

USA DEATH IN FLORIDA

**GOVERNOR REMOVES PROSECUTOR FOR NOT
SEEKING DEATH SENTENCES; FIRST
EXECUTION IN 18 MONTHS LOOMS**

**AMNESTY
INTERNATIONAL**



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Table of Contents

Summary.....	1
'Bold, positive change' not allowed.....	2
The State Attorney's decision.....	4
The Governor turns to a familiar name	5
The legislative and prosecutorial response to <i>Hurst</i>	8
A move consistent with human rights.....	10
Arbitrariness, race, <i>Hurst</i> and history.....	12
The machinery of death churns again	21
Afterword: some numbers	24
Appendix: the 20 current State Attorneys in Florida	25

SUMMARY

It is a tale of two states. One is a modern internationally connected state, linked to the rest of the world through trade and tourism and known among other things for its health, software and space technology industries. The other is an outlier state stuck in the past, connected to a punishment which in the 21st century sets it apart from much of the world.

Both are the US State of Florida, which is days away from conducting its first judicial killing in a year and a half, even as much of the country has turned against this policy.

“There will be robust debates on the best direction for Florida”, Governor Rick Scott proclaimed in his second inaugural address in 2015. Four years earlier, he had promised “bold, positive change”. Not when it comes to the death penalty, however. In March 2017, he responded to a State Attorney’s decision not to pursue the death penalty because of its demonstrable flaws by ordering her replacement with a prosecutor willing to engage in this lethal pursuit. Since then the governor has transferred 26 capital murder cases to his preferred prosecutor. Two of these cases have already resulted in juries voting for death sentences.

In January 2016, Florida was eight executions short of becoming the fourth state in the USA to conduct 100 executions since 1976 when the US Supreme Court stopped it in its tracks. The Court ruled Florida’s capital sentencing statute unconstitutional for giving jurors only an “advisory” role in who would end up on death row. Eighteen months later, capital trials are back on and the Florida execution machine is being readied to kill again, starting on 24 August.

The prisoner selected to be first in line for lethal injection is Mark Asay, sent to death row in 1988. He is also set to become the first white person in Florida to be put to death for the murder of a black victim. This “sad statistic” wrote Florida Supreme Court Justice James Perry, himself African American, dissenting against the December 2016 decision to lift Mark Asay’s stay of execution, is a “reflection of the bitter reality that the death penalty is applied in a biased and discriminatory fashion, even today”.

One says drop it, it is a waste of resources, prone to discrimination, arbitrariness and error, and makes promises to murder victims’ families it cannot keep. The other says crank up the machinery of death

Even now, at the 11th hour of this 30-year-old case, the race-of-victim issue has come to the fore after the state Supreme Court admitted it had for years wrongly described both murder victims as black, when one was not.

In any event, this is a moment to reflect upon an often overlooked aspect of Florida’s history – that it was a leader in lynching in the South and slow to eradicate this phenomenon in the 20th century – and upon the all too often ignored fact that today it remains a diehard death penalty state even as political support for this cruel, racially biased, error-prone and unnecessary punishment has waned elsewhere in the USA.

Racial discrimination was one of the death penalty’s flaws – along with its costs, risks and failure as a deterrent – cited by State Attorney Aramis Ayala, the first African American to be elected to that position in Florida, in explaining her decision to drop pursuit of death sentences.

So this is not just a tale of two states. It is also the tale of two officials who have taken very different approaches to the evidence that the death penalty is a failed policy. One says drop it, it is a waste of resources, prone to discrimination, arbitrariness and error, and makes promises to murder victims’ families it cannot keep. The other says crank up the machinery of death.

One is acting consistently with international human rights principles. The other is not.

‘BOLD, POSITIVE CHANGE’ NOT ALLOWED

Ayala called Scott and he asked her to step down as prosecutor in the Loyd case. When Ayala declined and asked for an opportunity to explain her decision, Scott abruptly ended the conversation

Emergency petition, In the Supreme Court of Florida, 11 April 2017

“There will be robust debates on the best direction for Florida”, Governor Rick Scott said in January 2015 in his second inaugural address. In his first such speech four years earlier, he had promised “bold, positive change”.

Not when it comes to the death penalty, however. Here Governor Scott will brook little debate and tolerate no bold positive change, it would seem. A recent illustration of this came in his response to the decision of a Florida prosecutor, State Attorney Aramis Ayala, not to pursue death sentences because of the demonstrable flaws of capital justice. The Governor has ordered her replacement by a prosecutor willing to engage in this lethal pursuit.

Governor Scott’s own support for judicial killing is well known. He signed more death warrants in his first term than any other Florida governor since the US Supreme Court upheld new capital statutes in 1976. While he was signing these death warrants – a quarter of Florida’s post-1976 executions occurred between 2011 and 2016 – his counterparts in Connecticut, Illinois and Maryland were signing into law bills abolishing the death penalty and those in Washington, Oregon and Pennsylvania were signing off on execution moratoriums. In the midst of this, in 2013, Governor Scott signed the Timely Justice Act, in part designed to cut the time between conviction and execution.¹

Early in Governor Scott’s second term, however, the US Supreme Court threw a wrench into Florida’s machinery of death. Executions have been on hold since the Court ruled in *Hurst v. Florida* in January 2016 that its capital sentencing statute was unconstitutional because it gave juries only an advisory role in death sentencing decisions. Governor Scott signed into law a new statute in March 2016. Predictably, that was ruled unconstitutional by the Florida Supreme Court in October, for not requiring juror unanimity on votes for death.² The legislature passed a new statute, requiring juror unanimity, which Governor Scott signed on 17 March 2017. Meanwhile, in December 2016, the Florida Supreme Court had ruled that *Hurst* applied retroactively to just over half of the nearly 400 prisoners then on death row, who would be entitled to resentencing if the state failed to prove that the “*Hurst* error” was “harmless”.³

Florida’s executive, like the legislature, has been in no mood to recognize that the death penalty is a harmful, unfixable and unnecessary policy. The state Attorney General went back to the US Supreme Court to seek to overturn the Florida Supreme Court’s “expansive” interpretation of the *Hurst* ruling, arguing that it had “plunge[d] the administration of the death penalty in Florida into turmoil” given that the death sentences “in more than 200 cases may have to be re-litigated”.⁴ On 22 May 2017 the US Supreme Court declined to intervene.⁵

With the end of that particular litigation, Florida’s executive moved to begin executions of condemned prisoners deemed not to benefit from the *Hurst* ruling. On 3 July, Attorney General

¹ See <https://www.amnesty.org/en/documents/amr51/038/2013/en/>

² *Perry v. Florida*, 14 October 2016.

³ *Asay v. Florida*, 22 December 2016. *Hurst* ruled Florida’s scheme incompatible with *Ring v. Arizona*, 2002 (Constitution requires juries to make factual findings necessary to sentence a defendant to death).

⁴ *Florida v. Hurst*, petition for writ of certiorari to the Supreme Court of Florida, 13 February 2017.

⁵ As of 19 July 2017, 120 of Florida’s death row prisoners had had their cases reviewed in light of *Hurst*. Of them, 100 had obtained, and 20 had been denied, relief. See <https://deathpenaltyinfo.org/node/6785>

Pam Bondi wrote to Governor Scott to seek a death warrant in the case of Mark Asay, who has been on death row since 1988. On the same day, Governor Scott wrote to the Warden of Florida State Prison designating the week of 21 to 28 August 2017 for the execution, and setting the date and time of 6pm on 24 August. This would be Florida's 93rd execution since 1976, and the 24th under Governor Scott. On 14 August, the Florida Supreme Court refused to stay the execution.

Governor Scott is the final clemency authority – Mark Asay's 2016 death warrant signed by the Governor states that "it has been determined that executive clemency is not appropriate". In its assessment of Florida's death penalty system published in 2006, the American Bar Association concluded that the lack of transparency surrounding the clemency process meant that it was impossible to determine the extent to which "inappropriate political considerations" impacted that process.⁶ Over a decade later, that remains the case. And now, the governor's executive orders removing from capital cases a prosecutor who has recognized the inequities of the death penalty further beg the question of how meaningful Florida's already opaque clemency process can be with Governor Scott at the head of it.

The execution of Mark Asay is set not only to be the first execution in Florida since the *Hurst* ruling, and the first under a new lethal injection protocol, but also the first in Florida since 1976, and possibly its history, of a white person sentenced to death for killing a black person.⁷ This "sad statistic" prompted a retiring Florida Supreme Court Justice – himself African American – to point out in December 2016 the still discriminatory nature of capital justice in Florida. Coupled with what he saw as the Court's arbitrary cut-off for application of *Hurst*, it was enough for him to conclude that Florida's death penalty was now unconstitutional.

State Attorney Ayala – the first elected African American State Attorney in Florida's history – has said that she has reviewed evidence of the death penalty's flaws and decided not to seek death sentences. She has brought a case against the Governor in the Florida Supreme Court challenging the legality of his move to replace her. Oral argument in the lawsuit was held in the Court in Tallahassee on 28 June 2017. The court's decision is pending.

Amnesty International opposes the death penalty unconditionally. Death penalty abolition is a goal under international law, and all moves towards abolition should be viewed as progress towards respect for the right to life. Some three and a half decades have passed since the UN Human Rights Committee made this clear in its authoritative interpretation of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), ratified in 1992 by the USA.

Since then, dozens of countries have abolished the death penalty and the UN General Assembly has passed repeated resolutions calling for a moratorium on executions, pending abolition.⁸ Today 141 countries are abolitionist in law or practice. The refusal of Florida's governor and its legislature to take bold, positive steps away from this cruel and brutalizing punishment is one reason why the USA has not joined this clear majority of countries.

Amnesty International considers that State Attorney Ayala's decision to reject the pursuit of death sentences is compatible with international human rights principles, whereas Governor Scott's response, and the legislature's failure to act against the death penalty, are not.

