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Sixth Amendment Sentencing After *Hurst*

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ABSTRACT

The U.S. Supreme Court's 2016 decision in *Hurst v. Florida*, which struck down Florida's capital sentencing scheme, altered the Court's Sixth Amendment sentencing doctrine. That doctrine has undergone several important changes since it was first recognized. At times the doctrine has expanded, invalidating sentencing practices across the country, and at times it has contracted, allowing restrictions on judicial sentencing discretion based on findings that are not submitted to a jury. *Hurst* represents another expansion of the doctrine. Although the precise scope of the decision is unclear, the most sensible reading of *Hurst* suggests that any finding required before a judge may impose a higher sentence must first be submitted to a jury and proven beyond a reasonable doubt. This reading invalidates several state capital sentencing systems and several noncapital systems, and it would require dramatic changes to federal sentencing as well.

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INTRODUCTION

In its 2016 decision, *Hurst v. Florida*,¹ the U.S. Supreme Court held that the Florida's capital sentencing system violated the Sixth Amendment right to a jury trial.² Although the opinion purports to routinely apply the Court's previous Sixth Amendment cases, a closer examination of *Hurst* shows that it expanded the doctrine. The Court struck down Florida's capital sentencing scheme because it conditioned the imposition of the death penalty on findings made by a judge, even though a jury had already made the same findings. But the Court's previous Sixth Amendment cases seemingly permitted such judicial factfinding when made subsequent to similar jury findings.

This is not the first time that the Supreme Court has expanded its Sixth Amendment sentencing doctrine without explicitly acknowledging that it was doing so. In *Ring v. Arizona*,³ decided in 2002, the Court invalidated Arizona's capital sentencing scheme.⁴ *Ring* claimed to simply apply existing doctrine, and because only a handful of states employed similar capital schemes, the case initially seemed relatively unimportant. But the decision in *Ring* actually modified the Sixth Amendment sentencing doctrine, and that modification proved momentous. Using the slightly modified *Ring* rule, the Supreme Court invalidated both the mandatory application of the Federal Sentencing Guidelines and the noncapital sentencing regimes in multiple states within three years.⁵

History may be repeating itself. Although the holding in *Hurst* applied only to the Florida death penalty scheme—and very few states have similar capital sentencing schemes—the manner in which *Hurst* broadened the Sixth Amendment sentencing doctrine may ultimately have wide-ranging effects in both capital and noncapital cases.

In particular, *Hurst* makes clear that mere “authorization” of a sentence by a jury does not satisfy the Sixth Amendment.⁶ Prior to *Hurst*, several

1. 136 S. Ct. 616 (2016).

2. *Id.* at 624.

3. 536 U.S. 584 (2002).

4. *Id.* at 609.

5. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that the mandatory application of the Federal Sentencing Guidelines violates the Sixth Amendment); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that mandatory state sentencing guidelines violate the Sixth Amendment).

6. As explained below, a statute “authorizes” a sentence when the sentence is available under the statute. But mere authorization is not enough where certain facts serve as statutory prerequisites to the imposition of the sentence. See *infra* Part III.

sentencing systems distinguished between factual findings that authorize or make a defendant eligible for a sentencing increase, and other findings required to impose a sentence. Several courts have held that only those findings that “authorize” a sentence need be submitted to a jury and proven beyond a reasonable doubt; a judge could make other findings by using a preponderance of the evidence standard.⁷ *Hurst* rejects this authorization approach to the Sixth Amendment. Instead, *Hurst* requires that a jury—as opposed to a judge—make *all* factual findings, beyond a reasonable doubt, necessary for the imposition of the sentence.

In addition, *Hurst* may have expanded the category of findings that trigger the Sixth Amendment. Prior to *Hurst*, the Court had intimated that Sixth Amendment sentencing doctrine applied only to findings of historical fact.⁸ But language in *Hurst* suggests that juries must also make qualitative determinations, such as the weighing of aggravating and mitigating circumstances, when those determinations are necessary for the imposition of particular sentences. Like *Hurst*’s rejection of “authorization,” an expansion of the Sixth Amendment to qualitative findings would affect many sentencing systems across the country. A number of states require judges to weigh aggravating and mitigating facts or make other qualitative findings before increasing punishment.⁹ *Hurst* suggests that the Sixth Amendment requires juries to perform those tasks instead.

This Article explores the wide-ranging consequences of *Hurst* on sentencing in the United States. It identifies the capital and noncapital sentencing systems that *Hurst* appears to invalidate—a list that is quite long. But this Article does more than simply identify the practical consequences of *Hurst*. It also explains how *Hurst*’s expansion of the Sixth Amendment sentencing doctrine improves the doctrine—a doctrine that has been in a state of near-constant flux since 2000.¹⁰ Those fluctuations stem, in part, from the Court’s

7. See, e.g., *State v. Martinez*, 115 P.3d 618, 625 (Ariz. 2005) (en banc); *State v. Gales*, 658 N.W.2d 604, 612–13 (Neb. 2003). It is worth noting that judicial factfinding typically requires a lower standard of proof (preponderance of the evidence) than jury factfinding (beyond a reasonable doubt).

8. See *Ring*, 536 U.S. at 589 (stating that, under the Sixth Amendment, capital defendants “are entitled to a jury determination of *any fact* on which the legislature conditions an increase in their maximum punishment” (emphasis added)); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (emphasis added)).

9. See *infra* Subpart IV.A (cataloguing these states).

10. There is a robust literature that addresses the wide-ranging consequences of *Apprendi v. New Jersey* and the subsequent expansions and contractions of the Sixth Amendment. See,

struggle to accommodate various considerations, including history, formalism, and the values that underlie the right to a jury trial. *Hurst* strikes a balance between these competing concerns, and it does so in a manner that is both sensible and administrable. That is because *Hurst* makes judicial sentencing discretion the touchstone of the Sixth Amendment sentencing doctrine. There is no jury right for findings that a judge makes of her own accord; the right exists only if the finding is required before the imposition of a sentence.

To be sure, *Hurst* does not explicitly acknowledge this expansion. Just as *Ring* purported to simply apply existing doctrine,¹¹ so too the opinion in *Hurst* describes the decision as a straightforward application of *Ring* to Florida's capital sentencing regime.¹² But that cannot be the case. *Ring* only required juries to make findings that were necessary to increase punishment; it was silent about requiring judges to make additional findings, and subsequent cases appeared to permit such judicial findings.¹³ If *Hurst* merely applied *Ring*, then Florida did not violate Timothy Hurst's Sixth Amendment rights because he had a jury finding that authorized the imposition of the death penalty.¹⁴ As explained below, the only sensible way to read *Hurst* is as an expansion of the Sixth Amendment's scope from factual findings that authorize sentencing increases to all factual findings required to impose a higher sentence.

