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Stare Decisis on Death Row: How the Florida Supreme Court Has Disregarded Stare Decisis Since 2020

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Table of Contents

1. Alanis Alvarez, J.D. candidate, Florida International University College of Law, 2023. The author would like to thank Professor Hannah Gorman for her guidance throughout this process and the Florida A & M Law Review for their contributions. A special thank you to my parents, Idorys Calvo and Jose Alvarez, for always believing in me; and to my family and friends for their unconditional love, support, and encouragement.

Introduction

Stare Decisis is an ancient doctrine that guides courts to defer to established precedents for issues already decided by prior courts instead of looking at issues anew.[2] This doctrine helps establish stability and reliability in the law.[3] It bolsters the judicial system's integrity as it allows people to rely on past decisions and confidence that their cases will be decided within the bounds of the law.[4]

In 2020, with the election of Florida governor Ron DeSantis and the mandatory retirement of three Florida Supreme Court Justices, the composition of the Florida Supreme Court changed drastically.[5] Governor DeSantis appointed several justices, making this Court one of the most conservative courts in the nation.[6] Due to this new court composition, the court has made drastic changes to long-standing precedent in Florida's death penalty law within a few months, disregarding the doctrine of *stare decisis* and the importance of certainty in the law.[7] These changes include: (1) opening the door to a possible change in the requirement of unanimous jury decisions in death penalty cases[8], (2) abandoning the heightened scrutiny applied to appeals for criminal convictions based on circumstantial evidence alone[9], (3) reversing the retroactive application of the revised scheme to determine intellectual disability[10], and (4) eliminating the required mandatory review of death sentences for proportionality on direct appeal[11]. With these decisions, the court has destroyed *stare decisis* in Florida in the span of ten months, bringing to question the reliability and certainty necessary for law as an institution.

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2. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 789–90 (2012).

3. State v. Sturdivant, 94 So. 3d 434, 440 (Fla. 2012).

4. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647 (1999); Robert Barnhart, *Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 Notre Dame L. Rev. 1911, 1922–25 (2005).

5. Noreen Marcus, *Conservatives Note That Ron DeSantis Has Turned Florida into 1 of the Most Conservative Courts in America*, U.S. News (Sept. 8, 2020, 12:41 PM), https://www.usnews.com/news/best-states/articles/2020-09-08/conservatives-note-that-ron-desantis-has-turned-florida-into-the-most-conservative-court-in-america.

6. *Judges Appointed by Ron DeSantis*, Ballotpedia, https://ballotpedia.org/Judges_appointed_by_Ron_DeSantis (last visited Aug. 15, 2022); Marcus, *supra* note 5.

7. Steve Contorno, *DeSantis Has the Dream Supreme Court Republicans Have Always Wanted*, Tampa Bay Times (May 30, 2020), https://www.tampabay.com/florida-politics/buzz/2020/05/30/desantis-has-the-dream-supreme-court-republicans-have-always-wanted/.

8. *See generally* State v. Poole, 292 So. 3d 694 (Fla. 2020).

9. *See generally* Bush v. State, 259 So. 3d 179 (Fla. 2020).

10. *See generally* Phillips v. State, 299 So. 3d 1013 (Fla. 2020).

11. *See generally* Lawrence v. State, 308 So. 3d 544 (Fla. 2020).

Ultimately, the Florida Supreme Court should not have strayed from binding precedent and made such drastic changes to an especially critical area of the law. Death Penalty law is one of the most impactful areas of the law because lives are at stake. The death penalty is one of the most controversial and dividing topics in modern society. It affects the lives of the individuals who face the death penalty and their families, friends, and the general public. As many courts have said before: "Death is different."[12] The death penalty is unique because of its finality and its complete rejection of any potential rehabilitation.[13] For that reason, the Eighth Amendment forces states to impose elaborate sentencing procedures for capital cases to ensure that the death penalty is not imposed in a cruel and unusual way.[14] Thus, these recent decisions bring several consequences to the forefront. These changes significantly affect where Florida stands on the death penalty compared to other states and have created tension between the court and the Florida Legislature.[15] Also, these decisions will increase the risk that death sentences are disproportionately imposed on vulnerable defendants and prevent those on death row from appealing their unjust convictions based on the previous intellectual disability scheme.[16] Moreover, people now view those on the court as judicial activists instead of neutral judiciary officers.[17] This situation brings into question the future of the court, which could affect the recent decisions of this current court and the uncertainty of the law itself.[18] Several other systems could prevent the Florida Supreme Court from being politicized, such as changing the way that the Judicial Nominating Committees are set up, allowing Floridians to elect the Florida Supreme Justices directly, or giving the Florida Supreme Court Justices life-tenure.

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12. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 605–06, 616 (2002); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Asay v. State, 210 So. 3d 1, 18 (Fla. 2016).

13. *Fitzpatrick*, 527 So. 2d at 811.

14. *Ring*, 536 U.S. at 606.

15. Emily L. Mahoney, *Top Florida Lawmakers Say They Won't Change Death Penalty Law, but 'Chaos' Remains*, TAMPA BAY TIMES (Jan. 31, 2020), https://www.tampabay.com/florida-politics/buzz/2020/01/30/top-florida-lawmakers-say-they-wont-change-death-penalty-law-but-chaos-remains/; *Florida Death Penalty Fact Sheet*, FLORIDIANS FOR ALTERNATIVES TO THE DEATH PENALTY, https://www.fadp.org/florida-death-penalty-fact-sheet/ (last visited Aug. 15, 2022).

16. State v. Poole, 292 So. 3d 694 (Fla. 2020).

17. Jordan Smith, *The Florida Supreme Court is Radically Reshaping Death Penalty Law*, THE INTERCEPT (Mar. 8, 2022, 7:00 AM), https://theintercept.com/2020/12/30/florida-supreme-court-death-penalty-law/.

18. *See Florida Supreme Court Justices*, FLORIDA SUPREME COURT, https://www.floridasupremecourt.org/Justices (last visited Aug. 15, 2022).

This comment will analyze how the Florida Supreme Court has disregarded the doctrine of *Stare Decisis* throughout 2020 and the consequences of the four significant changes to Florida's death penalty law. Part II discusses how the doctrine of stare decisis is defined and its origins. Part III addresses the need for certainty and reliability of the law for its survival as an institution. Part IV discusses how the court's new composition has led the court to overturn precedent in death penalty law. Part V delves into the four major changes that the Florida Supreme Court has made relating to the death penalty from January 2020 to October 2020 in chronological order. Part VI presents the recommendation that the Florida Supreme Court should not have made all of these drastic changes to the law because of the consequences on Florida as a state, on defendants on death row, on defendants that could face the death penalty, and on how citizens will now view the court. Part VII addresses other potential changes we can expect in Florida's death penalty law and the possibility that the court's composition could change in the future. Part VIII presents possible solutions to this dilemma by looking at this issue through different systems that may prevent the politicization of the court. Lastly, Part XI concludes with a summary of all discussed in this comment.

I. What is Stare Decisis & Its Origins

As the United States Supreme Court has described, stare decisis is the concept that "today's Court should stand by yesterday's decisions."[19] This idea of standing by a previous court's decisions is a foundational building block of the rule of law dating back centuries.[20] The doctrine of stare decisis is the practice of a court deferring to an established precedent when looking at an issue that it has addressed before, instead of considering the issue anew.[21] In most matters it is more important for "an applicable rule of law to be settled than it be settled right."[22] This doctrine ensures that two cases with similar facts and legal questions will be treated the same. Ultimately, stare decisis is a judicial policy that promotes respect for past court decisions, in-

19. Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015).
20. *Id.*
21. Mead, *supra* note 2, at 789–90.
22. *Id.* at 792.

cluding a court's own decisions, even if made by a different set of judges or justices.[23]

The doctrine of stare decisis has been developed for a long time worldwide in common law legal systems and in Anglo-American countries such as the United States, England, and Canada.[24] Because this doctrine is commonly followed in both the United States and England, it is very likely that the concept of stare decisis first came from the English Common Law through Edward Coke, who explained and reconciled conflicting decisions and created reports of the ancient law established during the time of the Year Books to show that old principles could be applied in modern times.[25]

Courts in the United States have relied on some form of stare decisis since the nation's founding, even if it was not established as a formal doctrine yet.[26] Likely established by the mid-eighteenth and nineteenth centuries, the development of stare decisis represents a major portion of the American nation-building experience and serves as a significant transformational change in United States legal history.[27] It has been theorized that judges fostered the doctrine of stare decisis to increase their policy-making power, legitimize the judiciary, and promote the idea that judges were neutral officers who only made legal considerations instead of political evaluations, strengthening the judiciary's presence in America's legal system.[28] Overall, there is some debate as to when exactly stare decisis became a doctrine in the United States.[29] Some scholars argue that stare decisis was firmly established when the American Revolution began, being honored by the nation's founding fathers, and enforced in every state in the Union. Yet, some historians contend that it was not until the late nineteenth century

23. Robert Noonan, *Stare Decisis, Overruling, and Judicial Law-Making: The Paradox of the JC Case*, 57 IRISH JURIST 119, 122 (2017).

24. F.R. Aumann, *Judicial Law Making and* stare decisis, 21 KY. L.J. 156, 161–62 (1933); *Primary Sources of Law: Canadian Case Law*, BORA LASKIN LAW LIBRARY, https://library.law.utoronto.ca/step-2-primary-sources-law-canadian-case-law-0 (last visited Aug. 15, 2022).

25. George T. Evans, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 23 DENV. L. REV. 32, 32—34 (1946); *Stare Decisis*, CFI, https://corporatefinanceinstitute.com/resources/knowledge/other/stare-decisis/ (last visited Aug. 15, 2022).

26. Mead, *supra* note 2, at 792.

27. Timothy R. Johnson, James F. Spriggs II, & Paul J. Wahlbeck, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, LAW EXPLORER (Nov. 9, 2015), https://lawexplores.com/the-origin-and-development-of-stare-decisis-at-the-u-s-supreme-court/.