⁶ Executive clemency has not been granted in a Florida capital case since 1983. The ABA report is at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/florida.html

⁷ On race issue, see also note 57 *infra*. This would be the first execution in Florida, and the USA as a whole, using etomidate as the sedative component of a three-drug protocol (followed by rocuronium bromide, a paralytic agent; and potassium acetate, to cause cardiac arrest). All three drugs were new in Florida's revised injection protocol of 4 January 2017.

⁸ Most recently, UN General Assembly resolution 71/187 of 19 December 2016.

THE STATE ATTORNEY'S DECISION

I have given this issue extensive and painstaking thought and consideration. What has become abundantly clear through this process is that while I currently do have discretion to pursue death sentences, I have determined that doing so is not in the best interest of this community or the best interest of justice

State Attorney Aramis Ayala, March 2017



State Attorney Aramis Ayala

On 16 March 2017, Aramis Ayala, the newly elected State Attorney for the Ninth Judicial Circuit of Florida,⁹ and the first African American elected or appointed to that position anywhere in Florida in its history, announced that while she had the discretionary power as a prosecutor to seek death sentences, she had concluded after “extensive and painstaking thought and consideration” that to do so was “not in the best interests of the community” or “the best interests of justice”.

In relation to the upcoming prosecution of Markeith Loyd, facing first-degree murder charges for the fatal shooting of his pregnant former girlfriend in Orlando on 13 December 2016 and of a police officer who was seeking to arrest him on 9 January 2017, State Attorney Ayala announced that she had decided to seek a sentence of life imprisonment without the possibility of parole rather than death.¹⁰ On capital cases more generally, she has said that she reviewed research showing that the death penalty:

- (a) has no impact on public safety;
- (b) is racially discriminatory;
- (c) discriminates against the poor;
- (d) is enormously expensive;
- (e) leaves victims' families in a state of uncertainty; and
- (f) is imposed on innocent people too often.¹¹

State Attorney Ayala emphasised that she was making her decision based on actual empirical evidence and not on personal theory, impulse or emotion. She said that “I do understand that this is a controversial issue, but what is not controversial is the evidence that led me to my decision.” She is in the company of at least two current US Supreme Court Justices, and a recently retired one, who consider that such evidence points to a punishment that has fallen into unconstitutionality.¹² The State Attorney said that she would “continue to hold people who do harm to this community accountable for their actions”, but that she would “do so in a way that is sensible, fair and just”. As things stood, she said, the death penalty did not meet those criteria. She said that pursuing life sentences rather than the death penalty would offer family members “more closure and more certainty”, and be less of a drain on the state's resources.

⁹ The Ninth Circuit covers Orange and Osceola Counties in east central Florida. Aramis Ayala took office on 3 January 2017. Florida has 20 State Attorneys, covering the 20 Judicial Circuits. Currently there are three women and 17 men in these positions (see Appendix).

¹⁰ Markeith Loyd was arrested on 17 January 2017, during which he was blinded in one eye and sustained other injuries. The Governor said that “he will now be held to the fullest extent of the law”, <http://www.flgov.com/2017/01/17/governor-scott-issues-statement-on-the-capture-of-markeith-loyd/>

¹¹ *Ayala v. Scott and King*. Complaint for declaratory and injunctive relief and jury demand. In the US District Court for the Middle District of Florida, 11 April 2017.

¹² *Baze v. Rees*, 16 April 2008, Justice Stevens concurring. *Glossip v. Gross*, 29 June 2015, Justice Breyer joined by Justice Ginsburg, dissenting.

THE GOVERNOR TURNS TO A FAMILIAR NAME

State Attorney Ayala...has made it clear that she will not fight for justice and that is why I am using my executive authority to immediately reassign the case to State Attorney Brad King
Governor Rick Scott, 16 March 2017

State Attorney Ayala stressed the lack of evidence that the death penalty protects either the public or increases the safety of law enforcement officers. In his statement issued in response to her announcement, Governor Scott adopted a less empirical approach, asserting instead that the police officer who Markeith Loyd is accused of shooting had been “executed” by “an evil murderer”, that State Attorney Ayala’s decision not to seek the death penalty against him made it “abundantly clear that she will not fight for justice”, and that the families of the victims “deserve a state attorney who will aggressively prosecute Markeith Loyd to the fullest extent of the law and justice must be served”. As the then most senior US Supreme Court Justice said in 2008, in the absence of conclusive evidence of a special deterrent effect, it “is the retribution rationale that animates much of the remaining enthusiasm for the death penalty”.¹³ The line between retribution and plain vengeance can be thin.¹⁴

Alongside his public statement, Governor Scott issued an executive order on 16 March 2017 assigning Brad King, State Attorney for the Fifth Judicial Circuit, to “discharge the duties” of State Attorney Ayala in relation to the upcoming prosecution.¹⁵ State Attorney King’s support for the death penalty is well-established, especially after he acted as lobbyist-in-chief for the Florida prosecutorial community in 2016 in pushing the legislature to adopt a new sentencing statute that would still not require unanimous juries in capital cases. Governor Scott ordered State Attorney King, along with any other prosecutors he needed, to “proceed immediately to the Ninth Judicial Circuit” to deal with the prosecution. In early April, State Attorney King filed notice of his intent to seek the death penalty against Markeith Loyd.

State Attorney King’s support for the death penalty is well-established, especially after he acted as lobbyist-in-chief for the Florida prosecutorial community in 2016 in pushing the legislature to adopt a new sentencing statute that would still not require unanimous juries in capital cases

On 3 April 2017, the Governor reassigned 21 more first-degree murder cases from State Attorney Ayala to State

Attorney King. Each executive order said that the “ends of justice will be best served” by having a prosecutor willing to pursue the death penalty in these cases. In a public statement issued on the same day, the Governor stated that State Attorney Ayala’s “complete refusal to consider capital punishment... sends an unacceptable message that she is not interested in considering

¹³ *Baze v. Rees*, 16 April 2008, Justice Stevens concurring.

¹⁴ James Raulerson was among the first people sentenced to death under Florida’s 1972 statute. He was convicted of the murder of a police officer. On the day of his execution in 1985, dozens of police officers kept vigil outside the prison, some of them wearing T-shirts with a drawing of the electric chair and the words “Crank up Old Sparky”. They cheered when the execution was complete. After Cuban national Pedro Medina’s head caught fire during his electrocution in 1997, Florida’s then Attorney General Bob Butterworth said: “People who wish to commit murder, they better not do it in the State of Florida, because we may have a problem with our electric chair.” In 1999, not long before the state adopted lethal injection, a member of Florida’s House Criminal Justice & Corrections Council, Representative Howard Futch, suggested that the state should “crucify” death row inmate Thomas Provenzano, whose symptoms of serious mental disability included delusions that he was Jesus Christ. “I’d make him a cross and we could take it out there to Starke (the location of death row) and nail him up”, Rep. Futch said.

¹⁵ The Fifth Judicial Circuit covers Citrus, Hernando, Lake, Marion and Sumter counties.

every available option in the fight for justice". Governor Scott added another case on 6 April, making a total of 23 cases reassigned up to that point.

A 24th was added on 8 June, and a 25th and 26th on 17 July. The 24th came after the Florida Supreme Court overturned the death sentence of Bessman Okafor, imposed in November 2015 by a judge accepting an Orange County jury's death verdict of three months earlier. Because that jury had not been unanimous for death (it was 11 to one), the Florida Supreme Court found that the sentence fell foul of *Hurst*, and that Bessman Okafor was therefore entitled to a new sentencing hearing. On the same day, Governor Scott issued another executive order, transferring Bessman Okafor's case from State Attorney Ayala to State Attorney King. The death penalty would remain on the table, the governor was saying. With Bessman Okafor's case, 17 of the 26 defendants now removed by Governor Scott from State Attorney Ayala involve prisoners who had already been sentenced to death but who had been granted resentencing hearings in the wake of the January 2016 *Hurst* ruling.

In her explanations about why she had decided to drop the pursuit of death sentences, State Attorney Ayala had, along with the flaws of capital justice, pointed to "the Florida death penalty statute being "in a state of chaos and constant challenge" since the *Hurst* ruling.¹⁶ Again, she has company. In early July 2017, former Florida Supreme Court Justice Gerald Kogan similarly described the capital justice system as being in "chaos" and "just a mess".¹⁷

The remaining nine of the 26 cases, including that of Markeith Loyd, were of individuals who had been arrested in the past several years and were awaiting trial for capital murder. The most recent two cases, added on 17 July 2017, were of Lakesha Chantell Lewis and Callene Marcia Barton, two women arrested 10 days earlier in Orlando and facing capital murder charges in the death of a three-year old boy.

On 2 June 2017, a jury voted unanimously that Juan Rosario be sentenced to death after convicting him of the murder of 83-year-old Elena Ortega in her home in 2013. This was the first case to go to trial in Orange County since State Attorney Ayala's announcement and was prosecuted under State Attorney Brad King, assigned to the case by Governor Scott.

On 18 July 2017, a jury in Osceola County unanimously recommended that Larry Perry be sentenced to death for killing his three-month old son in 2013. His case, too, had been transferred by Governor Scott from State Attorney Ayala to State Attorney King in order to keep the death penalty on the table. Two experts testified for the defence that Larry Perry has intellectual disability. An expert presented by the prosecution disagreed.¹⁸

On 24 July, Governor Scott announced that he would host the 2017 Latin American Summit in Miami on 2 October. Among the afternoon sessions will be a 'discourse on the importance of human rights'. Perhaps an agenda item could be a discussion of why a country purporting to be a champion of human rights has, since 2009, been the only one in the entire Americas region to conduct an execution

¹⁶ *State of Florida vs. Markeith Demangzlo Loyd*, Supplement to state's motion to stay proceedings, In the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, 27 March 2017.

¹⁷ Murderers leave Florida's death row after Hurst ruling; system 'a mess,' expert says, Tampa Bay Times, 3 July 2017, <http://www.tampabay.com/news/politics/stateroundup/murderers-leave-floridas-death-row-after-hurst-ruling-system-a-mess-expert/2329030>

¹⁸ In the Rosario case, the judge scheduled a September 2017 hearing for the formal sentencing. In the Perry case, sentencing before the judge was scheduled for 13 October 2017.