This Article proceeds in four parts. Part I provides a brief overview of the Sixth Amendment sentencing doctrine before *Hurst*, and it describes how *Hurst* expanded the doctrine. Part II explains that, after *Hurst*, a jury must make all factual findings, beyond a reasonable doubt, that are required in order to impose a higher sentence. This reading rejects any constitutional distinction

e.g., Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005) (exploring whether the *Apprendi* line of cases is best understood as a blunder); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (discussing the likely effect of the Sixth Amendment sentencing doctrine on defendants who plead guilty); Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010) (criticizing the Sixth Amendment sentencing cases); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001); Jonathan S. Masur, *Booker Reconsidered*, 77 U. CHI. L. REV. 1091 (2010) (using a dissent by Judge Easterbrook to critique *Booker*).

11. See *infra* notes 34–37 and accompanying text.
12. See *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (“We granted certiorari to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*. We hold that it does, and reverse.” (citation omitted)).
13. See *infra* text accompanying notes 115–117.
14. At least, the death penalty was “authorized” in the sense that the word “authorized” has been used by courts applying the Sixth Amendment sentencing doctrine. See *infra* text accompanying notes 149–150, 196–197, 202–203.

between factual findings that “authorize” a sentence and factual findings that are required to impose a sentence. *Hurst* also suggests that the jury right applies not only to findings of historical fact, but also to other required findings, including qualitative determinations. Part II explains how these doctrinal expansions are grounded not only in the formalist logic of *Hurst*, but also in larger principles about the role of the jury and about the role of judicial discretion that appear both inside and outside of the Sixth Amendment sentencing doctrine.

Parts III and IV drill down on these two expansions, explaining how *Hurst* supports each of these rules, identifying those sentencing systems that run afoul of each rule, and addressing counterarguments to adopting these rules in the wake of *Hurst*. Part III addresses the expansion of the Sixth Amendment from factual findings that “authorize” a sentence to all factual findings that are required to impose a sentence. Part IV addresses the possibility that *Hurst* expanded the Sixth Amendment from findings of historical fact to all required findings, including qualitative determinations.

I. *HURST* AND THE SIXTH AMENDMENT SENTENCING DOCTRINE

To understand *Hurst* and how it has shifted Sixth Amendment sentencing doctrine, it is necessary to explore briefly the genesis of the doctrine and its evolution. This Part traces the rise of the doctrine, as well as its various expansions and contractions. Then, it demonstrates why *Hurst* did more than simply apply *Ring*.

A. The Rise of the Sixth Amendment Sentencing Doctrine

In 1999, the Supreme Court first suggested that the Sixth Amendment placed restrictions on sentencing practices in *Jones v. United States*.¹⁵ *Jones* involved the proper interpretation of the federal carjacking statute. The statute provided for higher maximum sentences if various aggravating circumstances were present, such as inflicting serious bodily injury.¹⁶ The *Jones* Court had to decide whether those aggravating circumstances constituted elements for separate crimes or whether they were mere sentencing enhancements to be

15. *Jones v. United States*, 526 U.S. 227, 248 (1999) (“[D]iminishment of the jury’s significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.”).

16. 18 U.S.C. § 2119(2) (2018).

decided by the judge.¹⁷ The Court interpreted the statute as setting forth separate crimes, and it relied, in part, on the doctrine of constitutional avoidance.¹⁸ According to the *Jones* Court, interpreting the statute as establishing sentencing enhancements, rather than separate crimes with different elements, “would merit Sixth Amendment concern.”¹⁹ Allowing states to characterize elements of crimes as sentencing enhancements would let legislatures remove from juries the determination of whether a defendant was guilty beyond a reasonable doubt of a given element. It would reallocate that determination to judges, who need only find that element occurred by a preponderance of the evidence.²⁰

The same issue arose the following year in *Apprendi v. New Jersey*.²¹ *Apprendi* involved a New Jersey statute that increased the maximum penalty for crimes committed “with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”²² The New Jersey Supreme Court interpreted the statute as setting forth a sentencing enhancement, rather than as creating a separate crime.²³ Because it was a sentencing enhancement, the New Jersey court reasoned that the trial court need only make the finding of intimidation by a preponderance of the evidence.²⁴ This state court interpretation forced the U.S. Supreme Court to answer definitively whether the Sixth Amendment prohibited judges from making such findings by a preponderance of the evidence.

The *Apprendi* Court held that the Sixth Amendment jury right did, in fact, prohibit judges from making such findings. Specifically, the Court held that any fact that increases the statutory maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt.²⁵ The Court based its

17. 526 U.S. at 230–32.

18. *Id.* at 239–40. The canon of constitutional avoidance prefers the Court to decide cases on nonconstitutional grounds as opposed to constitutional ones when possible. For a discussion of the doctrine and an example of its application, see William W. Berry III, *Criminal Constitutional Avoidance*, 104 J. CRIM. L. & CRIMINOLOGY 105 (2014).

19. *Jones*, 526 U.S. at 248.

20. See, e.g., *In re Winship*, 397 U. S. 358, 364 (1970) (holding that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged); *Mullaney v. Wilbur*, 421 U.S. 684, 703–04 (1975) (applying *Winship* to Maine’s heat of passion law).

21. 530 U.S. 466 (2000).

22. N.J. STAT. ANN. § 2C:44–3(e) (West Supp. 1999–2000) (repealed 2001).

23. *Apprendi*, 530 U.S. at 471–73.

24. *Id.* at 468–69, 471–73.

25. *Id.* at 490. The Court recognized an exception for prior convictions, which is discussed in more detail *infra* text accompanying note 163.

decision on the importance of the jury trial right, which serves as a check on state power, as well as on the history of juries and punishment in the United States.²⁶

Because the Court limited the rule announced in *Apprendi* to increases in statutory maximum sentences, the Sixth Amendment sentencing doctrine did not appear to affect many structured sentencing guideline practices in the United States. Structured sentencing arose in the last quarter of the twentieth century in response to perceptions that broad statutory sentencing ranges gave judges too much power to impose dramatically different sentences on defendants who had committed similar crimes.²⁷ In order to combat sentencing disparity, a number of states and the federal government adopted legislative or administrative schemes that limited judicial sentencing authority to narrow bands within statutory ranges, based on a judge's factual findings at sentencing.²⁸ Because the Court framed *Apprendi*'s rule in terms of increasing the maximum statutory sentences, these structured sentencing practices appeared constitutional in the wake of *Apprendi*.

But *Ring v. Arizona*²⁹ expanded the Sixth Amendment sentencing doctrine beyond statutory maxima. *Ring* involved a Sixth Amendment challenge to Arizona's capital sentencing regime. Arizona convicted Timothy Ring of first-degree murder, and the statutory maximum punishment for murder was the death penalty. Arizona law permitted the imposition of the death penalty only if certain aggravating circumstances were present, and Arizona assigned the task of finding those aggravating circumstances to the trial judge, not a jury.³⁰

The *Ring* Court held that this sentencing scheme violated the Sixth Amendment. Even though the maximum punishment for first-degree murder specified in the statute was death—thus satisfying the rule articulated in *Apprendi*—the Court focused on the maximum penalty that Ring could receive based on his conviction alone, which was life imprisonment.³¹ Unless and until

26. 530 U.S. at 476–90.