28. *Id.*

29. *Id.*

that this doctrine was developed, arguing there was no set doctrine of stare decisis in America before 1850.[30]

There are two primary forms of stare decisis: horizontal stare decisis and vertical stare decisis.[31] Horizontal stare decisis is the practice of a court deferring to its own prior decisions, adopting the same legal precedents from similar cases.[32] Conversely, vertical stare decisis is when a lower court follows the decisions and opinions of higher courts with superior jurisdiction, such as the United States Supreme Court or a state's highest court.[33] It is important to note that horizontal stare decisis is different from comity, which is where a court adheres to the decision of another court with equal jurisdiction.[34]

This comment will only be addressing horizontal stare decisis, specifically from the point of view of the Florida Supreme Court. The Florida Supreme Court has explained that the doctrine of stare decisis directs the court to follow precedents "unless there has been a significant change in circumstances under the adoption of the legal rule, or an error in legal analysis."[35] Although the court did note that adherence to precedent does provide stability to the law and society, it still highlighted that the doctrine must yield when a recognized rule of law shows to be unworkable in practice.[36]

II. Certainty & Reliability of the Law

Generally, the doctrine of stare decisis promotes several benefits to the law. The United States Supreme Court identified numerous advantages to the consistency that stare decisis produces, including: (1) efficiency, (2) reliability, (3) fairness, (4) predictability, and (5) the integrity of the judicial process.[37] First, commitment to established precedents "provides stability to the law and to the society governed by that law."[38] Inconsistency in applying the law would be unfair as it would violate a fundamental principle in the American legal system that similar litigants will be treated the same.[39] This doctrine bolsters the integrity of the judicial process and system because there is some

30. *Id.*
31. Mead, *supra* note 2, at 790.
32. *Id.*
33. *Id.* at 788, 790.
34. *Id.* at 790.
35. State v. Sturdivant, 94 So. 3d 434, 440 (Fla. 2012).
36. *Id.*
37. Mead, *supra* note 2, at 792.
38. Hohn v. United States, 524 U.S. 236, 251 (1998); *Sturdivant*, 94 So. 3d at 440.
39. Mead, *supra* note 2, at 793.

certainty that two factually similar cases will be treated the same as those cases decided in the past regardless of the individuals presiding over them.[40] It shows the public that judges are neutral officers of the court, not individuals with their own agendas. Further, the public would lose confidence in the legal system if judges were left to their full discretion to decide cases while disregarding legal precedent.[41]

Relying on precedents as a form of decision-making is the preferred method because it promotes the foreseeable, equitable, and consistent development of legal principles, cultivates trust in judicial decisions, and contributes to the integrity of the judicial process as a whole.[42] Moreover, although the application of stare decisis is not a mandatory command, it reduces the incentive for challenging legal precedents because judges are very resistant to overturn such established rules of law, saving both the courts and litigants from the expensive and time-consuming undertaking that is endless re-litigation.[43] Because this doctrine is such a large part of the American legal system, attorneys are also able to advise their clients with some certainty as to the position or defense they should take for a case, and whether to even take a certain case to court.[44]

Although stare decisis does provide stability in the law and society, there is a disadvantage that must be addressed: the doctrine occasionally permits erroneous decisions to continue influencing the law and encumbers the legal system's ability to quickly adapt to the changes in society.[45] Blind adherence of this principle could affect the accuracy of judicial decisions, which should be applying the correct law.[46] Thus, because there are some competing policies at issue, there has to be some sort of balancing to determine whether a prior decision should be followed.[47] Yet, to maintain all the benefits that come from this doctrine, courts should view overturning precedent with caution, only doing so when a prior decision is clearly erroneous and there is a special justification to depart from an established law.[48] Ultimately, a

40. *See* Lee, *supra* note 4, at 653.

41. Mead, *supra* note 2, at 793.

42. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014).

43. Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015).

44. *16 Advantages and Disadvantages of Judicial Precedent*, ConnectUs (May 4, 2019), https://connectusfund.org/6-advantages-and-disadvantages-of-judicial-precedent.

45. *Kimble*, 576 U.S. at 455; *see* Lee, *supra* note 4, at 653–54.

46. Lee, *supra* note 4, at 653–54.

47. *Id.* at 654.

48. *Kimble*, 576 U.S. at 455–56.

change in the law can be very serious as it "disturbs the foundation for countless human interactions."[49]

III. Florida Supreme Court: Change in Court Composition

In 2018, the Florida Constitution was amended to set the mandatory retirement age for Florida Supreme Court Justices to 75 years of age, requiring justices to retire on the date of this birthday.[50] Prior to this amendment, Justices were required to retire at the age of 70 unless this birthday fell within the second half of their six-year term where the Justices were then allowed to finish the entire six-year term.[51] Article 5, Section 8 of the Florida Constitution now states that "no justice or judge shall serve after attaining the age of seventy-five except upon temporary assignment."[52] This amendment took effect on July 1, 2019, and eliminated the exception previously allowed.[53]

Three Florida Supreme Court Justices reached the age of 70 in 2018 during the second half of their last six-year term. Justices Barbara Pariente, Fred Lewis, and Peggy Quince had to mandatorily retire on January 7, 2019, at the end of their six-year term.[54] These retirements occurred just six months before the amendment of Article 5, Section 8 of the Florida Constitution took effect. If these Justices would have turned 70 after July 1st, they likely would not have been forced to retire in January 2019, and the composition of the court would have been completely different. Moreover, just one day after these three justices retired, Republican Governor Ron DeSantis took office as the new Governor of Florida.[55] Just as Governor DeSantis was taking office, the three "most liberal members of the Florida Supreme Court retired," allowing the new governor to appoint three conservative replacements.[56] Essentially, this leaves only one of the seven justices on the Supreme Court, Justice Jorge Labarga, to be considered a moderate.[57]

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49. Mead, *supra* note 2, at 793.

50. Fla. Const. art. V, § 8; *Merit Selection, Retention & Mandatory Retirement of Justices*, Florida Supreme Court, https://www.floridasupremecourt.org/Justices/Merit-Selection-Retention-Retirement (last visited Aug. 15, 2022).

51. *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

52. Fla. Const. art. V, § 8.

53. *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

54. *Supreme Court JNC FAQ*, FLGOV, https://www.flgov.com/wp-content/uploads/2018/09/Supreme-Court-JNC-FAQ.pdf (last visited Aug. 15, 2022).

55. *Ron DeSantis*, Ballotpedia, https://ballotpedia.org/Ron_DeSantis (last visited Aug. 15, 2022).

56. Marcus, *supra* note 5.

57. *Id.*

In January 2019, Governor DeSantis appointed three new justices: (1) Justice Barbara Lagoa, (2) Justice Robert Luck, and (3) Justice Carlos Muniz.[58] Of those three justices, both Justice Lagoa and Justice Luck only served a few months because in late 2019 President Donald Trump appointed them to serve on the United States Court of Appeals for the 11th Circuit.[59] With two vacancies in the court, Governor DeSantis then appointed Justice John Couriel in June 2020 and Justice Jamie Grosshans in September 2020.[60] In Florida, Justices are selected based on a merit selection and retention system.[61] Under this system, the Governor appoints a justice by selecting an individual from a list of about six names that is submitted by the Judicial Nominating Commission.[62] Once these justices are appointed, they eventually face Florida voters in the next general election in a yes or no vote as to whether they should be retained.[63] If a justice is retained, he or she will then serve a six-year term starting in early January after the election and will continuously go back up for a retention vote just before their term ends.[64]

The Florida Supreme Court tended to often side four-three with more liberal policies, but with these new appointments the court has transformed to one where six of the seven Justices on the court have more conservative tendencies.[65] The current court composition is as follows: (1) Chief Justice Charles Canady, (2) Justice Ricky Polston, (3) Justice Jorge Labarga, (4) Justice Alan Lawson, (5) Justice Carlos Muniz, (6) Justice John Couriel, and (7) Justice Jamie Grosshans.[66] Ultimately, these appointments drastically changed the composition of the court to a six-one split, making this court one of the most conservative courts in the United States.[67] Ultimately, within a few months, this court has shown a willingness to disregard established legal precedent set by previous courts.

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58. *Judges Appointed by Ron DeSantis*, *supra* note 6.

59. *Robert J. Luck*, BALLOTPEDIA, https://ballotpedia.org/Robert_J._Luck (last visited Aug. 15, 2022); *Barbara Lagoa*, BALLOTPEDIA, https://ballotpedia.org/Barbara_Lagoa (last visited Aug. 15, 2022).

60. *Judges Appointed by Ron DeSantis*, *supra* note 6.

61. FLA. CONST. art. V, § 10(a); *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

62. *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

63. FLA. CONST. art. V, § 10(a); *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

64. FLA. CONST. art. V, § 10(a); *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

65. Contorno, *supra* note 7.

66. *Florida Supreme Court Justices*, *supra* note 18.

67. Marcus, *supra* note 5; Contorno, *supra* note 7.

IV. Stare Decisis is Destroyed by the Florida Supreme Court

In 1972, the U.S. Supreme Court found that the inconsistent administration of the death penalty was unconstitutional in violation of the cruel and unusual punishment under the Eighth and Fourteenth Amendment in *Furman v. Georgia*.[68] In that same year, under the Florida Supreme Court's interpretation of *Furman*, the state's death penalty scheme was unconstitutional because it required judges to impose the death penalty on any person guilty of a capital offense unless the jury came back with a ruling of mercy.[69] This decision ultimately led to the resentencing of about 100 people on death row.[70] Within months, the Florida Legislature reinstated the death penalty, making it the first state to do so after *Furman*.[71] Just four years later in *Proffitt v. Florida*, the U.S. Supreme Court found that the death penalty was constitutional because it created a system that imposed the death penalty only for those convicted of first-degree murder and added the idea of weighing aggravating and mitigating factors in the decision.[72] However, it was ultimately the decision of the judge what sentence was given with the jury only giving an advisory sentence.[73] Further, if given the death penalty, the case would be automatically appealed to the Florida Supreme Court to determine if the death penalty was arbitrarily imposed, fixing all potential constitutional issues under the pre-*Furman* system.[74] Throughout the years, the Florida Supreme Court almost doubled the amount of aggravating factors that a jury can consider when deciding to impose the death penalty and has provided more guidance as to the role of the judge and jury in these proceedings.[75] This system largely stayed the same for many years until the U.S. Supreme Court's decision in *Hurst v. Florida*, placing the state in legal chaos.[76] Since 1976, Florida has executed 99 people.[77] Amongst

68. Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 Colum. Human Rights L. Rev. 935, 938 (2020).

69. *Id.* at 939.

70. *Id.*

71. *Id.* at 940.

72. Proffitt v. Florida, 428 U.S. 242, 247–48 (1976); Gorman & Ravenscroft, *supra* note 68, at 939.

73. Gorman & Ravenscroft, *supra* note 68, at 943–44.

74. *Id.* at 944–45.

75. *Id.* at 945.

