fact that increases the statutorily prescribed maximum penalty must be proven beyond a reasonable doubt.[22] The case specifically involved a challenge to a sentence enhancement if the judge determined that a defendant acted with racial prejudice.[23] The majority viewed this

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[16] *See generally Hurst*, 136 S. Ct. 616.
[17] *See In re* Winship, 397 U.S. 358, 363 (1970).
[18] *See generally*, Walton v. Arizona, 497 U.S. 639 (1990); Jones v. United States, 526 U.S. 227 (1999).
[19] *See Walton*, 497 U.S. at 642–43.
[20] *See id.* at 643.
[21] *Id.* at 647–49.
[22] *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).
[23] *See id.* at 470.

determination, which potentially doubled the defendant's sentence, as seeking a specific mens rea and therefore could not stand as a simple sentencing guideline.[24] In an interesting break from previous decisions, the *Apprendi* court seemingly dismissed the distinction between "elements" and "sentencing factors" and placed on the jury all fact-finding responsibilities that will impact the defendant's punishment.[25] The Court saw the jury's duty as one "not of form, but effect," and stated that any labels placed on a particular fact are irrelevant if that fact is essential to the imposition of a sentence and it exposes the defendant to greater punishment.[26] The *Apprendi* decision represented a significant shift in responsibility from judge to jury in sentencing, a shift that at the time was logically at odds with precedent of *Walton*.[27] The Court seized the opportunity to resolve issues with precedent two years later in *Ring v. Arizona*.[28]

The defendant in *Ring* faced the death penalty under the same statutory scheme as the defendant in *Walton*, wherein he was found guilty of first-degree felony murder by the jury and subsequently sentenced to death by the judge due to certain "aggravating factors."[29] Justice Ginsberg, in delivering the opinion of the Court, directly addressed the irreconcilability of *Walton* and *Apprendi*, ultimately endorsing the *Apprendi* reasoning and overruling *Walton*.[30] Any fact, noted the Court, that subjects the

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[24] *See id.* at 493.
[25] *Id.* at 494.
[26] *Id. But see* Almendarez-Torres v. United States, 523 U.S. 224 (1997) (stipulating that history of prior convictions exposing a defendant to greater punishment did not require review by the jury).
[27] *See Apprendi*, 530 U.S. at 536–37.
[28] *See Ring*, 536 U.S. at 590.
[29] *See id.* at 591–94.
[30] *See id.* at 604–05 ("*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a

defendant to a greater punishment must be reviewed by a jury and proven beyond a reasonable doubt.[31] This included Arizona's sentencing enhancement of "aggravating factors" because the maximum penalty for the felony murder verdict issued by the jury was life imprisonment, but the defendant was then subjected to a harsher penalty of death after the judge considered additional facts related to the case.[32] This scheme, according to the majority, violated the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. [33] Effectively invalidating judge-only sentencing in the five states that possessed such a procedure, the *Ring* decision expanded the scope of *Apprendi* to capital punishment cases and marked a significant shift in sentencing responsibility from the judge to the jury.[34]

III. Current Policy – Substantive Law at Issue

A. Legal Issue Presented

The cases at issue in *Apprendi*, *Ring*, and more strike at the heart of a debate guiding capital punishment jurisprudence since *Furman*: who reserves the right to punish a defendant, the people or the state? [35] Are "sentencing enhancements" (such as a determination of aggravating factors by a judge) state attempts at eroding the jury's role in the imposition of capital punishment? In each

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'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").

[31] *See id.* at 602.

[32] *See id.* at 597.

[33] *See id.* at 609.

[34] *See* Kimberly J. Winbush, Annotation, *Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to State Death Penalty Proceedings*, 110 A.L.R.5th 1, § 2a (2003).

[35] *See* White, *supra* note 13, at 2.

case examined above, the petitioner sought to have a jury of his peers render the final judgment, not the court. Relying on constitutional imperatives, these petitioners asserted that protections from state-sanctioned punishment are baked into the Bill of Rights.[36] If the state is given the right to create laws and punish human behavior, then the jury, a cross-section of the society, ensures that state administration of justice will be rendered by members of the community and not a singular official.[37] Conversely, the statutes forming the basis of judicial sentencing schemes were intended to resolve the issues of *Furman* and remove the arbitrary administration of capital punishment by juries.[38] The goal was to satisfy the (possibly paradoxical) aims of consistency and individualization in sentencing by allowing impartial judges to be the final word in the imposition of capital punishment.[39] States arguing to keep their judicial sentencing schemes maintain that the judge is better equipped, in both academics and experience, to provide the most beneficial administration of justice in society.[40]