27. See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002) (explaining this shift as part of the shift from penal welfarism to penal populism); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 169–73 (2016) (describing the rise of structured sentencing).

28. See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69 (1999); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997); see also *infra* notes 103–108 and accompanying text.

29. 536 U.S. 584 (2002).

30. See *id.* at 592–93 (describing the Arizona capital sentencing system).

31. See *id.* at 597 (“Based solely on the jury’s verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.”).

the judge found an aggravating circumstance, the judge could not sentence Ring to death. And this, according to the *Ring* Court, violated the Sixth Amendment.³² For the sentence to be constitutional, the jury had to find the aggravating factors beyond a reasonable doubt.³³

Notably, the *Ring* Court framed its holding narrowly: that the Sixth Amendment prohibits “a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.”³⁴ And it explained its holding as nothing more than an application of *Apprendi* to capital cases.³⁵ When the Court decided *Ring*, only four other states—Colorado, Idaho, Montana, and Nebraska—had similar capital sentencing schemes.³⁶ Initially, the *Ring* decision’s effect seemed to be modest. But in applying *Apprendi*’s rule to something more than a straightforward increase of a statutory maximum penalty, *Ring* had dramatically expanded the scope of the doctrine to other forms of structured sentencing.³⁷

Two years later, in *Blakely v. Washington*,³⁸ the Court, citing *Ring*, acknowledged this expansion of the doctrine: “Our precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”³⁹ By expanding the Sixth Amendment to apply to factual findings that a jury must make before the judge has the authority to increase a sentence, *Ring* invalidated many of the structured guideline sentencing systems that were thought to have survived *Apprendi*.⁴⁰ Within a year of deciding *Blakely*, the Supreme Court used the expanded Sixth

32. *See id.* at 609.

33. *Id.*

34. *Id.*

35. *See, e.g., id.* at 589, 609 (framing the decision as a mere acknowledgment that *Apprendi* was “irreconcilable” with a previous decision upholding Arizona’s capital system) (“Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”).

36. *See* COLO. REV. STAT. § 16-11-103 (2001) (providing for a similar scheme, but employing a three-judge panel); IDAHO CODE § 19-2515 (2001); MONT. CODE ANN. § 46-18-301 (1997); NEB. REV. STAT. § 29-2520 (1995).

37. *See* JOHN F. PFAFF, SENTENCING LAW AND POLICY 322 (2016) (stating that *Ring* clarified that *Apprendi* was not “a drafting rule” and, as a result, “*Ring* would prove to be the intellectual forebear of *Blakely*”).

38. 542 U.S. 296 (2004).

39. *Id.* at 303 (alteration in original).

40. PFAFF, *supra* note 37, at 328 (“[T]he outcome in *Blakely* was inevitable given the Court’s holding in *Ring*.”).

Amendment sentencing doctrine to invalidate mandatory application of the Federal Sentencing Guidelines as well.⁴¹

But the Sixth Amendment sentencing doctrine has not expanded in an unbroken line. The doctrine has experienced several contractions. For example, in *Harris v. United States*,⁴² the Court refused to apply the doctrine to statutes that imposed mandatory minimum sentences.⁴³ In *Oregon v. Ice*,⁴⁴ the Court held that the U.S. Constitution did not prohibit states from assigning the findings of fact necessary for the imposition of consecutive sentences for multiple offenses to the judge, rather than the jury.⁴⁵ Most notably, in applying the Sixth Amendment doctrine to the Federal Sentencing Guidelines, the Court has repeatedly permitted some restrictions on federal judges' ability to increase sentences in the absence of factual findings, suggesting that not all factual findings required to increase a defendant's sentence trigger the Sixth Amendment.⁴⁶

But the Court has also expanded the doctrine in the years since *Ring*. In *Southern Union v. United States*,⁴⁷ the Court extended the doctrine to criminal fines.⁴⁸ Most notably, in *Alleyne v. United States*,⁴⁹ the Court overruled *Harris* and held that the Sixth Amendment applied not only to findings that increased the maximum available punishment, but also to findings that imposed mandatory minimum punishments.⁵⁰

These expansions and contractions illustrate that the Sixth Amendment sentencing doctrine is still in flux. Sometimes, the Court explicitly acknowledges a contraction or expansion in the case that establishes it.⁵¹ But other times, it

41. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that the mandatory application of the Federal Sentencing Guidelines violated the Sixth Amendment).

42. 536 U.S. 545 (2002), overruled by *Alleyne v. United States*, 570 U.S. 99 (2013).

43. *Id.* at 548.

44. 555 U.S. 160 (2009).

45. *Id.* at 169–70, 172. Many commenters have argued that the holding in *Ice* is entirely incompatible with the rules announced in *Apprendi*, *Ring*, and *Blakely*. See, e.g., PFAFF, *supra* note 37, at 368–70 (stating that *Ice* is entirely inconsistent with *Ring* and *Blakely*); Bowman, *supra* note 10, at 455–58 (criticizing the analysis in *Ice* as “little more than a compilation of the arguments rejected by the majority opinions in *Apprendi*, *Blakely*, and *Cunningham*”).

46. See, e.g., *Gall v. United States*, 552 U.S. 38, 66 (2007); *Booker*, 543 U.S. at 230–32. The Court's decisions about the Federal Sentencing Guidelines have triggered a near-avalanche of critical commentary. See, e.g., Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1 (2008); Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665 (2006).

47. 567 U.S. 343 (2012).

48. *Id.* at 360.

49. 570 U.S. 99 (2013).

50. See *id.* at 103.

51. See, e.g., *id.* (explicitly overruling *Harris*).

has altered the doctrine without acknowledging the shift until subsequent cases.⁵² As the next Subpart explains, *Hurst* appears to fall into this second category. Just as the rule announced in *Apprendi* could not fully explain the outcome in *Ring*, the rule announced in *Ring* cannot fully explain the outcome in *Hurst*.

B. Reading *Hurst*

Timothy Lee Hurst received a death sentence in Florida for murdering his coworker, Cynthia Harrison.⁵³ Authorities found Harrison's body in the freezer of the restaurant where she worked—bound, gagged, and stabbed over sixty times.⁵⁴ The jury found Hurst guilty and recommended a death sentence.⁵⁵ Under Florida law, the trial judge was required to hold a separate hearing to determine whether “sufficient aggravating circumstances existed to justify imposing the death penalty.”⁵⁶ The trial judge reached the same conclusion as the jury and sentenced Hurst to death.⁵⁷

Hurst challenged his sentence on appeal, arguing that Florida's sentencing scheme violated the Sixth Amendment. Specifically, he asserted that his sentence ran afoul of *Ring v. Arizona*,⁵⁸ because a jury, not a judge, must find the facts necessary to sentence a defendant to death. The Florida Supreme Court affirmed his sentence, concluding that the U.S. Supreme Court had previously upheld the constitutionality of Florida's capital sentencing system.⁵⁹ In particular, the Florida Supreme Court relied on *Hildwin v. Florida*,⁶⁰ in which the U.S. Supreme Court stated that the Sixth Amendment “does not require that the specific findings authorizing the imposition of the sentence of

52. This happened not only in *Ring*, see *supra* text accompanying notes 34–37, but also in *Booker*, which did not acknowledge all of the restrictions on judicial sentencing discretion that the new advisory system imposed until later cases. See, e.g., *Gall v. United States*, 552 U.S. 38, 49–50, 50 n.6 (2007).

53. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

54. *Id.*

55. *Id.*

56. *Id.*

57. See *id.* Because of an error, the Florida Supreme Court initially reversed the sentence. At resentencing, the jury again issued its advisory verdict of death, and the judge again found the facts necessary to sentence Hurst to death. See *id.* at 620.

58. 536 U.S. 584 (2002).

59. See *Hurst v. State*, 147 So.3d 435, 445–47, 449 (Fla. 2014), *rev'd*, 136 S. Ct. 616 (2016); see also *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989), *overruled by Hurst*, 136 S. Ct. 616 (upholding Florida's capital statute); *Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976) (same).

60. 490 U.S. 638 (1989) *overruled by Hurst*, 136 S. Ct. 616.

death be made by the jury.”⁶¹ The Florida court noted that the U.S. Supreme Court never overruled *Hildwin* in its post-*Apprendi* cases.⁶²

The U.S. Supreme Court reversed. It held that *Hurst*’s sentence violated the Sixth Amendment, and it overruled *Hildwin* and other prior cases “to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.”⁶³

At first glance, *Hurst* reads as a simple application of *Ring*. Indeed, much language in the majority opinion supports this reading.⁶⁴ For example, the majority states:

61. *Id.* at 640–41.

62. *Hurst*, 147 So.3d at 446–47. The Court decided *Hildwin* more than a decade before its embrace of the Sixth Amendment sentencing doctrine in *Apprendi*.

63. *Hurst*, 136 S. Ct. at 624. Justice Breyer concurred in the judgment, but on the grounds that judicial sentencing in a capital case violated the Eighth Amendment. *Id.* at 624 (Breyer, J., concurring in the judgment). Justice Alito dissented, arguing that the Court should revisit *Ring*, and further, should not extend it to *Hurst* because Florida’s capital sentencing scheme was distinguishable from the Arizona scheme struck down in *Ring*. *Id.* at 625–26 (Alito, J., dissenting).

64. The majority opinion begins by explaining that, although a jury recommended a death sentence for *Hurst*, “Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty.” *Id.* at 619 (majority opinion). After this description, the Court pronounced: “We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” *Id.*

Notably, every time that the *Hurst* majority referenced the case’s holding, it always framed the holding in terms of the imposition of capital punishment. *See, e.g., id.* (“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.”); *id.* at 622 (“As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.”); *id.* at 624 (“Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s factfinding, that is necessary for imposition of the death penalty.”); *id.* (“The Sixth Amendment protects a defendant’s right to an impartial jury. This right required Florida to base Timothy Hurst’s death sentence on a jury’s verdict, not a judge’s factfinding. Florida’s sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.”).

In light of this framing, one might argue that the holding in *Hurst* applies only to capital sentencing proceedings. But such an argument is almost certainly wrong. Although the U.S. Supreme Court has repeatedly affirmed that capital defendants are entitled to certain rights that are not guaranteed to defendants who are not facing the death penalty, *see, e.g.,* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1149–62 (2009) (describing heightened Eighth Amendment scrutiny in capital cases), the Sixth Amendment jury trial right is not one of those rights. And the Supreme Court has always

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.⁶⁵

But there are features of Florida's capital sentencing statute that are difficult to square with the holding in *Ring*. The Florida jury made only a recommendation to the sentencing judge, and regardless of what sentence the jury recommended, the judge was free to make her own sentencing decision.⁶⁶

applied the Sixth Amendment sentencing rule that it first articulated in *Apprendi*—that a court cannot increase a punishment for a crime unless the fact that increases the punishment is submitted to a jury and proven beyond a reasonable doubt—to capital and noncapital defendants alike. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (“Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”). Also, if the holding in *Hurst* had been limited to death penalty cases, then Justice Breyer presumably would have joined the majority opinion rather than concurring in the judgment. Justice Breyer's concurrence was based on his view that “the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.” *Hurst*, 136 S. Ct. at 624 (Breyer, J., concurring in the judgment) (quoting *Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment)).

65. *Hurst*, 136 S. Ct. at 622 (majority opinion).

66. FLA. STAT. § 921.141(1)–(3) (2015). The relevant text read:

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082 . . .

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. In each case in which the court imposes the death

A judge could impose a death sentence when a jury recommended life in prison, and she could impose a life sentence when the jury recommended death.⁶⁷ The jury's advisory sentence did not determine which sentence the judge imposed; rather, it was whether the judge could find that "sufficient aggravating circumstances exist[ed]," as enumerated in the relevant statute, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."⁶⁸ The statute classified these findings as "facts."⁶⁹

If Timothy Hurst's jury had recommended a sentence of life imprisonment, there is no question that his death sentence would have violated the rule from *Ring*. If the finding of one or more facts is necessary to increase a sentence, then a jury must find those facts, not a judge.⁷⁰ But Timothy Hurst's jury did not recommend life imprisonment. The jury recommended death, and so the sentence did not implicate those features of the Florida statute that were in tension with *Ring*.

The jury in *Hurst* found at least one aggravating fact and recommended a sentence of death.⁷¹ The judge reached the same conclusion.⁷² If *Hurst* were merely about a right to a jury finding a certain fact, one would expect the Court to have held that there was no Sixth Amendment violation in the case because the jury made the relevant factual finding with respect to Timothy Hurst. And the fact that others might face an unconstitutional sentence—because the statute permits a judge to impose a death sentence without a jury finding of an aggravating factor—would not have been a basis for Hurst to prevail, as the

sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Id.

67. *Id.*

68. *Id.*

69. *Id.*

70. See *Ring v. Arizona*, 536 U.S. 584, 589, 602 (2002).

71. *Hurst*, 136 S. Ct. at 622.

72. After the jury convicted Hurst, the trial judge held a separate sentencing proceeding for the jury to sentence Hurst. During that sentencing proceeding, the jury was asked to provide a sentencing recommendation to the judge, and the jury was instructed that it could return a recommendation of death only if it found at least one aggravating sentencing factor beyond a reasonable doubt and if it also found that the aggravating sentencing factors were not outweighed by mitigating factors. Hurst's jury recommended death by a vote of seven to five.