76. *Id.*

77. *Florida: History of the Death Penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited Aug. 15, 2022).

this chaos, Florida still has the largest and most active death row in the nation, clearly showing why the death penalty should be approached with great care.[78]

Usually, courts defer to binding precedent set by prior courts, but in some cases, courts will disregard precedence. Although following the doctrine of *stare decisis* is favorable, courts are not bound by established precedent "where there has been a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis."[79] The U.S. Supreme Court is more willing to overturn precedent in cases that are "interpreting procedural rules where reliance interests are minimal."[80] Courts consider several factors when deciding whether to apply the doctrine of stare decisis including: (1) the risk of undermining the public's confidence in the law and the legal system, (2) whether the prior decision is poorly reasoned and unworkable in modern society, (3) any other intervening events, and (4) the reasonable expectation of litigants.[81] Overturning precedent is approached with such caution that even if all these factors favor disregarding such precedent, courts still need a special justification.[82]

In 2020, the Florida Supreme Court disregarded the doctrine of stare decisis and overturned years of established precedent from January to October, creating instability and uncertainty in the law as well as in the judicial process. These unsettling decisions are likely the result of the major adjustment in the court's composition that occurred between 2019 to 2020. The following parts will detail these changes in chronological order with a preview of what was the established precedent prior to these 2020 decisions.

A. Unanimous Jury Decisions (January 2020)

To begin its path of scrapping years of precedent, in January 2020, the Florida Supreme Court found that unanimous jury recommendations are not necessary before death sentences can be imposed. This decision makes Florida an outlier again amongst those States that still impose the death penalty.[83] This decision goes against most

78. Gorman & Ravenscroft, *supra* note 68, at 941.

79. United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018).

80. Mead, *supra* note 2, at 791.

81. *Andrews*, 77 M.J. at 399; *see* Mead, *supra* note 2, at 791.

82. *Andrews*, 77 M.J. at 399; Dickerson v. United States, 530 U.S. 428, 443 (2000).

83. State v. Poole, 292 So. 3d 694, 719 (Fla. 2020) (Labarga, J., dissenting) (The only other State that does not require unanimous jury decisions is Alabama.).

state and federal law, which the majority had no problem doing.[84] The court's decision could take away an important safeguard for ensuring that the death penalty is only imposed to the most heinous murders, destroying the important progress that Florida has made in death penalty law.[85] Further, Florida Law requires unanimous jury decisions to convict a defendant of a criminal offense, yet the court has decided that unanimous juries are not required when determining whether to sentence a defendant to death.[86] The fact that Florida has the most death row exonerations clearly shows that the State should maintain these safeguards to prevent the death penalty from being arbitrarily imposed.[87]

In 2016, the U.S. Supreme Court decided the case *Hurst v. Florida*, finding that Florida's capital sentencing scheme was unconstitutional where it had juries render only an advisory verdict with no specification as to its factual basis, while the judge then held a separate hearing for a review of aggravating and mitigating factors with an ultimate decision of whether the death penalty was the appropriate sentence.[88] The Court relied on its prior decision in *Ring v. Arizona*, where it held that the Sixth Amendment of the U.S. Constitution required a jury to find each fact necessary to impose a death sentence, not a judge, because capital defendants were just as entitled as noncapital defendants to have a jury make factual findings.[89] As a response to the U.S. Supreme Court's ruling the Florida legislature redrafted its capital sentencing statute, now requiring juries to unanimously find that at least one aggravating factor has proven beyond a reasonable doubt.[90]

When the case was remanded back to the Florida Supreme Court, it held the following: (1) the Sixth Amendment of the U.S. Constitution required a jury to find all elements necessary to impose the death penalty; (2) Article I, Section 22 of the Florida Constitution required that a jury unanimously and expressly find all the aggravating

84. *Id.* (The only other State that does not require unanimous jury decisions is Alabama.).

85. *Id.* at 720.

86. *Id.*

87. *See Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited Aug. 15, 2022).

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

89. *Id.* at 98–100.

90. FLA. STAT. § 921.141(2) (2022); *Florida Supreme Court "Recedes" from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, AMERICAN BAR ASSOCIATION (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole/.

factors they believe were proven beyond a reasonable doubt, unanimously recommend the death penalty, and unanimously find that there are sufficient aggravating factors that outweigh the mitigating factors; and (3) the Eighth Amendment of the U.S. Constitution required jury unanimity in any recommended death sentence.[91] Thus, as a result of the Florida Supreme Court's findings, the Florida legislature amended Florida Statute, Section 921.141, now requiring a unanimous jury recommendation for a death sentence.[92] Finally, the Florida Supreme Court then subsequently decided that its decision in *Hurst v. State* should apply retroactively to cases that were not final as of 2002 when the U.S. Supreme Court decided *Ring v. Arizona* under the principles of fundamental fairness and that the *Hurst* decision was a development of fundamental significance.[93] The court's decision in *Mosley* and *Asay* led to over 150 out of 400 individuals on Florida's death row to be eligible for resentencing, two of them were even exonerated.[94] About 145 people of those 151 obtained a new penalty phase trial on the basis of *Hurst* relief.[95] Really only about 40% of those on death row at the time would actually receive relief under *Hurst*.[96] About 48 inmates received reversals of their sentences to life sentences, and some were still in the appeal and resentencing process, but in January 2020 the court receded from its decision in *Hurst*.[97]

In January 2020, the Florida Supreme Court overruled *Hurst v. State*, finding that a unanimous jury only has to find a single aggravating factor to recommend the death penalty.[98] In *State v. Poole*, the

91. *Hurst*, 202 So. 3d at 44.

92. FLA. STAT. § 921.141(2)(b) (2022); *Florida Supreme Court "Recedes" from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, *supra* note 90.

93. Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016); Asay v. State, 210 So. 3d 1, 22 (Fla. 2016).

94. Smith, *supra* note 17; *Florida Supreme Court Overturns Precedent Throughout 2020*, AMERICAN BAR ASSOCIATION (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/florida-supreme-court-continues-to-overturn-precedent-throughout-2020/.

95. Gorman & Ravenscroft, *supra* note 68, at 938; *The Balance Justice Project: Training & Resources*, FIU LAW, https://law.fiu.edu/academics/experiential-learning/the-balanced-justice-initiative-at-fiu-law/ (last visited Aug. 15, 2022).

96. Gorman & Ravenscroft, *supra* note 68, at 938; *The Balance Justice Project: Training & Resources*, *supra* note 95.

97. *Id.* at 976; *Florida Death-Penalty Appeals Decided in Light of* Hurst, DEATH PENALTY INFO. CTR. (Jan. 23, 2020), https://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst; *Timothy Hurst, Whose Case Struck Down Florida's Death-Penalty Statute, Is Resentences to Life*, DEATH PENALTY INFO. CTR. (Mar. 11, 2020), https://deathpenaltyinfo.org/news/timothy-hurst-whose-case-struck-down-floridas-death-penalty-statute-is-resentenced-to-life.

98. State v. Poole, 292 So. 3d 694, 709 (Fla. 2020).

State appealed to the Florida Supreme Court, requesting that it recede from *Hurst*, after Mr. Poole won his appeal of his death sentence on the basis that he was entitled to a resentencing after 2016.[99] The court held that it had to partially recede from its decision in *Hurst v. State*, finding that the jury only needs to find one or more statutory aggravating circumstances which constitutes elements and that neither the Sixth Amendment nor the Eighth Amendment require any unanimous jury recommendation of death.[100] Further, the court found that the additional findings required by *Hurst* did not qualify as elements under state law and that the State Constitution's prohibition on cruel and unusual punishment did not require a unanimous jury recommendation before imposition of the death penalty.[101]

Although the court highlighted the importance of stare decisis, it still decided that it was more willing to correct its "mistakes."[102] The court acknowledged that it should be giving grace to the prior court, presuming that it faithfully carried out its duty.[103] Yet, it ultimately decided that the previous court's error could not go unnoticed because it had no legal justification to decide the way it did, accusing it of using the "narrow decision" that was *Hurst v. Florida* to ignore years of precedent.[104] However, the previous court did accomplish its duty in faithfully interpreting the law, and requiring unanimous jury decisions does serve the function of the prohibition of cruel and unusual punishment under the Eighth Amendment by ensuring that the death penalty is only imposed on the worst crimes.[105] The court downplays the significance of stare decisis, making it seem like courts will not follow precedent when it conflicts with new law, specifically when it believes that defendants would not change their behavior in expectation of the "procedural rules" announced in *Hurst v. State*.[106] The court decided to disregard precedent because it found that the prior court clearly erred in its interpretation of the *Hurst v. Florida* decision and it mentioned that there was no valid reason not to recede from precedent.[107] However, it seems that the court refused to use a "multi-part test" that was expressed in *North Florida Women's Health & Counseling Services, Inc. v. State* because it felt that it was not commonly used

99. *Id.* at 700.
100. *Id.* at 709.
101. *Id.* at 712.
102. *Id.*
103. *Poole*, 292 So. 3d at 712.
104. *Id.* at 713.
105. *Id.* at 721 (Labarga, J., dissenting).
106. *Id.* at 713–14 (majority opinion).
107. *Id.* at 713.

or cited when the court receded from precedent in the past.[108] Ironically, the court felt that such a "multi-part test" would take away from a consistent and objective application.[109]

Significantly, the court went on to address what this means for the statute that the Florida legislature enacted after its decision in *Hurst v. State*. Although it claimed that it was not addressing whether the statute should be retained or changed, it did state that "it simply restored discretion" that the previous court took away from Florida's political branches.[110] This decision significantly affects the stability of Florida's death penalty law as it no longer aligns with our current law, Florida Statute, Section 921.141. It also creates the uncertainty that this law could be changed at any time by the legislature as that door has now been left open. However, Florida Lawmakers in the Florida Senate have rejected this change by the court, holding firmly that unanimous jury decisions should be required to sentence someone to death.[111] Senate President Bill Galcano reaffirmed this position, stating that it is unlikely that the Senate will be taking any steps to address this issue.[112] Yet, the door has been left open for a change in the future.

B. Heightened Scrutiny (May 2020)

Just four months after its decision in *State v. Poole*, the Florida Supreme Court made another drastic change to Florida's death penalty when it lowered the standard applied to death penalty cases that rely solely on circumstantial evidence. In *Bush v. State*, the court held that Florida should no longer apply a heightened standard on appeal of death penalty cases simply supported by circumstantial evidence and should instead apply the usual standard of whether the State presented competent, substantial evidence to support the verdict.[113] However, circumstantial evidence inherently requires jurors to make a leap in their reasoning to reach their conclusion; reviewing these cases

108. N. Fl. Women's Health & Counseling Services, Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003) (In *North Florida Women's Health & Counseling Services, Inc. v. State*, the court expressed that before deciding to overrule a prior opinion it traditionally had to ask certain questions such as: "whether the decision has proved unworkable; whether the decision could be reversed 'without serious injustice to those who have relied on it and without serious disruption in the stability of the law;' and whether there have been drastic changes in the factual premises underlying the decision.").

109. *Poole*, 292 So. 3d at 713.

110. *Id.* at 714.