President Donald Trump and Governor Rick Scott during an infrastructure summit with governors and mayors in Washington, DC, on 8 June 2017 © NICHOLAS KAMM/AFP/Getty Images

"I am glad that America elected my friend, Donald Trump, a businessman, outsider like myself, as President", Governor Scott noted in his March 2017 State of the State address. President Trump, who spent considerable time during his first six months as President at his Florida mansion (dubbed the "Winter White House" or "Southern White House") in Mar-a-Lago, Palm Beach, has encouraged Governor Scott to run for the US Senate in 2018, and has appointed him to the Council of Governors.¹⁹ Governor Scott is currently chairman of New Republican, a political action committee whose goal, the Governor says, is to "make the Republican Party Great Again". He adds: "The President is a friend of mine... I am committed to helping him as he fights against the political machine and attempts to force real change... Donald Trump needs a Republican Party that supports him with ideas that will make America Great..."²⁰

Real change is needed on the death penalty. Florida, and the USA as a whole, remain greatly out of step with much of an increasingly abolitionist world. Former governor of New Mexico and US ambassador to the UN, Bill Richardson, wrote in June 2017: "I've always viewed it a sign of wisdom to demonstrate the ability to change your mind – that goes double if you're an elected official. As New Mexico's governor in 2009, I changed my mind regarding the death penalty and signed a bill to abolish it after having supported it for decades. Empirical evidence and common sense convinced me that the death penalty is an ineffective deterrent, is unfairly applied and has become increasingly costly for states".²¹

¹⁹ See <https://www.whitehouse.gov/the-press-office/2017/06/16/remarks-president-trump-policy-united-states-towards-cuba>; <https://www.whitehouse.gov/the-press-office/2017/05/01/president-donald-j-trump-announces-intent-appoint-governors-council> and <https://www.nga.org/cms/cog>; also <https://www.whitehouse.gov/the-press-office/2017/04/28/remarks-president-trump-national-rifle-association-leadership-forum>

²⁰ Governor Scott to Chair "New Republican" Federal Super PAC, 11 May 2017, <https://newrepublican.org/governor-scott-chair-new-republican-federal-super-pac/>. See also, e.g. Scott, Bondi condemn white supremacists, but not Trump's 'fine people' comments, Politico, 16 August 2017, <http://www.politico.com/states/florida/story/2017/08/16/florida-trump-supporters-condemn-white-supremacists-but-not-presidents-comments-113983>

²¹ I carried out the death penalty as a governor. I hope others put it to rest. Bill Richardson, Washington Post, 17 June 2017 https://www.washingtonpost.com/posteverything/wp/2017/06/13/trashed-2/?utm_term=.edb03803f635

Six days after this jury voted for death – a choice put before them because State Attorney Ayala had been removed from the case – Governor Scott announced that he would host the 2017 Latin American Summit in Miami on 2 October “to discuss the important relationship Florida shares with the region”.²² Among the afternoon sessions will be a “discourse on the importance of human rights”.²³ Perhaps an agenda item could be a discussion of why a country purporting to be a champion of human rights has, since 2009, been the only one in the entire Americas region to conduct an execution. During those eight years, the USA has conducted over 300 judicial killings, with Florida accounting for one in 12 of them.

THE LEGISLATIVE AND PROSECUTORIAL RESPONSE TO *HURST*

[C]urrent decisions by state legislatures...to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits
Justice Stevens, US Supreme Court, April 2008²⁴

By the time of the *Hurst* decision in January 2016, it had been over a decade since the Florida Supreme Court had warned the legislature to revisit the capital statute because of the juror non-unanimity issue.²⁵ In contrast to this lax approach prior to *Hurst*, the Florida legislature quickly passed a revised sentencing statute after the ruling, with the Florida Prosecuting Attorneys Association successfully lobbying legislators to have Florida remain an outlier state, by allowing juries to be less than unanimous when voting for a death sentence. State Attorney Brad King was the spokesperson for the prosecutorial community in this lobbying effort. Casting aspersions on the notion of unanimous juries, State Attorney Brad King told House legislators in seeking to have them vote for non-unanimous juries in capital sentencing:

“you take a person literally off of the street that may have had no contact with our court system at all, and you put them in the position of not just making a finding of fact which is what jurors are typically called upon to do... Now in a death recommendation situation, they’re told, ‘you have to individually weigh these aggravators and mitigators, and you have to vote, you personally have to vote, to give this defendant life or death’. And so what you do is you allow one juror, with no contact with the system, with no education in the law, with no qualifications as a death penalty qualified judge, you give them absolute control over what that sentence is going to be. Because all they have to do then is vote life and if you have a unanimous jury verdict requirement for death, they get to control that decision.”²⁶

²² Governor Scott to host 2017 Latin American Summit, 24 July 2017, <http://www.flgov.com/2017/07/24/governor-scott-to-host-2017-latin-american-summit/>

²³ <http://www.cvent.com/events/governor-rick-scott-s-2017-latin-american-summit/agenda-d7bd9631e2eb489c92785bc1dda05c4c.aspx>

²⁴ *Baze v. Rees*, *op.cit.*

²⁵ “Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote... The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty... [W]e ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state”. *State v. Steele*, 12 October 2005 (revised opinion). Emphasis in original.

²⁶ At the hearing on the Senate bill, State Attorney King reiterated that line of argument. Requiring unanimity on a death penalty vote, he said, would allow an individual juror to “hijack the whole process that’s set up, from the other 11 jurors, from the judge, from the Florida Supreme Court, that one juror gets to decide and gets to choose that no one else is going to be able to consider recommending death.” State Attorney King then, as he had in the House, provided examples of prosecutors failing to obtain

The new law lasted a bare six months before being found unconstitutional by the Florida Supreme Court.²⁷ In its interpretation of the US Supreme Court's *Hurst* ruling, the state Supreme Court ruled that

“before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.”

In the *Perry v. Florida* ruling issued on the same day, 14 October 2016, the Florida Supreme Court found the new statute unconstitutional. Its requirement that “only ten jurors, rather than all twelve must recommend a death sentence is contrary to our holding in *Hurst*”, it ruled.

Given the national picture in which most death penalty states in the USA required unanimity on death sentencing, it was entirely predictable (and should have been so to the Florida legislature as well as to State Attorney King and his fellow prosecutors) that the new law would likely run into trouble on judicial review because of its failure to require juror unanimity of death sentencing decisions. “I don't care what 47 states do. This is the right public policy for the state of Florida”, the bill's sponsor, Representative Ross Spano, had said during the House debate on 18 February 2016.

Among other things, the Florida Supreme Court noted evidence that juries not required to reach unanimity “tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus”. For its part, the legislature had failed to deliberate on the flaws of the death penalty and the prospects for the law surviving judicial scrutiny if they insisted on non-unanimity.

As I and other Justices have previously pointed out, individuals who are executed are not the ‘worst of the worst,’ but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse on the basis of race

US Supreme Court Justice Stephen Breyer, *Sireci v. Florida*, December 2016

Since State Attorney Ayala's decision in March 2016 not to pursue death sentences, House members have sided with the Governor in his bid to

replace her with someone who will. In an amicus curiae (friend of the court) brief filed in the Florida Supreme Court in May 2017, the House members describe the actions of the State Attorney as “nothing short of a dereliction of her duties”, an “abuse of her office”, and a “gross affront to the faithful enforcement of the law.” The amicus brief would have the Court believe that legislators have learned their lesson:

“This Court left no ambiguity as to why a ‘jury must unanimously recommend death in order to make a death sentence possible’ – unanimity ensures that the jury's

death sentences in other states because jury unanimity had not been achieved.

²⁷ With a Senate Bill requiring unanimity and a House bill allowing for a nine-three divide, a compromise was required. The Senate dropped their insistence on unanimity. The final bill, passed 93 to 20 in the House and 35 to five in the Senate, required that at least 10 jurors vote for death. Fewer than that and the sentence would be life imprisonment without the possibility of parole – death in prison but not by execution. Governor Scott signed Florida's new capital sentencing statute into law on 7 March 2016. Predictably, on 14 October 2016, the Florida Supreme Court ruled it unconstitutional for its failure to require juror unanimity on votes for the death penalty. The legislature passed a new statute, requiring unanimous juries. Governor Scott signed it into law on 13 March 2017.

recommendation ‘expresses the values of the community as they currently relate to imposition of death as a penalty.’ The unanimous jury is ‘a significant and reliable objective index of contemporary values,’ and preserves its role as ‘a veritable microcosm of the community’. ‘A jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death.’”

According to the House brief, Governor Scott would have been within his right to suspend State Attorney Ayala altogether because of her move against the death penalty. Instead, it continued, the Governor was “generous when he stopped short of that and instead took a more deferential approach by only removing her from certain cases”.²⁸ Governor Scott, the amicus said, had “acted entirely reasonably when he determined that the interests of justice demanded the reassignment” of the prosecutor from the capital murder cases in her jurisdiction.

Amnesty International considers that it is State Attorney Ayala who has acted reasonably. Having evaluated the compelling evidence of the flaws of the death penalty and deciding not to pursue it, she is acting in a manner consistent with human rights principles. The Florida legislature, on the other hand, failed to give serious consideration to such evidence when it set about hastily passing a new capital sentencing statute in the wake of *Hurst v. Florida*, and continues to fail to examine the death penalty system through a human rights lens. It is guilty of what in 2008 US Supreme Court Justice John Paul Stevens described as “habit and inattention”. Six years later, Justice Stephen Breyer wrote in a Florida case: “As I and other Justices have previously pointed out, individuals who are executed are not the ‘worst of the worst,’ but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse on the basis of race.”²⁹

A MOVE CONSISTENT WITH HUMAN RIGHTS

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights
UN Guidelines on the Role of Prosecutors

On 4 April 2017, State Attorney Aramis Ayala filed a petition in the Florida Supreme Court asking it to order Governor Rick Scott to show by what constitutional authority he had replaced Attorney Ayala in capital murder cases.³⁰ The petition asserted that the Governor’s move was taken “for political reasons” and was “illegal, unfair, and disruptive”.³¹ The Court heard oral argument on the case on 28 June 2017. Its decision is pending.