Court will generally not hear constitutional challenges in cases that do not themselves raise a constitutional problem.⁷³

In arguing to affirm Hurst's death sentence, Florida emphasized that the jury had recommended the death sentence, and that the recommendation necessarily reflected a finding beyond a reasonable doubt, which was necessary to impose the higher punishment.⁷⁴ But the *Hurst* Court dismissed the jury's finding of an aggravating circumstance as irrelevant. Rather than directly addressing the factual finding by a jury, the *Hurst* Court instead focused on how the statute authorized capital punishment:

The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.⁷⁵

What mattered was not whether a jury had actually made the factual finding, but rather that the statute permitted imposition of the death penalty only after a judge made the same factual finding and found that mitigating evidence did not outweigh aggravating evidence.⁷⁶ In other words, the Court rejected the idea that the Sixth Amendment guarantees only that certain facts be found by a jury; instead, what matters is whether the statute requires a judge make any factual findings before the sentence can actually be imposed.

Importantly, Hurst's victory was not because the Florida system permitted judges to impose the death penalty without a jury finding that an aggravating

73. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) ("[T]his Court has generally insisted that parties rely only on constitutional rights which are personal to themselves."); see also *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (stating that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring))).

74. See Brief for Respondent at 15, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505) ("Hurst received a death sentence only after a jury found beyond a reasonable doubt at least one aggravating circumstance. He thus received all *Ring* could require.").

75. *Hurst*, 136 S. Ct. at 622 (alterations in original) (internal citations omitted).

76. See *id.* at 619 ("We hold *this sentencing scheme* unconstitutional." (emphasis added)).

factor existed—that is, in those cases where the jury recommended life. *Hurst*'s jury did not recommend life; it found the presence of at least one aggravating factor and recommended a death sentence. The *Hurst* Court could not have granted Timothy Hurst relief on the basis that the Florida statute violated the rights of other criminal defendants.⁷⁷

One might argue that, even though Hurst had a jury finding, his sentence nonetheless violated the Sixth Amendment because of the breakdown of the jury vote in his case. The jury recommended death by a vote of 7 to 5.⁷⁸ While previous Supreme Court decisions make clear that the Sixth Amendment jury right does not require unanimity, there is uncertainty about whether determinations in criminal cases made by a simple majority are constitutional.⁷⁹ Indeed, Hurst argued that a 7 to 5 jury determination does not satisfy the Sixth Amendment.⁸⁰ The *Hurst* Court, however, did not address the issue of jury breakdown in its opinion. If Hurst's rights were violated because only a bare majority of jurors found an aggravating factor, one would expect the Court to have resolved the case on those relatively straightforward grounds. But instead, the Court left open the question whether a simple majority can satisfy the Sixth Amendment. Thus, the Court's decision in *Hurst* rests on a different Sixth Amendment problem—whether a state can require judges to make findings before permitting the imposition of the death penalty.⁸¹

77. See *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (noting “the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others”).

78. *Hurst*, 136 S. Ct. at 622.

79. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Apodaca*, the Court upheld Oregon's “ten of twelve” juror rule with respect to state prosecutions, even though it found that federal cases required unanimity. In a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court similarly upheld a 9–3 jury outcome. The Court's decisions, though, emphasized that constitutional problems could arise if states moved toward simple majorities. *Johnson*, 406 U.S. at 362 (majority opinion emphasizing that nine jurors was enough and a “substantial majority” is to be convinced); *id.* at 366 (Blackmun, J., concurring in both cases) (“[A] system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty.”).

80. See Brief for Petitioner at 36–51, *Hurst v. Florida*, 136 S. Ct. 616 (2016) (No. 14-7505).

81. Alternatively, one might argue that Hurst's rights were violated because the jury did not indicate which aggravating factor they found as a basis for their death penalty recommendation. That leaves open the possibility that a majority of jurors were unable to agree on the presence of a single aggravator. But this was almost certainly not the basis of the Court's decision. The Court does not require juror unanimity on alternative elements, see *Schad v. Arizona*, 501 U.S. 624 (1991), and although that rule has been criticized, see Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 190 n.67 (2011) (collecting sources), there is no reason to think that the Court would have overruled its previous case on point without mentioning the issue at all.

The Supreme Court's reference to harmless error provides further proof that the case expanded the Sixth Amendment sentencing doctrine. The *Hurst* Court noted that it did not reach the state's argument that any error was harmless because the Court "normally leaves it to state courts to consider whether an error is harmless."⁸² But a finding of harmless error would not be the same as saying that the jury's finding in Timothy Hurst's case satisfied the Sixth Amendment. A harmless error finding is a determination that, even though the state violated the defendant's rights, the result would have been the same had no violation occurred.⁸³ In other words, in leaving the harmless error question for the Florida courts, the *Hurst* Court explicitly acknowledged that Florida violated Timothy Hurst's Sixth Amendment rights even though he had a jury finding in his case.⁸⁴

In short, it is not possible to read *Hurst* as a mere application of the rule articulated in *Ring* to Florida's capital sentencing system. Such a reading is incompatible with the underlying facts of the case and the reasoning of the decision. The next Part advances what we believe to be the best reading of *Hurst*, and it explains what that reading means for the future application of the Sixth Amendment sentencing doctrine.

II. *HURST* AND AN EXPANDED SIXTH AMENDMENT SENTENCING DOCTRINE

The Court's holding in *Hurst* expands the scope of the Sixth Amendment sentencing doctrine, rather than simply applying the rule articulated in *Ring*. The best understanding of *Hurst*'s holding is that a jury must make *all* factual findings required, beyond a reasonable doubt, to increase an available sentence. Put differently, if a statute or sentencing scheme constrains the judge's discretion to increase a particular sentence, then a jury—and not a judge—must make the factual finding necessary to lift that constraint. This reading of *Hurst* changes the Sixth Amendment sentencing doctrine because it eliminates any constitutional distinction between findings that "authorize" a sentence and findings that are required to impose a sentence.

As this Part explains, such a reading of *Hurst* not only better explains the Court's decision in light of the facts and reasoning of the case, but it also creates a clear, administrable standard that harmonizes the Court's formalistic Sixth

82. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

83. See generally 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 855 (4th ed. 2018) (discussing the harmless error standard).

84. See *Hurst*, 136 S. Ct. at 623–24.

Amendment sentencing cases with the values that underlie the jury right. Tying the jury right at sentencing to constraints on judicial sentencing authority limits legislatures' ability to draft around the Sixth Amendment, and it allows courts to avoid ephemeral distinctions between factual questions, legal questions, and mixed questions of law and fact. This reading of *Hurst* also preserves the ability of judges to engage in factfinding incidental to exercises of sentencing discretion—a practice that has a long history in this country—without eroding the Sixth Amendment right of defendants to have a jury make those findings that increase their sentencing exposure.

In addition to rejecting a distinction between factual findings that “authorize” a sentence and other required factual findings, *Hurst* may also have expanded the Sixth Amendment doctrine in one additional regard: the right not only to findings of historical fact, but also to findings that require qualitative determinations.

A. The Central Meaning of *Hurst*

Because *Hurst* did more than simply apply *Ring*, we must determine how, precisely, *Hurst* modified the Sixth Amendment sentencing doctrine. The short answer is that *Hurst* appears to shift the Sixth Amendment inquiry from whether there are factual findings required to “authorize” an increased sentence to whether there are any factual findings that must be made before a judge can impose a higher sentence. This shift from the factual findings for “authorization” to any required factual findings would explain the Court’s decision that Florida violated *Hurst*’s Sixth Amendment rights even though he had a jury finding. It would also explain the Court’s acknowledgement of the possibility of harmless error. In short, this reading would ensure that the holding of *Hurst* matches both its facts and reasoning.