111. Mahoney, *supra* note 15.

112. *Id.*

113. Bush v. State, 295 So. 3d 179, 200–01 (Fla. 2020).

with a heightened standard avoids convictions found based on "pyramiding assumption upon assumption."[114]

Because courts have questioned the reliability of circumstantial evidence when compared to direct evidence over the years, there was a time when all federal courts and almost all state courts applied a heightened standard when the evidence of a defendant's guilt presented at trial was entirely circumstantial.[115] Juries were told to view the circumstantial evidence with great caution and that the evidence "must be such as to exclude every reasonable hypothesis other than that of guilt."[116] However, in 1954, the U.S. Supreme Court rejected the use of such standard, finding that circumstantial evidence should be given the same weight as testimonial evidence and that such a standard was confusing and incorrect.[117] Because of this decision, by 1982, all federal courts and most state courts no longer applied the heightened standard for cases supported by circumstantial evidence on appeal nor gave the jury such instruction.[118] Although Florida no longer gave the instruction to juries, the Florida Supreme Court retained the special standard as an appellate standard of review for evaluating whether there was sufficient evidence to sustain the verdict in cases where the conviction was supported by only circumstantial evidence, making Florida one of three states to do so.[119] For about 100 years, Florida applied a special standard for cases supported only by circumstantial evidence.[120] The standard is articulated by various Florida courts as follows: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."[121]

In May 2020, the Florida Supreme Court receded from this precedent and decided that a lower standard should apply in death penalty cases that are merely supported by circumstantial evidence.[122] The majority in this case consisted of Chief Justice Canady, Justice Polston, Justice Lawson, and Justice Muniz, who was appointed by Ron DeSantis, which explains why the court decided to make such a

114. *Id.* at 216 (Labarga, J., dissenting).
115. Knight v. State, 107 So. 2d 449, 455–56 (Fla. Dist. Ct. App. 2013).
116. *Id.* at 455.
117. *Id.* at 456 (citing Holland v. United States, 348 U.S. 121, 139–40 (1954)).
118. *Id.*
119. *Id.*
120. Lawrence v. State, 308 So. 3d 544, 553 (Fla. 2020) (Labarga, J., dissenting).
121. *Knight*, 107 So. 2d at 457.
122. Bush v. State, 295 So. 3d 179, 200–01 (Fla. 2020).

drastic change.[123] In 2017, Mr. Bush was convicted of the 2011 murder of his estranged wife and unanimously sentenced to death by a jury based solely on circumstantial evidence. Bush appealed his case on the basis that there was insufficient evidence to support his conviction of 1st degree murder, asking the court to review his case on appeal using the heightened standard of review.[124] In its decision, the Florida Supreme Court found that the standard that should be used in these cases is the usual standard applied to determine the legal sufficiency of the evidence supporting a criminal conviction in cases where there is some direct evidence, which is "whether the State presented competent, substantial evidence to support the verdict."[125] The court reasoned that Florida should now join all federal courts and the majority of state courts that have abandoned applying this heightened standard on appellate review after being an outlier for decades because it was confusing and unwarranted.[126]

Florida has always applied a heightened standard to cases simply supported by circumstantial evidence because circumstantial evidence cannot be enough to support a conviction that is still consistent with a reasonable hypothesis of innocence as it furnishes nothing more than just a suspicion or a probability of guilt.[127] This standard has been workable for the last 100 years, but the Florida Supreme Court again decided to scrap a strong safeguard in death penalty law that forced courts to look at these cases, especially those where defendants were facing a death sentence, with the upmost scrutiny.[128] Just because the State takes more precaution in reviewing these cases using a heightened standard, especially those death penalty cases, does not mean that it runs afoul with either the U.S. Constitution or the Florida Constitution.[129]

Ultimately, this decision completely contradicts the court's reasoning in *State v. Poole*. In that case, the court had no issue with making Florida an outlier in "death penalty states by walking away from a requirement that jurors make unanimous sentencing findings;" after all, Florida does not have to follow what other courts do in other

123. *Id.* at 183.

124. *Id.* at 199.

125. *Id.* at 200–01 (The court described that this standard is applied by looking at the "evidence in the light most favorable to the State," asking whether "a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.").

126. *Id.* at 200.

127. *Id.* at 216 (Labarga, J., dissenting).

128. *Id.*

129. *Id.* at 216–17.

parts of the country.[130] Yet, the court felt the need to remove Florida from its position as an outlier when it applied a heightened standard in cases supported only by circumstantial evidence –even though that standard had been applied in Florida for decades. This clearly shows that Florida now has a court that uses motivated reasoning to scrap years of precedent, creating instability in the law.

C. Intellectual Disability (May 2020)

In May 2020, just one week after its *Bush v. State* opinion, the Florida Supreme Court held in *Phillips v. State* that *Hall v. Florida* should no longer apply retroactively, disregarding the precedent set in *Walls v. State* by the court just four years earlier.[131] This means that those death row inmates that were not found intellectually disabled under Florida's previous scheme could no longer appeal their convictions or have their appeals heard on this basis, losing their chance to argue that they should be shielded from execution because of intellectual disability.[132] The court has ensured that the application of *Hall* no longer be reliable and consistent. It has once again "removed an important safeguard in maintaining the integrity of Florida's death penalty jurisprudence."[133]

Since 2002 the execution of individuals that are found to be intellectually disabled has been unconstitutional after the United States Supreme Court, in a six-three majority, found that the practice of executing intellectually disabled individuals violated the Eighth Amendment of the U.S. Constitution.[134] In *Atkins v. Virginia*, the Court found that the execution of intellectually disabled criminals was cruel and unusual punishment under the Eighth Amendment because it was excessive punishment for individuals that act on impulse and cannot truly be morally culpable.[135] The two justifications for the death penalty –retribution and deterrence of capital crimes– are not served when intellectually disabled individuals are executed due to their deficiencies.[136] Although the Court found that the execution of

130. Smith, *supra* note 17.

131. *See* Phillips v. State, 299 So. 3d 1013, 1015 (Fla. 2020); Smith, *supra* note 17.

132. *See Phillips*, 299 So. 3d at 1024 (Labarga, J., dissenting).

133. *Id.*

134. Smith, *supra* note 17; *see* U.S. CONST. amend. VIII

135. *See* Atkins v. Virginia, 536 U.S. 304, 319, 321 (2002).

136. *Atkins*, 536 U.S. at 319–20 (The Court highlighted that if these two justifications for the death penalty are not served, the execution of an intellectually disabled inmate is "nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.").

the intellectually disabled was unconstitutional and that there was a substantive restriction on the States' ability to execute an intellectually disabled offender, it still allowed States to come up with their own schemes to determine which individuals were intellectually disabled.[137]

In Florida, to establish intellectual disability, a defendant had to show: (1) significant subaverage intellectual functioning, (2) deficits in adaptive behavior, and (3) manifestation of this condition prior to the age of 18.[138] Florida set up this scheme under Florida Statute, Section 921.137, which seemed facially valid and in line with what the Court described in *Atkins* as the Florida Legislature clearly intended that the IQ test's standard error of measurement be part of the calculation.[139] However, the Florida Supreme Court interpreted Florida Statute, Section 921.137 to mean that a defendant had to show an IQ score of 70 or below, demonstrating subaverage intellectual functioning, before having the opportunity to present more evidence of intellectual disability such as medical history to meet the two other prongs: adaptive functioning deficits and manifestation before 18 years of age.[140]

Subsequently, the United States Supreme Court in *Hall v. Florida* held that Florida's scheme to determine intellectual disability as interpreted by the Florida Supreme Court was unconstitutional under the Eighth Amendment of the U.S. Constitution because it was a strict cutoff that created an undeniable risk that intellectually disabled individuals would be executed.[141] The Court reasoned that the statute disregarded medical practice because it took the IQ score as conclusive evidence of a defendant's intellectual capacity where professionals would have looked at other pieces of evidence, failing to acknowledge that this test has a margin of error that makes it less precise.[142] This interpretation of the statute was inhumane and cruel as it prevented individuals like Mr. Hall who scored an IQ of 71 from presenting any other evidence of intellectual disability such as "deficits in adaptive functioning, including evidence of past performance, environment, and upbringing," foreclosing this showing because of a fixed number.[143]

137. *Id.* at 317.
138. *See* FLA. STAT. § 921.137 (2013); *Phillips*, 299 So. 3d at 1018.
139. Hall v. Florida, 572 U.S. 701, 711 (2014).
140. *Id.*; Walls v. State, 213 So. 3d 340, 345 (Fla. 2016); § 921.137.
141. *Hall*, 572 U.S. at 721.
142. *Id.* at 712.
143. *Id.* at 714.

Thereafter, the Florida Supreme Court in *Walls v. State* found that under the *Witt* standard, the Court's decision in *Hall v. Florida* warranted retroactive application.[144] It was clear to the court that the *Hall* decision emanated from the U.S. Supreme Court and that it was constitutional in nature.[145] The court then found that the *Hall* decision did merit retroactive application because it met the final prong of the *Witt* standard.[146] The *Hall* decision was a "development of fundamental significance that places beyond the State of Florida the power to impose" a death sentence for intellectually disabled individuals within a broader range of IQ scores than before and forces Florida courts to consider all prongs of the test for intellectual disability equally.[147] Thus, after 2016, defendants who had been judged under the previous system to determine intellectual disability and were prevented from presenting other evidence of their intellectual capacity, had the opportunity to appeal their case on this basis.[148]

Yet, just four years later in May 2020, the new Florida Supreme Court ignored the doctrine of stare decisis and held that *Hall v. Florida* should no longer apply retroactively.[149] In *Phillips v. State*, Mr. Phillips was convicted of murder in 1982 and sentenced to death in 1998. In 2006, he appealed his conviction claiming that he was intellectually disabled but was denied because he failed to meet all three prongs of the statutory intellectual disability test. Then, in 2018, Mr. Phillips sought another determination of his intellectual capacity, relying on the court's decision in *Walls v. State*. The circuit court found that although Mr. Phillips met the first and third prongs of the intellectual disability standard, he failed to meet the second prong– concurrent deficits in adaptive behavior, which led him to appeal to the Florida Supreme Court.[150]

In this appeal, the Florida Supreme Court took a drastic step back in its progress, holding that "this Court clearly erred [. . .] and we now recede from our decision in *Walls v. State*."[151] Reanalyzing the law, the court held that the rule from *Hall* did not constitute a develop-

144. *Walls*, 213 So. 3d at 346 (explaining that under the Witt v. State standard, a change in the law will apply retroactively if the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.").

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.* at 347.

149. Phillips v. State, 299 So. 3d 1013, 1015 (Fla. 2020); Smith, *supra* note 17.

150. *Phillips*, 299 So. 3d at 1015–17.