Based on the *Apprendi* and *Ring* decisions, it seems that the Court is falling on the side of the jury in this issue. By requiring that "aggravating factors" and other sentence enhancements be proven beyond a reasonable doubt, the Court is, in effect, forcing states to include the jury in nearly every aspect of capital sentencing. By increasing jury involvement, and therefore allowing for more conflicting opinions regarding the proper administration of

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[36] *See Ring*, 536 U.S. at 595; *see also Apprendi*, 530 U.S. at 471.
[37] *See* Witherspoon v. State, 391 U.S. 510, 519 (1968).
[38] *See* K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 70 (2004); *see also* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 94–95 (2002) (describing the twin goals as consistency and individualization).
[39] *See* Tomer, *supra* note 38, at 70.
[40] *See id.* at 73.

justice, the courts potentially could see more "arbitrary" sentencing. Moreover, the Court views the constitutional basis for the jury's authority as an intentional safeguard against failures in state sentencing, and while jury sentencing tends to be more arbitrary, it seems the Court is willing to tolerate that arbitrariness in favor of preventing the erosion of public rights to a jury trial.[41]

A. *Hurst v. Florida*

It is within that framework that the Supreme Court discussed "hybrid" sentencing schemes in *Hurst v. Florida.* In the years following the *Ring* decision, those state procedures rendered invalid were redrafted to include the jury as fact finder when determining "aggravating factors," but the so-called "hybrid" states did not experience any changes to their sentencing schemes.[42] There were attempts to challenge these hybrid procedures before the Supreme Court prior to *Apprendi* (most notably *Hildwin v. Florida*), but no challenge successfully invalidated the hybrid scheme until *Hurst* in 2016.[43] The defendant in *Hurst* faced the death penalty after the jury found him guilty of first-degree murder and recommended the death sentence after consideration of aggravating factors.[44] The trial judge then concurred in this recommendation after considering aggravating factors independently.[45] The Court, in keeping

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[41] *See Ring*, 536 U.S. at 607; *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

[42] *Recent Case: Criminal Procedure – Sixth Amendment – Alabama Supreme Court Upholds a Death Sentence Imposed by Judicial Override by a Jury Recommendation for Life Imprisonment Without Parole: Ex parte Hodges, 856 So. 2d 936 (Ala. 2003)*, 117 HARV. L. REV. 1283 (2004); *see generally* Winbush, *supra* note 34 at § 20.

[43] *But see* Hildwin v. Florida, 490 U.S. 638 (1989) (upholding Florida hybrid scheme), *overruled by* Hurst v. Florida, 136 S. Ct. 616, 621 (2016).

[44] *See Hurst*, 136 S. Ct. at 620.

[45] *See id.*

with *Ring* and *Apprendi*, determined that Florida's sentencing scheme violated the Sixth Amendment right to a jury trial as well as constitutional due process.[46]

As in *Ring*, the required finding of an aggravated circumstance exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict and, as a result, a jury determination of fact was necessary for the imposition of the death penalty.[47] The Court acknowledged that the Florida scheme did afford the jury an advisory verdict, contrasting the Arizona scheme in *Ring*, but nonetheless found this distinction irrelevant because the judge maintained the ability to override a jury verdict based on her own independent determination of aggravating factors.[48] In making this decision, the Court invalidated Florida's hybrid sentencing scheme as a violation of the Sixth Amendment and, in so doing, the Court potentially rendered unconstitutional similar schemes in states such as Alabama and Delaware.[49]

IV. Analysis – The Implications of *Hurst* on Capital Punishment Sentencing

The *Hurst* court extended the reasoning of *Apprendi* to a sentencing procedure that allowed a judicial role in fact-finding and shifted ultimate responsibility to the jury in a previously hybrid scheme. Moreover, the implications of this shift suggest a resolution to the issue of judicial imposition of capital punishment. Of the thirty-eight states that impose a death penalty, thirty-five of them now include the jury in the sentencing phase, and pending revisions to the Florida statute this spring, that total will rise to thirty-

[46] *See id.* at 621–22.
[47] *See id.* at 622.
[48] *See id.* at 621.
[49] *See id.* at 620–21.

six.[50] Only Alabama and Delaware still maintain a hybrid system.[51]

Over the past several years, American approval of the death penalty has had several peaks and valleys, with approval being at its highest in 1994 at eighty percent.[52] More recently, however, polling indicates a shift towards public disapproval of the death penalty.[53] Polls released by the Pew Research Center and Columbia Broadcasting System ("CBS") News in April of 2015 showed public support for the death penalty at fifty-six percent, near the lowest level recorded in the last forty years.[54] According to the November 2015 American Values Survey of 2,695 Americans, fifty-two percent preferred the imposition of life without parole rather than death.[55] In light of these polling numbers, the implications on the opinions of future juries in capital punishment cases are very interesting. If

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[50] *See* Bowers, *supra* note 3, at 933 (citing *Ring*, 536 U.S. at 608 n.6); *see also* Casey C. Sullivan, *Florida's Capital Punishment Sentencing Is Unconstitutional*, THE FINDLAW U.S. SUPREME COURT NEWS & INFORMATION BLOG (Jan. 12, 2016, 1:50 PM), blogs.findlaw.com/supreme_court /2016/01/floridas-capital-punishment-sentencing-is-unconstitutional.html (considering the implications of the *Hurst* decision nationally).