This reading of *Hurst* prohibits assigning to judges any factual findings required for the imposition of an increased sentence. This would do more than restrict advisory jury recommendations. It would also prohibit statutes that require *both* the judge and the jury to make factual findings in order to increase a sentence.⁸⁵ Such a statute would violate the Sixth Amendment because it would still make a judge’s finding of fact necessary to increase the sentence from one category of punishment to another.

Hurst also suggests that the findings necessary for the imposition of a higher sentence appear to include more than simply questions of historical fact.

85. See *infra* Subpart III.A (discussing such statutes).

In holding the Florida death penalty scheme unconstitutional, the *Hurst* Court mentioned that the judge not only had to engage in factfinding, but also had to weigh aggravating and mitigating factors: “The trial court *alone* must find ‘the facts . . . [t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’”⁸⁶ Statutes routinely require judges to weigh sentencing factors and make other qualitative judgments before increasing sentences, such as requiring judges to find that a particular aggravating factor is “extraordinary.”⁸⁷ All of these statutes impose requirements beyond a jury’s factfinding before a judge can increase a defendant’s sentence. Thus, *Hurst* may also extend the Sixth Amendment beyond questions of historical fact to qualitative determinations at sentencing.

Our reading of *Hurst* applies not only to sentencing findings that statutes require, but also to those that the Constitution requires. For example, the Eighth Amendment does not permit the automatic imposition of capital punishment. Instead, states must narrow the category of offenders who are subject to the death penalty by making individualized sentencing determinations, usually by identifying aggravating factors and by requiring the consideration of mitigating factors that might outweigh those aggravating factors.⁸⁸ Thus, under our reading, the Sixth Amendment applies both to statutorily and constitutionally required facts.

The Supreme Court has also read the Eighth Amendment to place limitations on the ability of states to impose life without parole (LWOP) sentences on juveniles.⁸⁹ States that continue to impose LWOP sentences on juveniles must ensure that no juveniles receive LWOP except “the rare juvenile offender whose crime reflects irreparable corruption”⁹⁰—an admonition that some states have interpreted as requiring a finding of “irreparable corruption” before imposing an LWOP sentence on a juvenile.⁹¹ The Eighth Amendment requires such findings in order to ensure proportionality in punishment; *Hurst*

86. *Hurst*, 136 S. Ct. at 622 (quoting FLA. STAT. § 921.141(3) (2015)).

87. See *infra* Subpart IV.A.

88. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976) (upholding Georgia’s capital statute in part because it narrowed the class of murderers eligible for the death penalty); see also William W. Berry III, *Eighth Amendment Presumptions*, 89 S. CAL. L. REV. 67 (2015) (exploring possible consequences of this doctrine).

89. See, e.g., *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

90. *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479–80).

91. See, e.g., *Landrum v. State*, 192 So.3d 459, 469 (Fla. 2016); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016); *Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016); *People v. Padilla*, 209 Cal. Rptr. 3d 209 (2016).

explains that the Sixth Amendment requires that a jury, rather than a judge, make those findings. In other words, a jury must make factual findings required by the Eighth Amendment, not just those required by statute.

Reading *Hurst* to expand the Sixth Amendment to all findings that are necessary to increase a sentence does more than simply explain how the Court disposed of Timothy Hurst's sentence. It also makes the Sixth Amendment sentencing doctrine more sensible. For one thing, it ensures that the Sixth Amendment sentencing doctrine is more than simply a drafting rule. In particular, it prevents legislatures from drafting statutes that claim to "authorize" higher sentences based on one or more jury findings, but then require further factfinding by judges before permitting the imposition of a higher sentence. At present, many sentencing systems distinguish between factual findings that make a defendant eligible for an increased sentence and other factual findings that a judge must make before imposing such a sentence.⁹² But that distinction does not survive *Hurst*. Rather than treat Hurst's jury finding as sufficient because it "authorized" the capital sentence, the Court instead insisted that a jury make all factual findings that are required for the imposition of the death sentence.⁹³

While the *Hurst* Court obviously rejected the difference between facts that "authorize" a sentence and other facts that are required to impose a sentence, it is less clear whether the Court meant to eliminate the distinction between findings of historical fact and other findings. If it did, then *Hurst* would avoid the difficulty of distinguishing between questions of fact and questions of law. Prior to *Hurst*, courts limited the Sixth Amendment sentencing doctrine to factual questions; legal questions were exempt.⁹⁴ Determining whether a finding involves a "question of fact" or a "question of law" can be a complicated endeavor, and it has created confusion and conflict in both the criminal and civil justice systems.⁹⁵ The enduring disagreement and disorder has led some to

92. See *infra* Subpart III.A.

93. "[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death' The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) (quoting FLA. STAT. § 775.082(1) (2015)).

94. See, e.g., *Nunnery v. State*, 263 P.3d 235, 251 (Nev. 2011); *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009); *Carlson v. State*, 128 P.3d 197, 210 (Alaska Ct. App. 2006); see also Sam Kamin & Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 558–61 (2010) (collecting cases).

95. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546–55 (1965) (noting that "[t]he distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary" and discussing the difficulties in

conclude that there is no sensible way to distinguish between questions of law and questions of fact.⁹⁶ Focusing on what findings the statute requires, rather than whether a finding involves a question of fact, avoids this legal quagmire.

B. Sixth Amendment Formalism and Sixth Amendment Values

The Supreme Court has, at times, based its Sixth Amendment doctrine more on history and formalism than on the values underlying the Sixth Amendment jury trial right. The Sixth Amendment sentencing doctrine has walked a fine—perhaps nearly undetectable—line between reserving formal, structured sentencing decisions for the jury, while still preserving a role for judicial discretion in the selection of the ultimate sentence. The result has been a confused and confusing Sixth Amendment sentencing doctrine.⁹⁷ The doctrine has shifted over time, and it has, in many instances, failed to ensure that the jury serves as a meaningful check on the imposition of punishment.

Hurst restores balance to the Sixth Amendment sentencing doctrine; it respects the historical origins of the doctrine without allowing the formalistic tendencies of the doctrine to eclipse the very reasons for guaranteeing a jury right to defendants. In particular, it respects the long history of allowing judges to determine what ultimate sentence to impose, while at the same time ensuring that a jury makes decisions “which the law makes essential to the punishment.”⁹⁸ It does so by making the presence or absence of judicial sentencing discretion the central Sixth Amendment inquiry, rather than relying on distinctions between

making such a distinction); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232 (1985) (noting that “the ‘vexing’ distinction between ‘questions of law’ and ‘questions of fact’ . . . has long caused perplexity in such diverse areas as contracts, torts, and administrative law”); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1876 (1966) (arguing that “[c]larity of thought is not advanced by debating whether law application is law-making or fact-finding, as commentators have done”).