151. *Id.* at 1019.

ment of fundamental significance but was merely a procedural requirement "that those with IQ test scores within the test's standard of error have the opportunity to otherwise show intellectual disability."[152] It emphasized that *Hall* did not expand the categorical prohibition of executing individuals that are intellectually disabled that prevents the State of Florida from imposing certain sentences, but just requires Florida Courts to fix its procedures of determining an individual's intellectual capacity by forcing them to take a more holistic analysis of the prongs.[153]

As part of its decision, the court also discussed whether the doctrine of stare decisis should yield.[154] Although the court tried to make several mentions that following stare decisis would provide stability to the law, it still held that following the doctrine of stare decisis in the case would be unsound and would serve no one well.[155] Further, even though the court tried to present the idea that it was not easy to conclude that a previous court had erred in its prior decision, it failed to give the Florida Supreme Court of 2016 grace and presume that it carried out its duty faithfully.[156] The court accused the previous court of using *Hall* "to undermine the finality of numerous criminal judgments."[157] Moreover, this court blatantly overturned precedent based on differences of opinion. It found that Mr. Phillips' reliance interests were at their lowest because *Hall* simply dealt with procedural issues, and other interests supported the finality of Mr. Phillip's judgment.[158] Although the court tried to support its reasoning with society's interests in keeping Mr. Phillips on death row, it completely ignored the importance of finality in the law and the complete destruction that its decision would have on all those cases on appeal.

Because the court has receded from its decision in *Walls*, there is "an increased risk that certain individuals may be executed, even if they are intellectually disabled."[159] This is an issue that the court fixed just four years before. This decision essentially prevents some individuals whose convictions were final before the *Hall* decision from having their cases reconsidered even though they are consistent with the rule

152. *Id.* at 1020.
153. *Id.*
154. *Id.* at 1023.
155. *See* Phillips v. State, 299 So. 3d at 1023.
156. *Id.*
157. *Id.*
158. *See* Phillips v. State, 299 So. 3d at 1024.
159. *Id.* at 1025 (Labarga, J., dissenting).

set out in *Hall*.[160] It essentially comes down to timing, an individual that could still be found intellectually disabled is arbitrarily prevented from proving such because of the timing of the legal process. This only hurts what stare decisis is trying to promote and "undermines the prohibition of executing the intellectually disabled."[161] This decision deprives those on death row of fairness and uniformity in the law because although some individuals have been given relief pursuant to *Walls*, similarly situated individuals going forward can no longer receive the same benefits. As explained by Justice Labarga in his dissent, *Hall* should not be seen as just a procedural evolution of the law because the decision clarifies the criteria for intellectual disability, which is a status that presents an absolute bar to execution.[162] The death penalty is the harshest sentence our society can impose, and the court's decision in *Phillips* will prevent individuals from showing that the Constitution prohibits their execution.

D. Mandatory Proportionality Review (October 2020)

Just a few months after the *Phillips v. State* decision, the Florida Supreme Court scrapped a long-standing legal requirement of reviewing death sentences on direct appeal to determine if the sentences were a disproportionate punishment. This court disregarded binding precedent under the reasoning that proportionality review violates the conformity clause in the Florida Constitution because the U.S. Supreme Court has held that comparative proportionality is not required under the Eighth Amendment but is merely an additional safeguard.[163] However, proportionality review is a very important safeguard for those facing the death penalty because it ensures that the death penalty is not randomly imposed by atypical juries in cases that do not warrant it.[164] Thus, even though this review is not mandated, that does not mean that the Florida Constitution prohibits it.[165] This decision is just one of the many that the court has used to dismantle the safeguards provided within Florida's death penalty jurispru-

160. *Id.*

161. *Id.* at 1026.

162. *Id.* at 1025–26.

163. *See* Lawrence v. State, 308 So. 3d 544, 550 (Fla. 2020).

164. Madison Johnson, *Overruling 50 Years of Precedent, Florida Supreme Court Will No Longer Review Proportionality in Capital Direct Appeals*, AMERICAN BAR ASSOCIATION (Nov. 1, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/florida-supreme-court-capital-appeals-proportionality-review/.

165. *Lawrence*, 308 So. 3d at 555–56 (Labarga, J., dissenting).

dence.[166] It undermines the reliability of Florida's death penalty and the Florida Supreme Court's decisions on direct appeal, as it no longer requires the court to do something that it has done for nearly 50 years.[167]

For over 50 years, the Florida Supreme Court was required to review all capital cases in the state for proportionality on direct appeal to ensure uniformity of death sentences by reserving such a sentence for only the "most aggravated and least mitigated of first-degree murders."[168] The Florida Supreme Court first recognized the doctrine of proportionality in *State v. Dixon* in 1973, where it stated that "the review of this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case."[169] Proportionality review required the court to review a death sentence by comparing it to other factually similar cases to decide whether such a sentence was appropriate or excessive.[170] The court would look at the sufficiency of the evidence used to convict the defendant and the death sentence's comparative proportionality under a qualitative review.[171] Under Florida Rule of Appellate Procedure 9.142, the court would conduct this fundamental proportionality review regardless of whether the defendant challenged his sentence on that ground.[172] Shockingly, since 1995, the Florida Supreme Court has overturned 11 death sentences because of proportionality review including those of Michael Yacob's in 2014 and Tyrone Phillips' and Robert McCloud's in 2016, which show how important this review is.[173]

However, in October 2020, the court held with a five-one majority that it would no longer conduct a proportionality review of capital cases. In *Lawrence v. State*, Mr. Lawrence was sentenced to death in 2018 for the murder of a woman in 1998.[174] In deciding whether his death sentence is proportionate, the court strays from precedent and finds that the comparative proportionality review that the court has conducted for the past 50 years is precluded by the Florida Constitu-

166. *Id.* at 552.

167. *Id.* at 554.

168. *See Id.* at 548 (quoting Rogers v. State, 285 So. 3d 872, 891 (Fla. 2019)); *Florida Supreme Court Overturns Precedent Throughout 2020*, *supra* note 94.

169. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Johnson, *supra* note 164.

170. *Florida Supreme Court Overturns Precedent Throughout 2020*, *supra* note 94.

171. Johnson, *supra* note 164.

172. FLA. R. APP. P. 9142; Johnson, *supra* note 164.

173. Smith, *supra* note 17; Johnson, *supra* note 164.

174. *Lawrence*, 308 So. 3d at 545.

tion.[175] The court reasoned that the 2002 addition of the conformity clause to Article I, Section 17 to the Florida Constitution is the main reason why it could no longer conduct a proportionality review because this article provided that the prohibition of cruel and unusual punishment had to be construed in conformity with the decisions of the U.S. Supreme Court interpreting the Eighth Amendment.[176] The court reasoned that because the Eighth Amendment of the U.S. Constitution did not require comparative proportionality review in death penalty cases as interpreted by the U.S. Supreme Court, no such review could be done by the Florida Supreme Court in death penalty cases.[177] Thus, after the conformity clause was added, the court had been incorrectly enforcing a state-law requirement for proportionality review, which should have been done away with in *Yacobs v. State,* where the previous court found that its proportionality review survived the addition of the conformity clause to the Florida Constitution.[178] The court adopted Chief Justice Canady's dissent from *Yacobs*, where he argues that because the Eighth Amendment of the U.S. Constitution is made applicable to the States through the due process clause of the Fourteenth Amendment, it becomes a "particular aspect of due process" that the conformity clause limits relating the authority of the Florida Supreme Court.[179] One of the main reasons why this happens is because, in 2020, the court's composition is very different. In the *Lawrence* decision, the majority consisted of Chief Justice Canady, Justice Polston, Justice Lawson –and Justice Muniz, and Justice Couriel, who both were appointed by Governor Ron DeSantis.[180] The only dissenter was Justice Labarga.[181] Knowingly, this new court addresses the ramifications of receding from precedent and supports its decision by quoting the same language it used in *State v. Poole* just months before. It found no reason not to recede from *Yacobs,* where it saw that defendants would not alter their behavior in reliance of this proportionality review, viewing the State's interest as outweighing

175. *Id.* at 552 (holding that "we recede from *Yacob*'s requirement to review death sentences for comparative proportionality and thus eliminate comparative proportionality review from the scope of our appellate review set forth in rule 9.142(a)(5)").

176. *Id.* at 550.

177. *Id.*

178. *Id.* at 552 (explaining that the *Yacobs* decision was wrong including the fact that it read proportionality review into Florida Statute § 921.141 and wrongfully relied on the due process clause and the mandatory jurisdiction articles in the Florida Constitution).

179. *Lawrence*, 308 So. 3d at 550.

180. *Id.* at 544.

181. *Id.* at 552 (Labarga, J., dissenting).

those of the people who will be sentenced to die.[182] It argued that there is no reason to apply erroneous precedent where Florida's death penalty statute provides safeguards against the arbitrary imposition of the death penalty.[183] But, the death penalty is the harshest sentence an individual receives, requiring the most intense level of judicial scrutiny, and this court has now drastically taken away one of the most reasonable safeguards offered to those on death row, making Florida an outlier amongst the death penalty states.[184]

V. Recommendation: Florida Supreme Court Should Not Have Made These Changes

Because the court has made such drastic decisions in such a short time, several consequences have flowed from those decisions. The following parts will discuss how these decisions have affected the State of Florida, defendants on death row, defendants that could face the death penalty, and how society views the Florida Supreme Court. Ultimately, the court should not have receded from its prior decisions.

A. Consequences on Florida as a State

To begin, Florida has the second largest death row, and is among the leading states in the number of new death sentences.[185] In the last few years, there has been a national decline in execution and death sentences.[186] However, Florida remains one of the most active states when it comes to the death penalty.[187] Further, Florida has had the greatest number of people exonerated from death row since 1973,

182. *Id.* at 551–52 (majority opinion).

183. *Id.*

184. *See id.* at 556 (Labarga, J., dissenting) (explaining that Justice Labarga points out that out of the 25 states that impose the death penalty, 60% of those states conduct a proportionality review).

185. *Florida Death Penalty Fact Sheet*, *supra* note 15; *Death Penalty Information Center 2021 Year End Report*, Death Penalty Information Center (Dec. 16, 2021), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report; *Corrections Offender Network: Death Row Roster*, Florida Department of Corrections, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Aug. 15, 2022); Deborah Fins, *Death Row U.S.A. Fall 2021*, NAACP Legal Defense and Educational Fund, Inc. (Oct. 1, 2021), https://www.naacpldf.org/wp-content/uploads/DRUSAFall2021.pdf.

186. *Death Penalty Information Center 2021 Year End Report*, *supra* note 183.