²⁸ An amicus brief in support of State Attorney Ayala was filed by state Supreme Court justices, current and former state and federal prosecutors and state attorneys general, and former US Solicitors General and US Department of Justice officials. It asserts that these amici “have gained an understanding of the important role that prosecutorial discretion and independent decision making play in the criminal justice system and the strong need to insulate prosecutors from outside political pressures.” *Ayala v. Scott*, Brief of Amici Curiae former judges, current and former prosecutors, and legal community leaders in support of petitioner’s emergency non-routine petition for writ of *quo warranto*. 21 April 2017.

²⁹ *Sireci v. Florida*, 12 December 2016, Justice Breyer dissenting from denial of certiorari.

³⁰ §27.14 of Florida Statutes, cited in the executive orders, states: “If any state attorney is disqualified to represent the state in any investigation, case, or matter pending in the courts of his or her circuit or if, for any other good and sufficient reason, the Governor determines that the ends of justice would be best served, the Governor may, by executive order filed with the Department of State, either order an exchange of circuits or of courts between such state attorney and any other state attorney or order an assignment of any state attorney to discharge the duties of the state attorney with respect to one or more specified investigations, cases, or matters, specified in general in the executive order of the Governor.”

³¹ She also filed a case in federal court. On 4 May 2017, the US District Court for Middle District of Florida issued a stay of proceedings, pending resolution of the state law claims.

State Attorney Ayala's move is against a punishment that is incompatible with fundamental human rights principles. Any move towards removing people from this punishment's reach "should be considered as progress in the enjoyment of the right to life", and towards the goal under international law of abolition of the death penalty.³² Her decision is also consistent with the UN Guidelines on the Role of Prosecutors. These state, among other things, that:

"Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (Emphasis added)

A prosecutor who pursues the death penalty is not pursuing an outcome that respects and protects human dignity and upholds human rights. While it is true that international human rights law, including article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of article 6.6 of the ICCPR.³³ The UN Human Rights Committee, the expert body established under the ICCPR to monitor its implementation, has said that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".³⁴

In a brief, the Florida Prosecuting Attorneys Association – the association that had lobbied to have non-unanimity retained in Florida's post-*Hurst* sentencing statute despite the fact that this was always likely to be found unconstitutional on judicial review – wrote:

"Ms Ayala effectively abolished the death penalty in the Ninth Circuit by implementing a hard-and-fast rule that removes her decision-making on a case-by-case basis, which is beyond the scope of her prosecutorial independence and discretion... Ms Ayala may not refuse to consider the death penalty simply because she does not agree with it, and simultaneously create discretionary policies to subvert the law with which she disagrees."

State Attorney Ayala has explained that her decision was based on her review of the evidence of the flawed, discriminatory, risky, costly and ineffective nature of the death penalty. For their part, the Florida governor and Attorney General claim that it would inject arbitrariness in the application of Florida's death penalty.

"In asserting unilateral authority to effectively repeal the State's death penalty laws within the Ninth Circuit, Ayala all but ensured that similarly situated defendants inside and outside the Ninth Circuit would be subject to different standards: for those tried and convicted within Ayala's jurisdiction, the death sentence would be off the table, at least for the foreseeable future, regardless of case-specific circumstances; for those in the rest of the State, the decision whether to seek the death penalty would be based on case-specific application of traditional sentencing factors, including statutory criteria prescribed by the Legislature."

This is little short of rich given the arbitrariness which besets the death penalty in the USA, Florida included. Evidence of arbitrariness is never far away. The Florida Supreme Court's decision relating to the retroactivity of *Hurst* has now contributed to it.

³² UN Human Rights Committee. General Comment No. 6, The right to life (Article 6), 1982.

³³ The USA ratified the ICCPR on 8 June 1992.

³⁴ CCPR General Comment No. 6, The right to life (Article 6), 1982.

ARBITRARINESS, RACE, *HURST* AND HISTORY

Asay will be the first white person executed for the murder of a black person in this State. This sad statistic is a reflection of the bitter reality that the death penalty is applied in a biased and discriminatory fashion, even today

Asay v. State, Florida Supreme Court, 22 December 2016, Justice Perry dissenting

The state of Florida is currently set to resume judicial killing at 6pm on 24 August 2017 with the execution of Mark Asay, a prisoner sentenced to death in 1988 for the murders of Robert Lee Booker and Robert McDowell in July 1987. He had been scheduled to be put to death on 17 March 2016, when he received a stay of execution in the wake of the *Hurst v. Florida* ruling.

In *Hurst*, the US Supreme Court found that the Florida's capital sentencing scheme violated the US Constitution's Sixth Amendment right to a jury trial because it gave juries only an advisory say in which defendants should be sentenced to death. This was incompatible with its holding in *Ring v. Arizona* in 2002, it said, that the Constitution requires juries, rather than judges, to make the factual findings necessary to sentence a defendant to death.

For the century before the Supreme Court's 1972 *Furman v. Georgia* ruling which voided capital statutes across the country because of the arbitrary manner in which the death penalty was being applied, the law in Florida required that a jury be the ultimate sentencing authority at a capital trial. What *Furman* required of a capital statute was unclear because it was essentially made up of nine separate opinions written by the nine Justices, making "the true scope of *Furman* difficult to ascertain",³⁵ and creating "much confusion in Florida, as elsewhere, and the two houses of the Florida Legislature divided sharply on the appropriate response to it".³⁶ Under the law eventually passed in December 1972, juries would vote to provide an advisory sentence, and the judge would have the final say, with the authority to override in either direction.³⁷ The Florida Supreme Court upheld the statute in July 1973, with a majority taking the view that the trial judge's sentencing role would be a check against juror bias:

"To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."³⁸

If the override authority given to elected trial judges had been seen by some as a guard against reactionary or inflamed jury sentencing, it failed. Although judges had to give "great weight" to the jury's recommendation,³⁹ they took to using their override power to turn jury life votes into death sentences more often than they overrode death to life. In the first 15 years of the post-*Furman* statute, one in five death sentences in Florida were imposed by judges overriding jury life recommendations.⁴⁰ Between 1973 and 1999 – a period of peak death sentencing and particularly ugly death penalty politics in the USA⁴¹ – there were 166 jury-override death

³⁵ *Hurst v. Florida*, Florida Supreme Court, 14 October 2016.

³⁶ Michael L. Radelet and Michael Mello, Death-to-life overrides: Saving the resources of the Florida Supreme Court. Florida State University Law Review, Vol. 20: 195 (1992).

³⁷ With the Florida Supreme Court conducting a proportionality review of all death sentences during the mandatory ("direct") appeal process.

³⁸ *State v. Dixon* (1973). The US Supreme Court upheld the Florida statute in *Proffitt v. Florida* in 1976.

³⁹ *Tedder v. State*, Florida Supreme Court, 1975.

⁴⁰ Michael Mello, The jurisdiction to do justice: Florida's jury override and the state constitution. 18 Fla. St. U. L. Rev. 923 (1991).

⁴¹ See for example, Killing for Votes: The dangers of politicizing the death penalty process. Death Penalty

sentences in Florida, about twice as many as death-to-life overrides in the same period. UN expert bodies were among those that expressed concern at the effect of elected judges on fair trial rights in the USA, especially in capital cases in the context of a politicized punishment.⁴²

In 1983, in a case in which the judge had overridden the jury's vote for life and imposed death, the Florida Supreme Court ruled that the "jury's function under the Florida death penalty statute is advisory only" and that "allowing the jury's recommendation to be binding would violate *Furman*".⁴³ The US Supreme Court took this case and upheld the sentencing scheme in 1984 in *Spaziano v. Florida*. While it noted that "Sentencing by the trial judge certainly is not required by *Furman*", it added that what "we do not accept is that, because juries may sentence, they constitutionally must do so." In 1989, in *Hildwin v. Florida*, the Court added:

"The Sixth Amendment does not require that the specific findings authorizing the imposition of the death sentence be made by a jury. Since the Court has held that the Amendment permits a judge to impose a death sentence when the jury recommends life imprisonment (*Spaziano*), it follows that the Amendment does not forbid the judge to make written findings authorizing the imposition of a death sentence when the jury unanimously makes such a recommendation. There is no Sixth Amendment right to jury sentencing, even where the sentence turns upon specific aggravating circumstances."

This is what the Supreme Court "expressly overrule[d]" in *Hurst v. Florida*. *Spaziano* and *Hildwin* were "wrong", the Court said, adding that "time and subsequent cases have washed away the[ir] logic". By then, more than 90 men and women had been put to death under Florida's death penalty law. The irrevocability of this punishment is difficult to ignore at such times. There can be no washing away past wrongs, whether it is the execution of the wrongfully convicted or of those sentenced under a law later deemed to have been wrongly decided.

Florida Supreme Court Justice Barbara Pariente has argued that "to avoid...arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing", the *Hurst* opinion "should be applied retroactively to all death sentences".⁴⁴ Her view has not prevailed. On 22 December 2016, the Court issued two decisions – *Mosley v. State* and *Asay v. State* – on the *Hurst* retroactivity question. It determined that the *Hurst* ruling did not apply to those prisoners whose death sentences were "final" before the *Ring v. Arizona* decision was handed down on 24 June 2002. John Mosley's death sentence – based on an 8-4 jury recommendation – became "final" in 2009 after the Florida Supreme Court upheld it on direct appeal. Thus the Court said seven years later, his case "falls into the category of defendants who should receive the benefit of *Hurst*," and granted him a new sentencing hearing.⁴⁵

In the other ruling issued on 22 December 2016, the Court ruled that Mark Asay should not so benefit. His two death sentences, based on 9-3 jury recommendations, were made final in

Information Center, 1996, available at <http://www.deathpenaltyinfo.org/killing-for-votes>

⁴² UN Doc.: CCPRC/79/Add. 50, Comments of the Human Rights Committee: USA, 7 April 1995, para. 23. UN Doc.: E/CN.4/1998/68/Add.3. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, on mission to the USA. 25 January 1998. Paras 69-75. Between 1999 and January 2016 there were no overrides from life to death and the practice is now banned under the post-*Hurst* law. Over 90 per cent of the life-to-death overrides did not survive the appeals process. Under Florida's law, judges could also override jury recommendations for death and impose a life sentence, and did so in at least 91 cases. Unlike the life-to-death overrides, this practice continued into the 21st century, with more than 25 instances between 2000 and 2016 (and at least one since the *Hurst* ruling). See Michael L. Radelet, Overriding jury sentencing recommendations in Florida capital cases: an update and possible half-requiem. *Michigan State Law Review*, Volume 2011: 793.