96. See JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 55 (1927) (stating that questions of law and fact “are not two mutually exclusive kinds of questions, based upon a difference of subject-matter” and that distinction between the two is created only by the “knife of policy” which “effects an artificial cleavage at the point where the court chooses to draw the line”); LEON GREEN, *JUDGE AND JURY* 270–71 (1930) (observing that the “two terms of legal science . . . ‘law’ and ‘fact.’ . . . readily accommodate themselves to any meaning we desire to give them”); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) (“The ubiquitous distinction [between law and fact], despite playing many key doctrinal roles, is muddled to the point of being conceptually meaningless.”).

97. See Bowman, *supra* note 10 (criticizing the doctrine); McConnell, *supra* note 46 (same).

98. *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (quoting 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE* § 87, at 55 (2d ed. 1872)).

findings that only “authorize” sentences and findings required to select a sentence. It also possibly precludes relying on distinctions between findings of fact and findings of law.

When the Supreme Court first established the Sixth Amendment sentencing doctrine, it did so in part based on originalist arguments. The *Apprendi* Court cited these originalist roots in holding that New Jersey’s sentencing factor was unconstitutional. Particularly, the Court emphasized that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”⁹⁹

But while it is clear that defendants are entitled to a jury determination of guilt, the precise role that the jury was meant to play in sentencing is relatively uncertain. Structured sentencing—both as required by the Court’s Eighth Amendment cases, as well as created by state and federal legislatures—is a creature of the late twentieth and early twenty-first century. But the idea that sentencing ought to occur as a separate proceeding that included facts and considerations other than the defendant’s crime of conviction existed for a long time prior to that development.

Early in American history, many crimes were sanction-specific—that is to say, a statute would set forth a fixed punishment for all defendants convicted of a certain crime. In those cases, a judge’s sentencing role was essentially ministerial, limited to imposing the punishment required by the offense of conviction, and it did not include consideration of any of either aggravating or mitigating factors.¹⁰⁰

99. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

100. *See id.* at 479 (noting that early American “substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. . . . [and a] judge was meant simply to impose that sentence”); *Alleyn v. United States*, 133 S. Ct. 2151, 2159 (2013) (highlighting the “intimate connection between crime and punishment” in early American laws and practices).

This may explain why the U.S. Constitution frequently mentions trials and expressly regulates criminal trial procedures but does not mention sentencing procedures or practices. *See, e.g.*, U.S. CONST. art. I, § 3 (providing that an impeached official may still be subject to a traditional criminal trial); *id.* at art. III, § 2 (setting forth procedures for criminal trials in all cases but impeachment); *id.* at amend. VI (providing for accused defendants to have various trial rights).

It is difficult to locate reliable historical sources that describe how a sentence from within those ranges was selected. There is a surprising amount of disagreement over the sentencing process at the founding. *See* Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 131 n.183 (2006) (noting that the “early history of discretionary sentencing—especially the date of its adoption in the United States—is a matter of some dispute” and collecting sources). But it is clear that most states did not

But even some early criminal statutes specified a range of potential punishments.¹⁰¹

Whatever the original understanding of the jury's role at sentencing, it was widely accepted by 1900 that judges should possess wide sentencing discretion.¹⁰² But in the second half of the twentieth century, the wide discretion enjoyed by trial judges became controversial.¹⁰³ Highly discretionary sentencing practices were perceived as creating unacceptable disparity in sentencing, and many began to advocate for reforms to bring greater consistency and certainty to the sentencing enterprise.¹⁰⁴

A number of jurisdictions responded by adopting structured sentencing systems. These systems curtailed judges' discretion by identifying aggravating and mitigating factors that judges were required to investigate. If such factors were present, the schemes required judges to modify defendants' sentences.¹⁰⁵ Some of these factors were questions of historical fact, such as whether the defendant killed multiple victims or killed during the commission of a crime; others were quantifiable considerations, such as the amount of loss a defendant caused or the number of prior criminal convictions.¹⁰⁶

Some jurisdictions used sentencing reform as an alternative to criminal code reform. The Federal Sentencing Guidelines, passed as part of the Sentencing

employ sentencing juries at the time. See Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 316–19 (2003).

101. *Alleyne*, 133 S. Ct. at 2158 (noting that “some early American statutes provided *ranges* of permissible sentences”).

102. See Hessick, *supra* note 100, at 131 (“Discretionary sentencing became the American norm no later than the nineteenth century.”).

103. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973) (arguing that judicial sentencing discretion had led to wide disparities in sentencing outcomes); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* 3–72 (1975) (arguing for a move toward “swift and certain” punishments in response to the increases in crime rate); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 3–34, 59–123 (1976) (calling for greater determinacy in sentencing); JAMES Q. WILSON, *THINKING ABOUT CRIME* 162–82 (1975) (arguing that rewards and penalties shape criminal behavior).

104. For examples of such proposed reforms, see ALAN M. DERSHOWITZ, *FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING* (1976); PIERCE O'DONNELL, MICHAEL J. CHURGIN, AND DENNIS E. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977); and VON HIRSCH, *supra* note 103. See also NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 28–57 (1974) (stressing the need to reform sentencing practices as a prerequisite to making imprisonment a rational and humane means of punishment).

105. See Frase, *supra* note 28; Reitz, *supra* note 28.

106. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 68–70 (1998) (describing the Federal Sentencing Guidelines' excessive reliance on quantification).

Reform Act of 1987, provide the most obvious example of this approach.¹⁰⁷ Even those jurisdictions that adopted less elaborate sentencing structures appear to have done so in part to effectuate changes ordinarily reserved for substantive offenses. For example, states that adopted presumptive sentencing regimes imposed aggravated sentences based on the kinds of facts previously used to identify different crimes, such as whether the defendant caused any physical harm to the victim.¹⁰⁸

The more structured sentencing began to resemble new criminal codes, the more it appeared to be an end-run around the jury determinations for aggravated offenses. The Supreme Court made clear that it shared these concerns when it announced the Sixth Amendment sentencing doctrine in *Apprendi* and subsequent cases.¹⁰⁹ But even as the Court expanded Sixth Amendment protections to capital defendants in *Ring* and to noncapital sentencing guidelines in *Blakely*, it was careful to affirm the constitutionality of judges making factual findings to aid their broad discretion to select a sentence within a statutory punishment range.¹¹⁰ Indeed, had the Court not reaffirmed this ability, it likely would have undermined the historically-based reasoning of its cases. After all, the country has a long history of judges deciding criminal sentences.¹¹¹

The Court dealt with this historical issue by resorting to formalism. The Court explained that structured sentencing could not reallocate the jury's determination of elements at trial to the judge during sentencing. By concluding that structured sentencing factors were the "functional equivalent" of elements, the Court was able to extend the jury trial right to sentencing determinations without questioning the historical power of judges to make

107. See *id.* at 39 (stating that the "legislative origins" of the Federal Sentencing Guidelines "may be found in the failed efforts of the 1970s to achieve a recodification of the federal criminal law").