187. *Id.*

clearly showing why we need all these safeguards.[188] These decisions have caused uncertainty and unreliability in the law, which stare decisis tried to prevent, affecting the State of Florida. There has been some chaos due to these decisions, especially where many cases that were already on appeal were placed in limbo. Specifically, the court's decisions in *State v. Poole* and *Phillips v. State* will prevent defendants that have already appealed their cases, due to lack of unanimous jury decision or findings of intellectual disability, from having their cases and sentences reviewed because of the timing of the law.[189] Thus, there are defendants that were able to have their death sentences vacated based on the court's prior cases in *Walls* and *Hurst*, yet other defendants on Florida's death row will have their sentences stand just because of the timing of their appeals. This outcome goes against the fundamental principle of America's judicial system that the similar litigants will be treated the same.[190]

Further, the court had no issue making Florida an outlier in two different aspects of death penalty law, which include: (1) no longer requiring comparative proportionality review of cases on direct appeal, and (2) no longer requiring unanimous jury decisions to sentence someone to death if the legislature decides to change statutory law.[191] As the court said, Florida does not have to follow what other courts do in other parts of the country.[192] However, the court found that Florida should be placed back in sync with other states that no longer apply a heightened standard when reviewing cases based solely on circumstantial evidence.[193] The court's contradictory positions show that there is a strong sense of motivated reasoning to support its end result.

These decisions also affect the relationship between the Florida Supreme Court and the Florida legislature based on the *Hurst* and *Poole* decisions. Although the Florida Supreme Court gave them the green light, the Florida legislature has stated that it will not be going back to the law before *Hurst v. State*, yet it is still a possibility that the legislature changes its position.[194] Right now, under Florida Statute

188. *Florida Death Penalty Fact Sheet*, *supra* note 15; see also *Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited Aug. 15, 2022).

189. State v. Poole, 292 So. 3d 694, 714 (Fla. 2020); Phillips v. State, 299 So. 3d 1013, 1026 (Fla. 2020) (Labarga, J., dissenting).

190. Mead, *supra* note 2, at 793.

191. *Poole*, 292 So. 3d at 719 (Fla. 2020) (Labarga, J., dissenting); Lawrence v. State, 308 So. 3d 544, 554, 556 (Fla. 2020) (Labarga, J., dissenting).

192. Smith, *supra* note 17.

193. Bush v. State, 295 So. 3d 179, 200 (Fla. 2020).

194. Mahoney, *supra* note 15.

Section 921.141, juries still must give unanimous recommendations to impose the death penalty, but there is still the chance that the legislature amends the statute, especially after the court has left that door open.[195] The court has left the door open for different legislators to come into power and change the law. This decision could lead to the legislature amending the Florida death penalty again, only creating chaos and disruption of a working system. Ultimately, this puts the legislature and judiciary at odds, creating confusion as to what the law really is and uncertainty as to how long the law will stay the same.

B. Consequences on Defendants on Death Row

Due to the court's decision in *Phillips v. State*, defendants on death row can no longer appeal their death sentences on a claim that they are intellectually disabled, if they were found to not be intellectually disabled under the old Florida Scheme because *Hall v. Florida* no longer applies retroactively.[196] In Florida, similarly situated individuals will not be treated the same and will not get the benefits of the same law, which is fundamentally unfair because procedural rules are dictating who will reap the benefits of the law.[197] Further, after the court's decision in *State v. Poole*, prosecutors tried to have death sentences that were vacated due to lack of unanimous jury decisions reinstated, including that of Michael Jackson and Bessman Okafor.[198] However, the court did do the right thing by following the previous court's mandate to resentence these individuals and not exceed the legal restraints of their authority. Mr. Okafor and Mr. Jackson will not be resentenced, although the court did acknowledge that this procedure would cause the victim's family great hardship and would be costly at the public's expense.[199] If this scenario would have gone the other way, it would have destroyed the integrity of our judicial system and would also push citizens to question the authority of the court, where it vacates sentences to only reinstate them without a resentencing hearing. The court knew that it could not exceed its authority in this way. Ultimately, if the legislature re-amends the current death

195. FLA. STAT. § 921.141(2)(b) (2022).

196. Phillips v. State, 299 So. 3d 1013, 1026 (Fla. 2020) (Labarga, J., dissenting).

197. *Id.*

198. State v. Jackson, 306 So. 3d 936, 938–39 (Fla. 2020); State v. Okafor, 306 So. 3d 930, 931 (Fla. 2020); Monivette Cordeiro, *Florida Supreme Court Refuses to Restore Death Sentence for Bessman Okafor*, ORLANDO SENTINEL (Nov. 25, 2020, 3:16 PM), https://www.orlandosentinel.com/news/crime/os-ne-florida-supreme-court-okafor-death-sentence-20201125-w4eiivntwrgrfbhc2bf3gilprm-story.html.

199. *Jackson*, 306 So. 3d at 945; *Okafor*, 306 So.3d at 935–36; Cordeiro, *supra* note 196.

penalty statute, many on death row will be subjected to a completely different system again and there is the possibility that the death penalty will be arbitrarily imposed.

C. Consequences on Defendants that Could Face the Death Penalty

Consequently, future defendants facing the death penalty will also be affected by these changes to Florida's death penalty law. First, if the Florida legislature does decide to amend Florida Statute Section 921.141, individuals could be given the death penalty without findings by unanimous jury decisions, risking that death sentences be arbitrarily imposed. Second, death sentences in the future will no longer be mandatorily reviewed for proportionality after *Lawrence v. State*. Third, if these defendants are sentenced to death based on only circumstantial evidence, on appeal, courts will no longer use the special standard that made sure there was sufficient evidence to support such a conviction. Lastly, these decisions also affect how lawyers will consult their clients because with these decisions, the court has made it almost impossible to win on appeal. As Justice Labarga has stated in his dissents to these decisions, the court has taken away important safeguards in place to prevent the death penalty from being arbitrarily imposed, which brings to question the integrity of Florida's death penalty jurisprudence.[200] Death is final, making it the most serious punishment a person can receive and these safeguards that the court took away ensured that it was only given to those that have committed the most heinous crimes.

D. How Individuals View the Florida Supreme Court: Judicial Activism

After these decisions, many have become cynical in how they view the Florida Supreme Court. Robert Dunham, the executive director of the Death Penalty Information Center, stated that the court no longer seen as a neutral arbiter and has lost its legitimacy due to its recent 2020 decisions.[201] He claims that the Justices are substituting well established precedent with their views, while systematically dismantling several safeguards in death penalty cases. Significantly, he says that once "the law becomes a vehicle for exercising power [. . .],

200. *Phillips*, 299 So. 3d at 1024 (Labarga, J., dissenting); Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) (J, Labarga dissenting).

201. Smith, *supra* note 17.

you have lost the courts."[202] Further, Stephen Harper, a law professor and supervising attorney of the Death Penalty Clinic at Florida International University, makes an important point that is at the center of all these decisions.[203] He states that taking together all of these decisions, the court has ignored stare decisis, which affects the court's credibility, stability, and predictability when lawyers advise their clients.[204] The court is overturning years of precedent simply because they disagree with it, with no special justification that is usually required.[205]

Mr. Dunham and Mr. Harper see the court as practicing judicial activism that is political in nature, especially with the court reversing its prior decisions over and over again at the destruction of stare decisis.[206] Judicial activism is defined in the Black Law Dictionary as "judicial decision-making whereby judges allow their personal views about public policy, among other facts, to guide their decisions," showing a willingness to overturn precedent.[207] Based on this definition, the Florida Supreme Court's 2020 decisions classify as decisions that overturn precedent and expand the power of the court. These decisions could push citizens to view the court as untrustworthy and unpredictable. Further, the court received an abundance of criticism for its decision in *Phillips v. State* because Florida prosecutors had not asked the court to reverse *Walls v. State*, pushing critics to see it as an act of judicial activism.[208] A court that randomly seeks to repeal old laws on its own is more of a legislature than a court, which is especially detrimental in such an impactful area of the law that is the death penalty.[209]

VI. The Future of the Law and the Court

In the span of a few months, the Florida Supreme Court has made four major changes to Florida's death penalty law. There is some fear that more changes are still to come. As many predicted once the

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. Smith, *supra* note 17.
207. Black's Law Dictionary (11th ed. 2019).
208. *Florida Supreme Court Limits Enforcement of Supreme Court Decision Barring Execution of Intellectually Disabled Prisoners*, Death Penalty Information Center (May 27, 2020), https://deathpenaltyinfo.org/news/florida-supreme-court-limits-enforcement-of-supreme-court-decision-barring-execution-of-intellectually-disabled-prisoners.
209. *Id.*

composition of the court changed, many of Chief Justice Canady's dissents have become the majority decisions.[210] This is true in *Phillips v. State,* which overruled *Walls v. State,* and in *State v. Poole,* which overruled *Hurst v. State*.[211]

The majority in the *Walls v. State* decision consisted of: at the time Chief Justice Labarga, Justice Pariente, Justice Lewis, Justice Quince, and Justice Perry.[212] The two dissenting justices were Justice Canady and Justice Polston.[213] In his dissent, Justice Canady laid out three reasons why the majority was wrong in their decision to apply *Hall* retroactively.[214] These reasons include: (1) prong of *Witt*, (2) the *Hall* decision is merely just an evolutionary refinement, and (3) federal law did not require the retroactive application of *Hall*.[215] Conveniently, these three same reasons became the basis for which the majority in *Phillips v. State* used to recede from *Walls*.[216] The majority in *Phillips*, much like the dissent in *Walls*, emphasizes that the court erred in its prior interpretation of *Hall*. The *Phillips* majority found that the *Hall* decision was merely a procedural clarification as to how states should structure their intellectual disability standards to pass constitutional muster, and not a development of fundamental significance that "placed beyond the authority of the state power to regulate certain conduct or impose certain penalties" like the *Walls* majority argued.[217] This is exactly what Justice Canady argued just four years before, in his *Walls* dissent. However, the main difference in 2020 was that Canady was now the Chief Justice of the Florida Supreme Court and he had the support of his main accompanying dissenter Justice Polston and Justice Lawson as well as Justice Muniz, who was newly appointed by Governor Ron DeSantis in 2019.[218] The only justice left on the court from the *Walls* majority was Justice Labarga, who strongly dissented in *Phillips*.[219] Thus, the change in the composition of the court played a large role in the court's decision to recede from its prior decision on *Walls*.

Similarly, the majority in the *Hurst v. State* decision consisted of: Chief Justice Labarga, Justice Pariente, Justice Lewis, Justice

210. Smith, *supra* note 17.
211. *Id.*
212. Walls v. State, 213 So. 3d 340, 340 (Fla. 2020).
213. *Id.* at 349 (Canady, J., dissenting).
214. *Id.* at 349–52.
215. *Id.*; Phillips v. State, 299 So. 3d 1013, 1019–22 (Fla. 2020).
216. *Phillips*, 299 So. 3d at 1019–22.
217. *Id.*
218. *Id.* at 1014.
219. *Id.* at 1024–26 (Labarga, J., dissenting).