⁴³ *Spaziano v. State*, 1983.

⁴⁴ *Asay v. State*, 22 December 2016, Justice Pariente concurring in part, dissenting in part (emphasis in original).

⁴⁵ *Mosley v. State*, 22 December 2016. It found that the state had not proved the error was harmless.

1991. He was one of the 173 of the 386 prisoners on death row whose sentences were final before the *Ring* decision was issued.⁴⁶

Justice Pariente dissented from the Florida Supreme Court's decision not to apply *Hurst* retroactively to all death sentences, pointing out that "we must be extraordinarily vigilant in ensuring that the death penalty is not arbitrarily imposed". She concluded that Mark Asay should get a new sentencing. The majority, however, voted to dissolve his stay of execution.

Justice James Perry also dissented, arguing that the "line in the sand" drawn by the majority "creates an arbitrary application of law to two groups of similarly situated persons". The majority had decided "to arbitrarily draw a line between June 23 and June 24, 2002 – the day before and the day after *Ring* was decided", Justice Perry continued, but "does not offer a convincing rationale as to why 173 death sentenced persons should be treated differently than those whose sentences became final post-*Ring*." While the majority found that Mark Asay did not benefit from *Hurst*, Justice Perry pointed out that "under the present majority's decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after *Ring*, cannot receive the death penalty without the protections articulated in *Hurst*... The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated."

On 10 August 2017, the Florida Supreme Court issued another ruling, again relating to the *Hurst* retroactivity question, drawing more concern about arbitrariness from Justice Pariente (Justice Perry retired in December 2016). The decision, *Hitchcock v. Florida*, involved the case of James Hitchcock, whose death sentence became final in 2000, and whose lawyers brought a number of arguments, including that death sentences imposed after non-unanimous jury votes are unconstitutionally unreliable and that the Florida Supreme Court's retroactivity cut-off for application of *Hurst* was unconstitutionally arbitrary. In its August 2017 ruling, the Florida Supreme Court upheld James Hitchcock's death sentence, asserting that these arguments did "not compel departing from our precedent" and that "our decision in *Asay* forecloses relief". The ruling could affect dozens of death row inmates.

Twenty years old at the time of the 1976 crime, James Hitchcock is now 61. He has had four sentencing proceedings in the past four decades after appeal courts found errors in the previous three death sentences. At the fourth sentencing, the jury recommended death by 10 votes to two, and this is the sentence that has been allowed to stand. In her dissent, Justice Pariente wrote that the statute under which James Hitchcock was sentenced was unconstitutional, and to deny him relief "when other similarly situated defendants have been granted relief amounts to a denial of due process". She argued that "in addition to the arbitrariness of the death penalty", as described by two US Supreme Court Justices in 2015,⁴⁷ "this Court imposes another layer of arbitrariness in determining which defendants will receive relief".

In James Hitchcock's specific case, Justice Pariente pointed out that at each of his four capital sentencings, his lawyers had presented mitigating evidence of his "extreme mental and emotional disturbance, that he was under extreme duress or the domination of another person", and that "his capacity to appreciate the criminality of his conduct was substantially impaired" at the time of the crime. She noted that in 1982, two Florida Supreme Court Justices had argued that James Hitchcock's death sentence should be reduced to life imprisonment on the basis that it was disproportionate. Again, in 1990, after his second sentencing, two other Justices argued the same.

Another of the Justices, who concurred in August 2017 in denying James Hitchcock relief under *Hurst*, suggested that the Florida Supreme Court "need not tumble down the dizzying

⁴⁶ *Asay v. State*, 22 December 2016.

⁴⁷ *Glossip v. Gross*, Justice Breyer dissenting, joined by Justice Ginsburg.

rabbit hole of untenable line drawing” in relation to retroactivity. Instead, Justice Lewis argued that the Court “could simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of this issue, even before *Ring* arrived.” James Hitchcock’s lawyers had “not properly preserved” this constitutional challenge and so forfeited it. Justice Pariente suggested that while such an approach would be preferable to the blanket denial being pursued by the Court’s majority, it would still result in “the additional arbitrariness of defendants being granted a new penalty phase only if their lawyers had the foresight to raise an issue that was repeatedly determined to be meritless before *Ring*”.

With this in mind, when considering who has been subjected to an irrevocable punishment under a sentencing scheme now deemed incompatible with *Ring v. Arizona*, the cases of those individuals killed by Florida’s executioners after they had brought “*Ring* challenges” in the courts perhaps demand particular reflection.

One such individual was Linroy Bottoson, a man with a long history of serious mental disability, who was sentenced to death in 1981 on a 10-2 jury recommendation. An appeal filed by Linroy Bottoson’s lawyers a month after *Ring* argued that the ruling “squarely and indisputably outlaws the Florida sentencing procedure used to impose petitioner Bottoson’s death sentence”.⁵¹ The Florida Supreme Court denied the appeal. Linroy Bottoson was put to death on 9 December 2002.⁵² Another 37 Florida death row prisoners would be executed before the US Supreme Court ruled on 12 January 2016, as Linroy Bottoson’s lawyers had argued over 13 years earlier, that Florida’s sentencing scheme was incompatible with *Ring*.

Long before the *Hurst* ruling, it had been argued that Florida’s sentencing scheme violated not just the 2002 *Ring v. Arizona* decision but the US Supreme Court’s 1985 *Caldwell v. Mississippi* ruling, which held that: “It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe... that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”⁴⁸ In the Florida system now ruled incompatible with *Ring*, “both judge and jury could look to the other as the decision-maker responsible for making the hard choices – with neither ever doing so. When responsibility for a death sentence is divided, there exists the danger – identified in *Caldwell* as constitutionally impermissible – that no one bears the ultimate responsibility for this critical decision”.⁴⁹

The “*Caldwell* problem” is one more reason why all those sentenced to death under Florida’s statute found unconstitutional in *Hurst* should have their death sentences overturned.⁵⁰

⁴⁸ *Caldwell v. Mississippi*, US Supreme Court, 11 June 1985. The Florida Supreme Court ruled in 1988 that *Caldwell* did not render Florida’s capital sentencing scheme unconstitutional (*Combs v. State*).

⁴⁹ William J. Bowers et al, The decision maker matters: An empirical examination of the way the role of the judge and jury influence death penalty decision-making. 63 Wash and Lee L. Rev, December 2006. Prosecutor’s comments during individual trials have raised additional *Caldwell* concerns. At the 1994 murder trial of William Thomas, for example, the jury voted 11 to one for the death penalty. During jury selection, the prosecutor had emphasised that “the Judge in this case, Judge Wiggins, will decide what the final sentence will be... [I]t is the Judge who makes the final decision as to what the sentence will finally be”. Then in closing arguments at the sentencing phase, the prosecutor again told the jury: “The final decision is not made by you. It’s made by Judge Wiggins... the Judge will then take your recommendation and then he will decide what the sentence will finally be”. Later in the same argument, the prosecutor asserted that “the proper recommendation in this case is a death recommendation to the Judge who makes the final decision about what the sentence will be”. William Thomas remains on death row 20 years after he was first sent there.

⁵⁰ See, for example, Craig Trocino and 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).

⁵¹ *Bottoson v. Moore*, Petitioner’s opening brief. Florida Supreme Court, 26 July 2002.

⁵² As Linroy Bottoson’s execution approached, a mental health expert concluded that “This man cannot perceive any connection between any crime and the punishment that is scheduled. Because of his fixed psychotic delusions he has no current capacity to come to grips with his own conscience, with the crime, with mortality, with his sentence, or with reality. He understands himself to be locked in the middle of a battle between Jesus and Satan, a battle that he is certain, as one of God’s prophets, Jesus will win. Mr

When considering the case of Linroy Bottoson, another that may come to mind is that of William Middleton. A study of Florida's death penalty published in 1981 noted that when Middleton, a white man, was sentenced to death in late 1980 for the murder of an elderly black woman, "he became the first white offender in memory to enter Florida's death row for the crime of killing solely a black victim".⁵³ William Middleton's death sentence was overturned on the grounds of inadequate representation by his trial lawyer who failed to investigate or present evidence of Middleton's "childhood of brutal treatment and neglect, physical, sexual and drug abuse, a low IQ and mental illness", possibly schizophrenia.⁵⁴

Like William Middleton, at least three black prisoners executed in Florida since 1976 for killing black victims had histories of mental disability. One of them was Linroy Bottoson, who like William Middleton had a trial lawyer who failed him. At the beginning of the sentencing phase of his trial, his lawyer admitted to the judge that he felt incompetent to proceed further and said that he had no mitigation witnesses to present. The lawyer continued:

"if [Bottoson] were a man of means and... circumstances were not such that he was required to have a Court-appointed lawyer and the county paying his costs and fees, I could effectively get anyone from anywhere in the United States to come and speak in his behalf. Now, I can't and... it all boils down to economics."

Three Florida Supreme Court Justices argued that Linroy Bottoson's death sentence should be overturned because this lawyer had made "no meaningful preparation whatsoever" for the sentencing. He "made little effort to learn about Bottoson's psychiatric problems or other mitigating evidence relevant to the penalty phase."⁵⁵

Linroy Bottoson was prosecuted in Orange County, the same jurisdiction to which State Attorney Ayala was elected 35 years later and who, among other things, cited discrimination against the poor and on the basis of race as reasons for dropping pursuit of the death penalty.