[51] *See* ALA. CODE § 13ª–5–47 (1981); DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013).

[52] *See* GALLUP, www.gallup.com/poll/1606/death-penalty.aspx (last visited Jan. 25, 2016).

[53] *See id.* Polling indicates that in the last decade disapproval of the death penalty among Americans has increased at a significant rate, increasing from twenty-six percent to thirty-seven percent since 2000.

[54] *See Less Support for Death Penalty, Especially Among Democrats*, PEW RES. CTR. (April 16, 2015), http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/.

[55] *See Anxiety, Nostalgia, and Mistrust: Findings from the 2015 American Values Survey*, PUBLIC RELIGION RESEARCH INSTITUTE (Nov. 17, 2015), http://publicreligion.org/research/2015/11/survey-anxiety-nostalgia-and-mistrust-findings-from-the-2015-american-values-survey/#.VqaDyPkrKUm.

the jury is to be a cross-section of society, reflecting the public opinion, then more and more jurors may find themselves unwilling to impose the death penalty on defendants.

Interestingly, the invalidation of the hybrid scheme may have additional impact in the number of death sentences ordered. Of the top fifteen states that imposed the death penalty in 2015, Florida and Alabama, hybrid states, were second and third, respectively.[56] Closer examination of the jurors in these hybrid states reveals important facts that suggest increased jury authority will lead to fewer death sentences. Data collected by the Capital Jury Project ("CJP") in 2005 provided multiple examples of juror opinions on imposing death in an actual case, specifically by comparing statements from jurors in jury-only sentencing states with those in hybrid states.[57] The resulting facts revealed that jurors in a hybrid state, where they were specifically instructed as providing a recommendation to the judge and not an actual sentence, were much more likely to impose the death sentence knowing they did not bear ultimate responsibility for the defendant's fate.[58] These hybrid jurors were also much more likely to misunderstand the court's instructions, take less time in deliberation, and refrain from asking for clarification or additional testimony.[59]

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[56] *See States in Order of Number of Death Sentences – 2015*, DEATH PENALTY INFORMATION CENTER (2015), http://www.deathpenaltyinfo.org/2015-sentencing#2014topstates.

[57] *See* William J. Bowers, Wanda D. Foglia, Jean E. Giles, & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 951–52 (2006). A total of 1198 interviews with jurors from 353 capital trials in fourteen states were conducted. These fourteen states were responsible for over seventy-six percent of persons on death row as of January 1, 2005.

[58] *See id.* at 956.

[59] *See id.* at 960–74. In Alabama, a hybrid state, nearly forty percent of jurors concluded deliberations in a capital punishment case within one

Narrative accounts taken from jurors in Alabama, Florida, and Indiana showed general feelings of detachment from the defendant and of being "off the hook" for whatever became of the individual standing trial.[60] The data collected by CJP suggests that providing full responsibility for sentencing to juries may lead to more deliberative and considerate decision-making from the jurors, suggesting a diminishing rate of state executions and thus changing the nature of capital punishment in the United States in the future.

V. Conclusion

The sentencing role in capital punishment has had its fair share of deliberation in our nation's highest Court, and over the decades since *Furman*, the Court's opinion has shifted on the importance of jury sentencing. Following the decisions in *Apprendi*, *Ring*, and now *Hurst*, the way Americans impose capital punishment has been firmly situated with the jury. This jurisprudential shift adds to the debate surrounding the death penalty by placing responsibility for its imposition on the people. Moreover, this "conscience of the community" is growing less fond of the death penalty every year. Fewer and fewer Americans favor the death penalty as a punishment and, in the future, these same individuals will make up juries across the

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hour. Thirty-eight percent of Florida jurors concluded deliberations within one hour, and in Indiana twenty-eight percent of jurors concluded deliberations within an hour. By contrast, in California, a jury-only state and the largest number of inmates on death row, only seven percent of jurors decided within an hour

[60] *Id.* at 961–63. Contrasting these figures with those from jury-only sentencing states shows a wide gulf in juror opinions and weight of responsibility. Those jurors that understood their verdict was the ultimate determination were much more likely to ask for clarification, deliberate for several hours or days, and give added consideration to mitigating factors in a capital punishment case.

nation. By placing sentencing authority on the jury, the Court effectively gave final say on the imposition of death to this "arbitrary" cross-section of the community.

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ISSN 1940-4131

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