Quince, and Justice Perry.[220] Just like in *Walls*, the only dissenting justices were Justice Canady and Justice Polston.[221] In his dissent, Justice Canady argues that the majority misuses the *Hurst v. Florida* decision in finding that a jury must make a unanimous decision to impose the death penalty when the Supreme Court stated that "each fact necessary to impose a sentence of death" needed to be made by a jury, which to him only means that the jury should make the findings of fact including the aggravating factors but not the ultimate determination of sentence.[222] This same analysis becomes one of the main reasons why the court decides to recede from *Hurst v. State* in *State v. Poole* just four years later.[223] Justice Canady's dissent in *Hurst v. State* lays the foundation for the majority's decision in *State v. Poole* to recede from *Hurst* and completely reshape Florida's death penalty law.[224]And just like the difference in court composition between *Walls* and *Phillips*, the court composition between *Hurst* and *Poole* plays a role in the *Poole* majority's decision.[225] In *State v. Poole*, Chief Justice Canady had the support of Justice Polston, Justice Lawson, and Justice Muniz, showing that the change in composition of the court in 2019 played a big role in this decision.[226] The only justice left on the court from the *Hurst* majority was Justice Labarga, who strongly dissented in *Poole*.[227] Thus, the best prediction of what other changes the Florida Supreme Court would make come from looking at Justice Canady's dissents in previous cases.[228]

One concrete change in the field of death penalty law that could be soon approaching is whether death row inmates may represent themselves in post-conviction proceedings.[229] The Florida Supreme Court is considering amending the Florida Rule of Criminal Procedure 3.851 and Florida Rule of Appellate Procedure 9.142.[230] The amendments involve the "discharge of postconviction capital counsel or the dismissal of the postconviction capital proceedings themselves, or both,

220. Hurst v. State, 202 So. 3d 40, 42 (Fla. 2020).

221. *Id.* at 42, 77 (Canady, J., dissenting).

222. *Id.* at 42, 77–78.

223. State v. Poole, 292 So. 3d 694, 709–11 (Fla. 2020).

224. *Id.* at 709–13.

225. *See id.* at 696.

226. *See id.*

227. *See id.* at 719 (Labarga, J., dissenting).

228. Zoom Interview with Professor Karen Gottlieb, Esq., Visiting Professor Death Penalty Law Clinic at Florida International University College of Law (Dec. 21, 2021).

229. Letter from John A. Tomasino, Supreme Court of Fla. Clerk, to The Florida Bar News Editor (May 6, 2021) (on file with Florida Supreme Court Case Docket), https://efactssc-public.flcourts.org/casedocuments/2021/537/2021-537_letter_73095_e48d.pdf.

230. *Id.*

the appeal from those orders, and the appointment of standby counsel upon the discharge of postconviction counsel."[231] In 2014, the Florida Supreme Court amended Florida Rule of Criminal Procedure 3.851(b)(6) to prohibit defendants who have been sentenced to death from representing themselves in postconviction proceedings, which would provide a reliable and predictable postconviction process that minimized any delays and ensured that the death penalty was applied consistently and fairly.[232] However, now the court will be hearing oral arguments to amend this rule, amongst others, on February 10th, 2022, at 11:00 A.M.[233] Significantly, there are various committees and organizations, including The Florida Association of Criminal Defense Lawyers and The Criminal Procedure Rule Committee, that have filed comments to these amendments, many of them arguing that these defendants should not be able to represent themselves in such a complex proceeding.[234] As of April 1, 2022, the Florida Supreme Court has yet ruled on this issue.[235]

Not only do these 2020 decisions bring into question what other changes in Florida's death penalty we should be expecting, but also bring into question the future of the Florida Supreme Court relating to its composition and how it may decide cases in the future. Significantly, in the future, it is possible that the court's composition drastically changes again due to mandatory retirements, retention elections, or a change in Governor. If these situations occur, the 2020 decisions are at stake of being overturned, causing even more instability in the law.

When it comes to the retention elections, several justices would be up for retention elections in the next couple of years. In 2022, five of the seven justices, including Justice Jorge Labarga, are up for merit retention elections.[236] If a Justice is not retained, he or she will be re-

231. *Id.*

232. In re Amendments to the Fla. Rules of Jud. Admin., 148 So. 3d 1171, 1171 (Fla. 2014).

233. *Case Docket: SC21-537*, FLA. SUPREME COURT DOCKET, http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2021&CaseNumber=537 (last visited Aug. 15, 2022).

234. Comment of the Criminal Procedure Rules Committee, In re Amendments to Fla. Rules of Crim. P. 3.851 and Fla. Rule of App. P. 9.142, No. SC21-537 (Fla. Apr. 13, 2021), https://efactssc-public.flcourts.org/casedocuments/2021/537/2021-537_response_56500_comments.pdf; Comment of the Office of the Fed. Pub. Defender for the N. Dist. of Fla., In re Amendments to Fla. Rules of Crim. P. 3.851 and Fla. Rule of App. P. 9.142, No. SC21-537 (Fla. Apr. 13, 2021), https://efactssc-public.flcourts.org/casedocuments/2021/537/2021-537_response_56506_comments.pdf.

235. *Case Docket: SC21-537*, *supra* note 233.

236. *Florida Supreme Court Justices*, *supra* note 18.

placed in the same way that they are appointed through the Judicial Nominating Commission system.[237] The fact that almost all of the Justices will be up for a vote by the public pushes a few concerns to the forefront, especially because in 2022 Governor DeSantis will also be up for reelection as well.[238] First, if some of the Justices are not retained and Governor DeSantis loses the elections, there would be a change in the court's composition and there may be a more even split among the Justices instead of the current six-one split. This situation could create even more instability in the law because the new court could potentially overturn the 2020 decisions using the same reasoning as the current court. Second, if all the Justices are retained and Governor DeSantis wins the 2022 election, the court's composition would remain mostly the same until at least 2026 and for now the 2020 decisions would remain intact. Thus, there could be even more changes in November 2022 that could affect the court's 2020 decisions.

We must further consider what may happen if all the current Justices are retained and Governor DeSantis is reelected, especially with the mandatory retirements on the horizon. If all the current justices are retained in their respective merit retention elections, there are still three upcoming mandatory retirements that will again change the court's composition. Significantly, Justice Labarga will turn 75 years old in 2027, Chief Justice Canady will turn 75 years old in 2029, and Justice Polston will turn 75 years old in 2030.[239] Because of the amendment to Article 5, Section 8 of the Florida Constitution, if these three Justices are still serving on the court, they must all retire around the same time within a span of three years.[240] Due to this, a major question remains: If in the 2026 elections, a democratic governor is elected in Florida and three new justices with evolutionist tendencies are appointed, is there a possibility that the Florida Supreme Court will overturn its 2020 decisions relating to the death penalty? If such a thing does happen, it will only show the importance and advantages of the doctrine of stare decisis.

As discussed previously in this comment, stare decisis promotes efficiency, predictability, and integrity in the judicial process.[241] This doctrine is essential to our legal system as it allows all defendants to be treated the same, encouraging citizens to trust in our courts. If the Florida Supreme Court's composition changes again and a new court

237. *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.
238. *See Ron DeSantis*, *supra* note 55.
239. *Florida Supreme Court Justices*, *supra* note 18.
240. FLA. CONST. art. V, § 10(a).
241. Mead, *supra* note 2, at 792.

decides that the current court got it wrong in 2020, it will again create significant instability in the state of the law and only confuse all other Florida courts, those facing the death penalty, and those on death row.

VII. Possible Solutions

Ultimately, Florida's judiciary has been affected by the recent gubernatorial elections of 2019, threatening to politicize a branch of our local government that should be focused on justice in an independent, impartial, and fair manner.[242] In order to retain what is left of the Florida Judiciary, there are several possible solutions that could prevent the judiciary from becoming politicized and the unpredictable application of the law that has been seen in 2020. To be judicially independent means that judges are free from potential domination by the other branches of government.[243] Judicial independence is one of the important aspects of a court because without it, "no one would agree to the judicial resolution of their dispute."[244] The Florida judiciary needs "qualified justices who are representative of the communities they serve," especially as it is one of the most diverse states in our nation.[245] It needs judges who are not only "intelligent, thoughtful, and faithful to the rule of law, but also bring a diversity of experience and background."[246]

A. Changing the Appointment System of the Judicial Nominating Commission

In Florida, Justices to the Florida Supreme Court are selected based on a merit selection and retention system.[247] Under this system, the Governor appoints a Justice by selecting an individual from a list of six names that is submitted by a Judicial Nominating Commission.[248] Judicial Nominating Commissions are supposed to be a nine-member

242. Peggy A. Quince, *Florida is Dangerously Close to Losing its Independent, Impartial and Fair Judiciary*, Miami Herald (Dec. 13, 2021, 4:49 PM), https://amp.miamiherald.com/opinion/op-ed/article256496886.html.

243. Drew Noble Lanier & Roger Handberg, *Judicial Independence: In the Eye of the Hurricane: Florida Courts, Judicial Independence, and Politics*, 29 Fordham Urb. L.J. 1029, 1031 (2002).

244. *Id.*

245. Quince, *supra* note 242.

246. Michael R. Band & Linda B. Edwards, *A Look Through the Looking Glass: The JNC and Judicial Nominating Process Deconstructed*, 92 Fla. Bar J. 11, 12 (2018).

247. Fla. Const. art. V, § 10(a); *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

248. *Merit Selection, Retention & Mandatory Retirement of Justices*, *supra* note 50.

nonpartisan commission of non-lawyers and lawyers that recruit, research, find, and evaluate applicants for judicial office.[249] Once this commission has found several judicial applicants, it will submit about six names to the Governor, who will decide which judicial applicant will be appointed.[250] When this system was first put into place, the Governor appointed three members onto the commission, the Florida Bar appointed three other members, and then those six newly appointed members picked the final three members of the commission.[251] However, Governor Jeb Bush and the legislature changed this system in 2001.[252] Now, it is the Governor who appoints five members directly, and the Florida Bar nominates four members that the Governor may accept or reject as many times as he or she wishes without giving any reasons.[253] This system essentially allows the Governor to hand pick every single member on the commission that will later present him with names for judicial nominations. This system of who is chosen to the Judicial Nominating Commission (JNC) plays a big role in the politicization of Florida's Judiciary, eroding its legitimacy. It gives the Governor the power to choose those that will present him with applicants for the Florida Supreme Court, giving him the ability to dictate the names that are given to him. This system creates a more politicized environment because judicial nominations will be driven by the Governor at the time, which is completely opposite to the goal of removing politics from the equation when selecting the Supreme Court justices.[254] In this system, there is only one appointing authority, the Governor, for all 26 JNCs in Florida.[255] These committees have become nothing more than "political patronage committees."[256]

The best way to change this effect would be to go back to the original system, which had been in place for over 30 years, that Governor Jeb Bush replaced.[257] The Judicial Nominating Committee has four important tasks: "(1) recruiting diverse applicants, (2) screening

249. *Judicial Nominating Commissions*, THE FLORIDA BAR, https://www.floridabar.org/directories/jnc/ (last visited Aug. 15, 2022).