In his dissent from the *Asay* decision, Justice Perry also drew attention to "Florida's troubled history in applying the death penalty in a discriminatory manner". He wrote that Mark Asay would be "the first white person executed for the murder of a black person in this State." This "sad statistic", he said, was a "reflection of the bitter reality that the death penalty is applied in a biased and discriminatory fashion, even today".⁵⁶

In an 11th hour twist, the Florida Supreme Court has admitted to wrongly describing, for years, the second of the two victims as a black man.⁵⁷ In a brief filed in February 2016, Mark Asay's

Bottoson believes that he will not be executed because humankind needs him."

⁵³ Hans Zeisel, Race bias in the administration of the death penalty: The Florida experience. 95 Harvard Law Review 457 1981-1982. Half a century earlier, in 1926, Britt Pringle was reported to have become the first white person to be sentenced to death in Florida for the murder of a black person. Convicted in Duval County of the murder of John Simmons, Britt Pringle was due to be executed in early November 1926 when he received a stay. Sarasota Herald Tribune, 30 October 1926. Britt Pringle was never executed, instead transferred to state hospital for the insane. Margaret Vandiver. Lethal punishment: Lynchings and legal executions in the South. Rutgers University Press, 2006, page 24.

⁵⁴ *Middleton v. Dugger*, US Court of Appeals for the 11th Circuit, 22 June 1988.

⁵⁵ *Bottoson v. Florida*, Florida Supreme Court, 8 January 1996, Kogan, J., concurring in part and dissenting in part.

⁵⁶ *Asay v. State*, Florida Supreme Court, 22 December 2016, Justice Perry dissenting. Prior to being appointed to the Florida Supreme Court in 2009, Justice Perry had been the first African American appointed to Eighteenth Judicial Circuit in Florida (he was appointed to that court in 2000).

⁵⁷ *Asay v. State*, 14 August 2017 ("We have previously described the victim born Robert McDowell as 'a black man dressed as a woman.' McDowell was known to friends and neighbors as Renee Torres. Torres was identified at trial by everyone who testified as white and Hispanic. Renee Torres née Robert McDowell may have been either white or mixed-race, Hispanic but was not a black man. We regret our previous error").

current lawyers – his first legal counsel for more than a decade – wrote, “Asay was convicted of two homicides – the shooting death of Robert Booker, a black male, and the shooting death of Robert McDowell, a white male... According to trial counsel, race was an ‘inescapable issue’ during the trial and the state focussed on the fact that the two victims were black. The racial motive advanced by the prosecution was developed mainly through an alleged jailhouse confession...”⁵⁸ The lawyers have raised the Florida Supreme Court’s error as a “matter of great significance that undercuts the State’s contention that Mr McDowell was murdered because he was black”.⁵⁹ At the time of writing, the issue was before the US Supreme Court.

In any event, with racial bias remaining a hallmark of the death penalty, this is a moment to look back at earlier eras and their links to the present day. With Florida’s rapid growth in modern times, and its reputation today as a retirement, business and tourist destination, it can be easy to forget Florida’s place in the USA’s history of racial violence and discrimination:

“Neither Florida’s distinctive early history under Spanish rule nor the tremendous demographic changes of recent decades should obscure the fact that in the nineteenth and much of the twentieth century Florida was culturally a part of the South. Florida was a slave state; it was the third state to join the Confederacy; it enacted and enforced racially discriminatory laws after the Civil War; Reconstruction in the state was long, contentious, and violent; Florida preserved the distinctively southern convict lease system longer than any other state except Alabama; Florida law and law enforcement officials imposed a rigid system of segregation; and the state experienced significant resistance to integration and civil rights.”⁶⁰

Florida led the southern states in lynching per capita – recording twice the rates in Mississippi, Georgia, and Louisiana, three times the rate in Alabama, and six times the rate in South Carolina.⁶¹ Florida’s law enforcement officers sometimes participated in lynching, and its governors at times condoned the practice. Several Florida lynchings had multiple victims. In Lake City in 1911, for example, six black men were taken from the jail and shot dead. Five years later in Alachua County, six blacks, four men and two women, were killed by a mob searching for a man suspected of killing the sheriff. In 1920 in Ocoee a black man was lynched for attempting to vote, and the mob then burned the African American section of the town. In 1923, Rosewood in Levy County was destroyed by a white mob. At least eight people were killed, and the town’s entire black population was driven out, never to return. In 1994, the Florida Senate voted for reparations for Rosewood’s surviving victims.⁶²

Around 90 per cent of lynching victims in Florida between 1882 and 1968 were black. Rape or attempted rape was given as the reason for the lynching in about 28 per cent of cases between 1889 and 1918. As lynching began to decrease in the 20th century, the decline was slow in Florida. It led the country in the number of lynchings in the 1930s. A case in Jackson County in 1934 drew particular national outrage and caused embarrassment to Florida officials.

⁵⁸ *Asay v. Florida*, Initial brief of appellant, In the Supreme Court of Florida, 15 February 2016.

⁵⁹ *Asay v. Florida*, Supplemental brief to petition for writ of cert. US Supreme Court, 16 August 2017.

⁶⁰ Margaret Vandiver. *Lethal punishment: Lynchings and legal executions in the South*. Rutgers University Press, 2006, page 22.

⁶¹ Michael Gannon, *Florida: A short history*, University Press of Florida, revised edition 2003. See also *Lynching in America: Confronting the legacy of racial terror*, EJI (see note 45 below) (This study found Mississippi, Florida, Arkansas, and Louisiana had the highest statewide rates of lynching in the USA. Counties with the highest rates of lynchings in America included Hernando, Lafayette, Taylor and Citrus in Florida. Polk County, Florida, was one of the counties with the largest numbers of lynchings.

⁶² Senate OKs \$2.1 million for Rosewood reparations. Sun Sentinel, April 1994, http://articles.sun-sentinel.com/1994-04-09/news/9404080701_1_rosewood-descendants-rosewood-bill-reparations; and Rosewood massacre a harrowing tale of racism and the road toward reparations, 3 January 2016, <http://www.theguardian.com/us-news/2016/jan/03/rosewood-florida-massacre-racial-violence-reparations>

I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance
Justice Thurgood Marshall, *Furman v. Georgia* 1972

“Lethal injection is FAR too good for this sort of filth. To hell with him. Hang him slowly and be done with him”

“Stick a needle in this pavement ape and put him down”

“Why can't we use him for target practice instead?”

“He would look good sitting in old sparky” [electric chair]

“Yet, another example of a useless nig nog, there are so many of these vile ‘human beings’, it's sickening!!! A spay and nuetering [sic] program needs to be created to begin eliminating these violent, pavement apes!! They have nothing to contribute to society!!”

“Time to bring back public executions. Today would be a great day to make him a windchime”

Readers' comments published on local Florida news website in January 2015 following its report that James Herard, an African American defendant, had been sentenced to death in Broward County for a murder committed when he was 19 years old.⁶⁵

The lynching of Claude Neal, an African American man suspected of the rape and murder of a white woman, had been announced in advance on radio and in the newspapers, and thousands of people gathered. He was tortured before being killed by six white men, and his corpse was mutilated by the mob. Postcards showing his body hanging from a tree on the Jackson County courthouse lawn were sold.⁶³ Lynching threatened to disrupt judicial proceedings in Florida until well into the middle of the 20th century. As late as 1949, a newspaper article in Orlando on a case in which four black men were accused of raping a white woman, commented “We'll wait and see what the law does, and if the law doesn't do it right, we'll do it.”⁶⁴

The 34 lynchings in Orange County in Florida between 1877 and 1950 put that county sixth of any in the country, according to a recent study by the Equal Justice Initiative (EJI). EJI has concluded among other things that:

“The decline of lynching in the studied states relied heavily on the increased use of capital punishment imposed by court order following an often accelerated trial. That the death penalty's roots are sunk deep in the legacy of lynching is evidenced by the fact that public executions to mollify the mob continued after the practice was legally banned.”⁶⁶

The death penalty was a part of Florida's punishment landscape from its early days. Twenty-three years before becoming a state in 1845, the Legislative Council of the Territory of Florida legislated to make murder, rape and arson capital crimes. For a century, 1822-1924, executions were carried out in the county of conviction, usually by hanging – from 1847 the

⁶³ Vandiver. Lethal punishment, *op. cit.*, page 26. Also The lynching of Claude Neal, Tampa Bay Times, 20 October 2011, <http://www.tampabay.com/features/humaninterest/spectacle-the-lynching-of-claude-neal/1197360>; and FBI closes book on Claude Neal's lynching without naming killers, Tampa Bay Times, 3 August 2014, <http://www.tampabay.com/features/humaninterest/fbi-closes-book-on-claude-neals-lynching-without-naming-killers/2191344>

⁶⁴ Vandiver. Lethal punishment, *op. cit.*, pages 25-27. See also, ‘We're truly sorry’: Fla. apologizes for racial injustice of 1949 ‘Groveland Four’ rape case, Washington Post, 19 April 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/were-truly-sorry-after-68-years-florida-apologizes-for-racist-history-of-groveland-four/?utm_term=.27bbfd325a88. Bill analysis available at <http://www.flsenate.gov/Session/Bill/2017/920/Analyses/2017s00920.pre.ju.PDF>

⁶⁵ James Herard sentenced to death for 2008 fatal shooting, 23 January 2015, <http://www.local10.com/news/james-herard-sentenced-to-death-for-2008-fatal-shooting/30886948>

⁶⁶ For further information visit <https://eji.org/> and specifically <https://lynchinginamerica.eji.org/report/>

law required that these hangings be public, but in 1872 this was amended so that they were held inside jails. In 1923, the legislature changed the method of execution to electrocution, requiring that all executions be conducted in a permanent execution chamber in the state prison. The electric chair in which more than 200 prisoners would be killed between 1924 and 1998 was made by inmates in 1923. A replacement chair made by prison personnel in 1998 was installed at Florida State Prison in 1999, shortly before the legislature passed a bill in January 2000 to make lethal injection the primary method of execution after a series of “botched” executions in the electric chair.⁶⁷

Four of Florida’s first executions after becoming a state in 1845 were of white men who had aided runaway slaves, but after that executions took on a familiar pattern. About 70 per cent of the more than 300 people executed in Florida between 1845 and 1964 were black. Between 1937 and 1964, there were 3,141 whites and 7,837 blacks who were victims of murder in the state. During this period, 0.43 per cent of black victim murders resulted in execution, compared to 3.56 percent for white victim murders. Between 1924 and 1964, 43 men were executed for rape; 41 of them were black. In every case in which the race of the rape victim has been identified, the victim was white.⁶⁸

A study of Marion County in central Florida (the county for which Brad King has been the elected State Attorney since January 1989) revealed that it was the location for 19 lynchings and four judicial executions in the period 1885 to 1930. All those killed were African American men. In the 1920s Marion County was trying to attract business, tourists and new residents, and lynching undermined such attempts. Marion County was not alone:

“The counties and cities of Florida vied with each other to do everything possible to attract the attention of potential tourists, residents, and investors, presenting a view of Florida as a paradise with limitless potential for enjoyment and profit. Editors of major papers began to criticize lynching, not only because it brought bad publicity, but also because, in the words of the Tampa Daily Times, ‘the mob is wrong, shocking to the sense of justice which men and women should maintain’. The old values of white supremacy and communal punishment had not been abandoned, but newer values were beginning to compete with them. Lynching had become an embarrassment and an obstacle to progress; for some whites, it also raised disturbing issues of justice and fairness.”⁶⁹

Whether the shift away from mob murder to judicial killing was driven more by an economic

“We can’t change our past, but we can acknowledge it and better shape our future... [W]e should eliminate the death penalty and expressly identify our history of lynching as a basis for its abolition”
Bryan Stevenson, Equal Justice Initiative

imperative than out of concern for the legal rights of blacks, the history of Marion County not only provides an example of “a jurisdiction where legal executions replaced lynching”, but also provides food for thought when considering the increasingly isolated position of Florida and the USA in relation to the death penalty. Today, Florida is promoted for its modernity and its part in the world, including its

international trade (“40% of all US exports to Latin and South America pass through Florida”), tourism (“Florida is the top travel destination in the world”), and its health, software, and space technology industries.⁷⁰ At the same time, it promotes a punishment which in the 21st century

⁶⁷ Florida Department of Corrections, Death Row Fact Sheet, <http://www.dc.state.fl.us/oth/deathrow/>

⁶⁸ Margaret Vandiver. Lethal punishment, *op. cit.*, pages 23-24.

⁶⁹ *Ibid.* 76

⁷⁰ Facts about Florida, <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95>. On tourism,

sets it and the USA apart from much of the world.

Race remains the elephant in the room. EJI's founder, Bryan Stevenson, has recently written:

“More than eight in ten American lynchings between 1889 and 1918 occurred in the South, and more than eight in ten of the more than 1,400 legal executions carried out in this country since 1976 have been in the South, where the legacy of the nation’s embrace of slavery lingers. Today death sentences are disproportionately meted out to African-Americans accused of crimes against white victims; efforts to combat racial bias and create federal protection against it in death penalty cases remain thwarted by the familiar rhetoric of states’ rights. Regional data demonstrate that the modern American death penalty has its origins in racial terror and is, in the words of Bright, the legal scholar, ‘a direct descendant of lynching.’

In the face of this national ignominy, there is still an astonishing failure to acknowledge, discuss, or address the history of lynching... We can’t change our past, but we can acknowledge it and better shape our future... The crucial question concerning capital punishment is not whether people deserve to die for the crimes they commit but rather whether we deserve to kill. Given the racial disparities that still exist in this country, we should eliminate the death penalty and expressly identify our history of lynching as a basis for its abolition.”⁷¹

Florida is about to resume executions at a time when the number of executions carried out and the number of death sentences passed each year are at historic lows for the post-1976 era of the death penalty in the USA. As such there are states in the USA from which Florida should learn by example. In 2012, for instance, the legislature in Connecticut passed an abolitionist bill, banning the death penalty in future cases. Governor Dannel Malloy pledged that he would sign the bill into law “when it gets to my desk”, adding that his state would be joining “16 other states and almost every other industrialized nation in moving toward what I believe is better public policy”. He made good his pledge on 25 April 2012. In August 2015, the Supreme Court of Connecticut found the death penalty violated that state’s constitution, removing existing death sentences and fully ending the punishment in that state.

The Connecticut Supreme Court said that while the issue of race was not a claim that had been raised and briefed in the case before it, and was not the basis for its ruling, “We cannot end our state’s nearly 400 year struggle with the macabre muck of capital punishment litigation without speaking to the persistent allegations of racial and ethnic discrimination that have permeated the breadth of this state’s experience with capital charging and sentencing decisions....” The Court continued:

“It may be that every black man ever executed for raping a white woman and every Native American ever executed for murdering a white man in Connecticut was guilty as charged, and received his due process and his proper punishment under the laws then in effect. But white men in Connecticut have also killed Native Americans over the past 400 years, and raped black women. None has ever hanged for it. To the extent that a criminal justice system operates such that only racial minorities are subject to execution for their participation in interracial crimes, the fact that those executed are guilty as charged is of little succor. To the extent that such biases, however subconscious, invariably continue to influence who is charged with and sentenced to the ultimate punishment, the death

see Gov Scott: Florida sets another tourism record, 16 February 2017, <http://www.flgov.com/2017/02/16/gov-scott-florida-sets-another-tourism-record-2/> See also: Gov. Scott: Florida Jumps Texas to Become 2nd in Airline Passengers, 7 July 2017, <http://www.flgov.com/2017/07/07/gov-scott-florida-jumps-texas-to-become-2nd-in-airline-passengers/>

⁷¹ Bryan Stevenson. A presumption of Guilt. New York Review of Books, 13 July 2017, <http://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/>

penalty likely would be hard put to survive constitutional scrutiny.”⁷²

At least five African American men have been executed in Florida since 1976 who were tried in front of all-white juries, four of them for crimes involving white victims.⁷³ Amos King, black, was executed on 26 February 2003 for the murder of a white woman. He maintained his innocence to the end. He was convicted by an all-white jury. That conviction survived the appeals process, but Amos King received a new sentencing hearing because his lawyer’s performance at the original trial had been so poor. Amos King was re-sentenced to death by a jury of 11 whites and one black. The prosecutor had dismissed at least two prospective African American jurors during jury selection. One, a police clerk, was rejected because “she is a young black female [and] the defendant is a young black male”, an apparent admission by the prosecutor that the prospective juror was struck on the basis of race.

Eighty-six per cent of the 44 prisoners executed in Florida’s electric chair between 1979 and 1999, and 85 per cent of those executed by lethal injection between 2000 and 2016, had been convicted of killing white victims. Since 1979, 20 African Americans have been executed for killing whites (11 in the electric chair, nine by lethal injection). No white person has been executed in Florida for killing an African American. The fact that this is set to change on 24 August 2017 cannot alter the history and legacy of racially motivated killing in Florida.

Speaking in July 2013 about the case of Trayvon Martin, an unarmed black teenager shot dead on a street near his home in Florida, President Obama said “there is a history of racial disparities in the application of our criminal laws – everything from the death penalty to enforcement of our drug laws.”⁷⁴ Two years later, the President returned to the subject, referring to the “legacy of hundreds of years of slavery and segregation, and structural inequalities that compounded over generations”, with the criminal justice system as “one aspect of American life that remains particularly skewed by race and by wealth, a source of inequity that has ripple effects on families and on communities and ultimately on our nation”.⁷⁵

“We cannot pretend that we have completely escaped the grip of a historical legacy spanning centuries”, wrote US Supreme Court Justice William Brennan faced with evidence of systemic racial discrimination in capital justice in Florida’s neighbouring state of Georgia; “We remain imprisoned by the past as long as we deny its influence in the present”.⁷⁶

THE MACHINERY OF DEATH CHURNS AGAIN

The witnesses, standing a few feet away, will behold [the condemned prisoner], no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction... The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die

Justice Harry Blackmun, US Supreme Court, 22 February 1994⁷⁷

The last execution in Florida was on 7 January 2016, just five days before the Court issued its *Hurst* ruling. Eighteen months later, the wheels of capital justice are churning again in Florida.

⁷² *State v. Santiago*, Supreme Court of Connecticut, 25 August 2015.

⁷³ James Adams (executed 1984), Willie Darden (1988), John Mills (1996), Linroy Bottoson (2002), Amos King (2003). The victim in the Bottoson case was black.

⁷⁴ <https://obamawhitehouse.archives.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>

⁷⁵ Remarks by the President at the NAACP Conference, 14 July 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>

⁷⁶ *McCleskey v. Kemp*, US Supreme Court, 1987, Justice Brennan dissenting.

⁷⁷ *Callins v. Collins*, Justice Blackmun dissenting from denial of certiorari.

Executions are set to resume with the lethal injection of Mark Asay on 24 August 2017, Florida's first under a new lethal injection protocol, and numerous capital proceedings are now underway or pending against individuals facing death penalty trials for the first time or those who have been granted new sentencing hearings based on the *Hurst* ruling.