250. *Id.*

251. Adam Richardson, *Florida's System for Nominating Judges has Become a Partisan Tool and Must Be Reformed*, FLORIDA PHOENIX (Oct. 5, 2020, 10:00 AM), https://floridaphoenix.com/2020/10/05/floridas-system-for-nominating-judges-has-become-a-partisan-tool-and-must-be-reformed/.

252. *Id.*

253. FLA. STAT. § 43.291 (2021).

254. Quince, *supra* note 242.

255. Jesse H. Diner, *JNCS: Return to the Way We Were*, 84 FLA. BAR J. 4 (2010); https://www.floridabar.org/the-florida-bar-journal/jncs-return-to-the-way-we-were/.

256. Richardson, *supra* note 251.

257. *Id.*; Diner, *supra* note 255.

applicants, (3) conducting thoughtful and unbiased interviews, and (4) making recommendations that reflect the diversity of the population the judge will serve."[258] This old system worked well because there were essentially "three appointing authorities to each JNC," ensuring a form of checks and balances on the Governor as well as an independent and impartial jury.[259] This old system worked to check executive appointments onto the courts in some way, which is a big factor in the measure of true judicial independence.[260] It scrutinized the judicial choices of Florida's Governor, truly giving the judiciary the independence it needs for its legitimacy. The old system would give the Florida Bar a big role in the judicial appointment process, which could help with the diversity of those appointed onto the court. Over the years, the Florida Bar has directed more attention to the importance of diversity and inclusion, even setting up a special task force to determine why more diverse candidates were not applying for Judicial Nominating appointments or for appointment as judges.[261] Making the Florida Bar a large part of this judicial nomination process will help the Florida Judiciary become more representative of the community it serves, which is what it currently needs. Even if going back to the old system is not an option, setting a limit to how many times the governor can reject the JNC's judicial nominations for the Florida Supreme Court as well as the Florida Bar's nominations to the JNCs could set some sort of limitations on who the Governor can appoint to the court. Ultimately, going back to the old system seems to be the best solution because it maintains the current system Florida has of merit selection and retention, but ensures that the judiciary is as independent as possible.

B. Electing Judges

Another potential solution would be allowing the Florida Supreme Court Justices to be elected by the people of Florida themselves. One benefit to this system is that the people of Florida can decide for themselves who they want in the highest court of their state, and they could also oust a judge that they feel is not fulfilling their responsibilities impartially and fairly.[262] Elections, those that are free and fair,

258. Band & Edwards, *supra* note 246.

259. Diner, *supra* note 255.

260. Lanier & Handberg, *supra* note 243, at 1051.

261. *Diversity/Inclusion*, FLORIDA BAR, https://www.floridabar.org/about/diversity/ (last visited Aug. 15, 2022).

262. Memorandum from Wallace B. Jefferson, *Chair of Appointments and Confirmations Working Group on Appointments and Confirmation Working Group* (Mar. 4, 2020),

are a fundamental aspect to democracy.[263] It relieves judges from the overwhelming partisan political pressure they may be under. In some ways, elections are more in the open and closed off to behind-the-scenes deal-making. It could help open the door to more judicial candidates who may not be appointed because of a lack of connections to those who make the appointments or screen the applicants. Electing judges also takes away the power from a single appointer like the Florida Governor, putting the power in the people's hands. An election could help to act as a check and balance to counter politicized judicial appointments. Yet, in order to achieve true knowledge of these potential judges, the people of the state would have to be given information about the judicial candidate, including his or her qualifications as well as their approach to the administration of justice.[264] The same information that is made available to the Governor and the JNC when nominating or appointing these justices would have to be made to the public. There would also need to be some sort of interview like event that would allow the people to really get to know the candidate. Ultimately, this could prove difficult for the state, especially if electing judges is to remain non-partisan.

Although having the people of Florida elect the justices would solidify who the citizens of the state want in its highest court and potentially create a more diverse court, it could still allow politicization of the judiciary. Because it may be difficult to give the information necessary to the public, this form of selecting justices may turn into which judicial candidate has a familiar or ethnic surname, and which political affiliation does each judge tend to side with.[265] It could make these "judicial elections" very similar to those for executive and legislative officials. Further, campaign donations may be involved, which could cause the impartial judiciary to seem influenced by major donors and affiliates.[266] Ultimately, although this system could still create a somewhat politicized environment in the judiciary, it would truly put the choice back into the hands of the people.

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https://www.txcourts.gov/media/1446559/wbj-memorandum-for-appointments-and-confirmations-working-group.pdf.

263. Ibrahim J. Gassama, *Ballots and Bullets: The Right to Democratic Governance in International Law After the Egyptian Coup*, 32 WIS. INT'L L.J. 621, 628 (2014).

264. Memorandum from Wallace B. Jefferson, *supra* note 262.

265. *Id.*

266. *Id.*

C. Giving State Supreme Courts Justices Life Tenure

Another solution that could help the Florida Supreme Court from becoming politicized is giving the justices of the court life tenure much like the justices on the United States Supreme Court. Life Tenure has been a very powerful tool to ensure that the Supreme Court Justices are independent from any political pressures that may threaten the integrity of the federal judiciary.[267] Once a justice is appointed onto the Supreme Court, they are completely independent from any individual or organization that may try to influence their decisions, which should be based on the law and not on political favor. Instilling this system in Florida's highest court could help with the stability of Florida law specifically death penalty law, which has been reshaped within ten months. It could help prevent one Governor from dominating the court by appointing several justices in one single term.[268] This is essentially what happened in 2019 when Governor DeSantis appointed five justices, three of whom were on the court today.[269] From 2019 to 2020, Governor DeSantis has been able to appoint over a quarter of the current court.[270] Unlike the current system of appointing justices to the Florida Supreme Court, lifetime appointments could produce more stability and predictability in the law as there would be less changes in the composition of the court compared to the changes that have occurred in the last couple of years. It would be the same justices for a long period of time, ensuring that the law remains fair and applied reliably. Giving these justices life-tenure would further some of the advantages that comes with *stare decisis*.[271] It would bring stability, predictability, and efficiency to the Florida Supreme Court, touchstones that have been disregarded by the court all throughout 2020. Also, such a system would lessen the adverse effects that the outcomes of gubernatorial elections have on the state judiciary.

Although this life-term system could present several benefits, in recent years many people have called for term limits for the Justices of the Supreme Court. This is a debate that has been developing for years, as many question how life-time appointments affect the judici-

267. Philip D. Oliver, *Assessing and Addressing the Problems Caused by Life Tenure on the Supreme Court*, 13 J. APP. PRAC. & PROCESS 11, 12 (2012).

268. Molly Callahan, *Why Do Supreme Court Justices Have Lifetime Appointments?*, NEWS@NORTHEASTERN (Sept. 21, 2018), https://news.northeastern.edu/2018/09/21/why-do-supreme-court-justices-have-lifetime-appointments/.

269. *Judges Appointed by Ron DeSantis*, *supra* note 6.

270. *Id.*

271. *See* Mead, *supra* note 2, at 792.

ary where life expectancy continues to rise.[272] Justices will now usually serve over twenty years on the Court and some justices have even remained on the Court into their 80s.[273] Law Professor James Lindgren has argued that instilling term limits on the Supreme Court would "help usher out judges with mental decrepitude and loss of stamina, eliminate strategic retirement for political reasons, reduce animosity in confirmation, and return to traditional levels of judicial independence."[274] Yet, there is that possibility that the Court's legitimacy would be questioned as the outcome of a presidential election would be more important than ever. In 2021, several members of Congress reintroduced the Supreme Court Term Limits Act, which limits Supreme Court Justice's terms to 18 years and allows each President to appoint a new justice every odd year, giving them the ability to appoint two justices within their four-year term.[275] This change would significantly affect the current Supreme Court and would change a system that has been in place for hundreds of years. This creates the question of how effective life-time appointments would truly be when many are trying to change that very system in the Nation's highest court.

Conclusion

As a result of the changes to the Florida Supreme Court's composition, the court has drastically receded from its prior decisions, ignoring the doctrine of *Stare Decisis* and reshaping death penalty law in Florida. The court has now taken away important safeguards that were in place for those on death row. These safeguards include: (1) unanimous jury decisions in death penalty cases, (2) the heightened scrutiny traditionally applied to appeals for criminal convictions based on circumstantial evidence alone, (3) the retroactive application of the revised Florida scheme to determine intellectual disability, and (4) the mandatory review of death sentences for proportionality. Taking away these important safeguards will push Florida decades back in its pro-

272. *Pros and Cons of Potential Term Limits for Supreme Court Justices*, Colum. L. Sch. (Mar. 25, 2014), https://www.law.columbia.edu/news/archive/pros-and-cons-potential-term-limits-supreme-court-justices.

273. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Pol'y 769 (2006).

274. *Pros and Cons of Potential Term Limits for Supreme Court Justices*, *supra* note 272.

275. *Press Release, Reps. Ro Khanna, Don Breyer, Barbara Lee, and Rashida Tlaib, Reps. Introduce Legislation to Set Supreme Court Term Limits, Appointments Schedule, Without Constitutional Amendment,* Beyer House (Sept. 3, 2021), https://beyer.house.gov/news/documentsingle.aspx?DocumentID=5330.

gress regarding the death penalty, create uncertainty about the future of death penalty law in the state, and produce tensions between the court and the Florida legislature. It will allow for the death penalty to be arbitrarily imposed, which has caused many to feel uneasy.

The gubernatorial election of 2018 has significantly affected the Florida Judiciary. At the same time, Governor DeSantis won the 2018 election, three Florida Supreme Court Justices had to mandatorily retire at the age of 70. This allowed Governor DeSantis to appoint three new justices to the court, flipping the court to a six-to-one conservative majority. And all throughout 2020, this new majority disregarded the doctrine of *stare decisis*, receding from long-standing precedent that helped many of those on death row. However, one main thing that this court did not consider was the fact that death is different, and for this reason, the death penalty law should be treated with great care. The actions of this court only show that it has participated in judicial activism and has become a politicized figure in the State of Florida. With these issues in mind, there are several other systems that promote judicial independence and could prevent continued politicization of the Florida Supreme Court. These systems include going back to the old way that Judicial Nominating Committees were set up prior to 2001, allowing Floridians to elect the Florida Supreme Justices directly, or giving the Florida Supreme Court Justices life tenure. These three solutions, although very different, could help the Florida Judiciary gain its independence and legitimacy.