In his dissent from the December 2016 *Asay* decision, Justice Perry wrote that "as my retirement approaches, I feel compelled to follow other justices who, in the twilight of their judicial careers, determined to no longer 'tinker with the machinery of death'."⁷⁸ Here Justice Perry was using the words of US Supreme Court Justice Harry Blackmun who in 1994 announced his conclusion that the death penalty "experiment" endorsed by the Court in 1976 had failed: "The basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative". Under US constitutional law, the death penalty is supposedly reserved for the most serious crimes and the most culpable of offenders.⁷⁹

Dane Abdool, a national of Trinidad, was sentenced to death in Orange County, Florida in 2008 for a crime committed when he was 19 years old. Experts assessed his mental age as varying between 11 and 14 years. At the trial, the defence and prosecution experts agreed that he had a learning disability. A forensic psychologist testified that Dane Abdool had "very low" intellectual functioning, was immature, and developmentally delayed. She concluded that he had an impulse control disorder, meaning he had a tendency to act before thinking, with obsessive-compulsive features, and a delusional disorder. The judge found that Dane Abdool's immaturity did not allow him "to think through the adult situation in which he found himself [at the time of the crime] and arrive at a reasonable conclusion". Had he been more mature at the time of the events which led to the murder, "he likely would have dealt with the adversity that he believe he was under in a different manner". The judge gave his young age "moderate" weight in mitigation. He gave great weight to the jury's 10-2 vote for execution. It was that 10-2 vote which has now fallen foul of *Hurst*, and led to him being granted a new sentencing hearing by the Florida Supreme Court on 6 April 2017.⁸⁰ His case was made the subject of an executive order signed by Governor Scott on that same day assigning State Attorney King to the prosecution at the new sentencing because leaving State Attorney Ayala on it would take the death penalty off the table.⁸¹

Prisoners who have been executed over the years after being prosecuted in Orange County include individuals with who had serious mental disabilities:

- Pedro Medina, executed in 1997, had a long history of serious mental disability. He was released from a psychiatric hospital in Cuba immediately before leaving that country and coming to the USA in 1980. The murder for which he was sentenced to death occurred two years later. He was diagnosed with various mental disabilities, including paranoid schizophrenic or major depressive disorder with psychosis. During post-conviction proceedings, a judge wrote: "the testimony of the two psychologists and one psychiatrist... showed in essence that defendant was psychotic; he had organic brain damage; he was diagnosed to be suffering from paranoid schizophrenia or major depressive disorder, recurrent, with psychosis, of long standing..."⁸²
- Thomas Provenzano, executed in 2000, had been diagnosed with paranoid schizophrenia before the crime for which he was sentenced to die, the murder of a bailiff in Orange County Courthouse, Orlando, in January 1984. The shooting left two other bailiffs paralyzed, one of whom died in 1991. At the trial, defence and prosecution experts agreed that Provenzano had serious mental disability, and that

⁷⁸ *Asay v. State*, Justice Perry dissenting. Justice Perry retired on 30 December 2016.

⁷⁹ See *Kansas v. Marsh*, 26 June 2006, Justice Souter dissenting.

⁸⁰ *Abdool v. Florida*, 6 April 2017.

⁸¹ State of Florida, Office of the Governor, Executive Order Number 17/98, 6 April 2017, http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-98.pdf

⁸² Quoted in *Medina v. State*, Florida Supreme Court, 21 November 1990.

his paranoid fears included the fixed delusional belief that he was being persecuted by the legal system and that these fears had contributed to his crime. The jury rejected his insanity defence and voted seven to five for the death penalty. Thomas Provenzano's mental disability worsened during his 15 years on death row. He was reported to engage in behaviour such as stuffing rags into his mouth to keep out the demons which he believed were attempting to enter his body.

Dropping pursuit of the death penalty removes the possibility of such injustices, and violations of international law and safeguards relating to this punishment, and also removes the possibility of the state cementing error through the irrevocable act of execution. As noted above, among State Attorney Ayala's given reasons for her decision to drop pursuit of the death penalty were that it is applied in racially discriminatory fashion; discriminates against the poor; and is imposed on innocent people too often. Since State Attorney Ayala's announcement in March 2017, the Florida Supreme Court has found yet another wrongful conviction in a capital case. On 11 May 2017 it ruled that the "purely circumstantial" case against Ralph Wright was insufficient to sustain his murder convictions, let alone the death sentences handed down against him at his 2014 Pinellas County trial. It ordered his acquittal. This brought to 27 the number of death row exonerations in Florida since 1973 to more than any other state in the USA, seven more than occurred in the state ranked second on this list, Illinois, whose governor responded with a moratorium on executions, followed by abolition of the death penalty in that state.

No matter how efficiently the capital justice system can be made to run, no matter who has life-or-death decision-making power at any stage of the process, and no matter what method is used to end the life of the prisoner, there is no escaping the death penalty's cruel, inhuman and degrading nature.

State Attorney Ayala's decision against the death penalty would protect defendants from the well-proven vagaries of the capital justice system – including its inconsistent application and its discriminatory aspects. While non-capital justice may suffer from the same problems, the death penalty is unique in both its cruelty and its irrevocability. As the US Supreme Court has pointed out, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."⁸³ In an increasingly abolitionist world, Governor Scott's series of executive orders responding to State Attorney Ayala's move cannot in any sense be said to prioritize human rights principles.

In his inaugural address in January 2011, Governor Scott urged his state to commit "to make Florida the premier location for innovation. Let's encourage the modern tinkerers... The out-of-the box thinkers... Let's tell the world 'If you can dream it, it's easy to make it happen in Florida'."⁸⁴ Since then, he has been one of those "tinkering with the machinery of death", signing the TJA into law, signing the post-*Hurst* sentencing statute into law, signing more death warrants in his first term than any other Florida governor in the modern era, removing a prosecutor who has acted against the death penalty for evidence-based reasons, and set a date for a resumption of executions after 18 months without them.

No matter how efficiently the capital justice system can be made to run, no matter who has life-or-death decision-making power at any stage of the process, and no matter what method is used to end the life of the prisoner, there is no escaping the death penalty's cruel, inhuman and degrading nature. New thinking in Florida about the death penalty is long overdue.

⁸³ *Gregg v. Georgia*, 1976.

⁸⁴ 4 January 2011, <http://www.flgov.com/florida-governor-rick-scott-inaugural-address-2/>

AFTERWORD: SOME NUMBERS

From 2000 to 2012, only one in five Florida jury death sentences were handed down on unanimous jury recommendations.⁸⁵ This phenomenon continued after that. Only about a quarter of the prisoners on

FLORIDA AND THE DEATH PENALTY

- **1st state to reinstate the death penalty after US Supreme Court invalidated capital laws in *Furman v. Georgia* (1972)**
- **1st state to conduct a ‘non-consensual’ execution after US Supreme Court approved new laws in *Gregg v. Georgia* (1979)⁸⁶**
- **4th most executions 1976-2016, after Texas, Virginia and Oklahoma**
- **3rd most death sentences 1973-2016, after California and Texas**
- **At the time of *Hurst v. Florida* in 2016, had 2nd largest death row, after California (which has not executed since 2006)**
- **Highest number of wrongful convictions discovered in capital cases, 1973-2017 (18 per cent of national total)**

Florida’s death row in June 2015 who had been sentenced to death in the previous three years were sent there after unanimous jury votes for the death penalty. The law in Florida now requires juror unanimity.

On 14 August 2017, Florida Supreme Court Barbara Pariente dissented from her colleagues’ refusal to block the impending execution of Mark Asay. Noting that he would become the first prisoner put to death in Florida since the *Hurst* ruling, she argued that “the jury’s 9-3 recommendations for death render Asay’s sentences of death constitutionally unreliable” under the Florida and US Constitutions. In addition, she argued that Mark Asay has been denied access to documents relating to Florida’s revised lethal injection protocol; “In its rush to execute Asay”, she said, “the State has jeopardized Asay’s constitutional rights and treated him as the proverbial guinea pig of its newest lethal injection protocol”.

Hurst v. Florida was handed down on 12 January 2016. Before that, between 1972 and the end of 2015, one in eight death sentences in the USA was passed in Florida.⁸⁷ From 1982 to 1999, the peak years of the death penalty, an average of 270 death sentences were passed in the USA per year. During this period, Florida was passing an average of 33 death sentences per annum, about 12 per cent of the national total. Between 2010 and the end of 2015, Florida accounted for 19 per cent of death sentences in the USA.

In relation to executions, too, Florida was bucking a national trend prior to the *Hurst* ruling. In 2013, it executed more people than it had in any year since 1984, in 2014 it equalled its 1984 total, and today lies behind only Texas, Virginia and Oklahoma in the number of executions carried out since 1976. In the five years before *Hurst*, Florida conducted a greater number of executions than any state except Texas.⁸⁸

The long-term impact of the *Hurst* ruling on the number of death sentences and executions in Florida remains to be seen. Amnesty International will be among those campaigning for the state to give up the death penalty altogether. A moratorium on executions pending abolition of the death penalty is the way to go, as repeated resolutions at the UN General Assembly have urged.

⁸⁵ Data compiled by the Florida Supreme Court Clerk’s Office and published in Florida Senate Bill Analysis and Fiscal Impact Statement of SB 644, Sentencing in capital felonies, 9 March 2015.

⁸⁶ The first “consensual” execution was in Utah in January 1977, of Gary Gilmore, who had refused to appeal his death sentence. After three more executions of so-called “volunteers” (in Nevada, Virginia and Indiana), Texas carried out the USA’s second “non-consensual” execution on 7 December 1982.

⁸⁷ Between 1973 and 2013, Texas handed down 1,075 death sentences, Florida 1,040, and California 1,013. Next was North Carolina with 536. Bureau of Justice Statistics, US Department of Justice, Capital Punishment, 2013 – statistical tables, Table 17, <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>

⁸⁸ States conducting 10 or more executions in the five years from 2011 to the end of 2015 were Texas (67), Florida (22), Missouri (19), Oklahoma (18), Arizona (13), Georgia (12) and Ohio (12).

APPENDIX: THE 20 CURRENT STATE ATTORNEYS IN FLORIDA ⁸⁹			
 1 st	 2 nd	 3 rd	 4 th
 5 th	 6 th	 7 th	 8 th
 9 th	 10 th	 11 th	 12 th
 13 th	 14 th	 15 th	 16 th
 17 th	 18 th	 19 th	 20 th

⁸⁹ The photos are taken from each State Attorney's official website (last visited 19 July 2017). Links to each site are available at <http://www.stateoflorida.com/attorneys.aspx>. The only site that was not carrying such a photo was the Ninth Judicial Circuit. That photo was obtained elsewhere (21 July 2017).