108. See, e.g., ALASKA STAT. § 12.55.155(c) (1); ARIZ. REV. STAT. ANN. § 13-701(D) (1); D.C. CODE § 24-403.01(b-2)(2)(H) (Lexis 2001); 730 ILL. COMP. STAT. 5/5-5-3.2(a)(1) (2012); IND. CODE § 35-38-1-7.1(1) (2017); N.C. GEN. STAT. § 15A-1340.16(d) (8).

109. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 492-93 (2000) (striking down a sentencing statute increased punishment based on the defendant's mens rea, which "is perhaps as close as one might hope to come to a core criminal offense 'element'").

110. See *infra* note 234 (collecting cases).

111. See *Kistler v. State*, 54 Ind. 400, 403 (1876) ("According to the old law, all the jury had to do was to determine the question of guilt or innocence. It was the duty of the court, after a verdict of guilty, to declare the punishment which the law imposed. If any discretion was permitted as to the punishment, that discretion was exercised by the court alone."); Iontcheva, *supra* note 100, at 316-18 (documenting that jury sentencing was adopted by only eleven states before the beginning of the twentieth century). See also *supra* notes 100-103 and accompanying text.

most sentencing decisions. In other words, by equating structured sentencing enhancements with elements of new, aggravated crimes, the Court constructed a doctrine that vindicated the values underlying the jury trial right. Because structured sentencing looked different than judges making factual findings when exercising broad sentencing discretion, the Court did not have to repudiate the historical sentencing authority of judges.

But the fine line between structured sentencing and judicial sentencing discretion that the Court had attempted to walk largely disappeared in *United States v. Booker*.¹¹² Following *Blakely*, it was clear that the Sixth Amendment sentencing doctrine had called into question the constitutionality of structured sentencing, including the Federal Sentencing Guidelines.¹¹³ Because the Guidelines required judges to find facts in order to determine the applicable guideline range, the federal system clearly violated the rule articulated in *Ring* and *Blakely*—that a jury must find beyond a reasonable doubt facts that increase a defendant’s sentencing exposure.¹¹⁴

But in striking down the Guidelines under the Sixth Amendment, the *Booker* Court adopted a remedy that not only watered down the doctrine’s rule, but also appeared to unmoor the doctrine from the values underlying the Sixth Amendment. The Court held that the Guidelines were constitutional so long as they were advisory, not mandatory.¹¹⁵ Judges still had to make factual findings required by the Guidelines: A judge had to consider the Guideline range in selecting a sentence, and reversal on appeal was more likely if she sentenced outside of the Guideline advisory range.¹¹⁶ The idea behind the remedy was that the judicial factfinding in this context did not violate the Sixth Amendment because judges now had at least some discretion to deviate from the Guidelines. And because judges had regained some discretion, the Guideline advisory range did not define the maximum punishment—the statute did.¹¹⁷

112. 543 U.S. 220 (2005).

113. See, e.g., Douglas A. Berman, *Sentencing Guidelines Are Dead! Long Live Sentencing Guidelines!*, SENT’G L. & POL’Y (June 25, 2004), http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/sentencing_guid.html [https://perma.cc/3XX2-BWF5] (“The Supreme Court’s decision in *Blakely* seems to mean that the standard operating procedures for most sentencing guideline systems—including those of the federal sentencing guidelines—are no longer constitutionally sound.”).

114. See *Booker*, 543 U.S. at 245.

115. *Id.*

116. These requirements were made clear in subsequent cases. See, e.g., *Gall v. United States*, 552 U.S. 38, 49–51 (2007); *Rita v. United States*, 551 U.S. 338, 347–48, 350–51 (2007).

117. See *Booker*, 543 U.S. at 245–46 (“[T]he federal sentencing statute, as amended, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.” (internal citations omitted)).

After *Booker*, judges were still finding facts, and those facts were still driving sentences. Because a judge was no longer always required to follow the Guidelines' recommendation and could, in theory, impose any sentence within the statutory range, this approach arguably satisfied the formal rule developed in *Apprendi* and *Ring*. But it did not vindicate Sixth Amendment jury trial values.

The *Booker* Court did not attempt to explain how its remedy vindicated Sixth Amendment values. Nor is it clear that it could have done so. The Sixth Amendment jury right functions as a structural limitation on government officials, and it also confers an individual right onto defendants.¹¹⁸ The Supreme Court has often highlighted the jury right as a structural limitation in its Sixth Amendment sentencing cases. As the Court in *Blakely* stated, the jury right is "a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."¹¹⁹ Put differently, the jury right ensures that the people can check decisions by government officials in particular cases; if the jury does not agree with the prosecutor's decision to bring charges in a particular case, they can refuse to convict. As *Blakely* explained, structured sentencing undermines the jury's structural role as a check on government officials. Indeed, "[t]he jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."¹²⁰

On some level, the formalistic rule endorsed in *Booker* continues to rely on democratic involvement as a structural limitation, but it is a check on the legislative branch, rather than a check on the judiciary.¹²¹ The people, through their elected legislators, determine what punishment range ought to correspond to a particular crime. Because the voting public knows that a judge is empowered to impose the maximum sentence upon a finding of guilty, then legislatures will only enact statutes with maximum authorized punishment that is appropriate upon a bare finding of guilt rather than based upon additional aggravating factors.

118. See Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 681–86 (1996).

119. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

120. *Id.* at 306–07.

121. See King & Klein, *supra* note 10, at 1487 (describing this structural limitation in the context of the *Apprendi* rule).

Even so, this structural limitation is weak. Imagine, for example, a state that punishes burglary by up to ten years' imprisonment. This state also advises judges that they should only impose a five-year sentence unless the defendant possessed a gun during the burglary, and it makes reversal on appeal far more likely if the judge does not find that the defendant possessed a gun. The voting public knows that judges have the authority to impose ten years in prison based only on a defendant's commission of a burglary. But it also knows that judges are probably only going to impose a ten-year sentence on a burglar if he also possessed a gun. So, the voting public will likely approve of such legislation if it thinks that burglars should receive five-year sentences and that armed burglars should receive ten-year sentences. Nonetheless, some unarmed burglars may receive ten-year sentences based on judges' discretion. This "advisory" sentencing system has effectively recategorized an element of a crime—possession of a gun—that ought to be found by a jury to a sentencing factor that will be found by a judge.

One might argue that a defendant in this hypothetical advisory system is no worse off than a defendant in a system of broad judicial sentencing discretion; in the latter system a judge is unlikely to impose the maximum sentence on defendants unless there are some aggravating facts present. The advisory system might even be preferable, one might argue, because it identifies *ex ante* the facts that defendants ought to dispute at sentencing, and it better ensures that defendants are treated similarly to one another. But those arguments do not explain why judges ought to be finding those sentencing facts, rather than juries. Nor do those arguments address the fundamental Sixth Amendment objection—that advisory sentencing systems are designed precisely to avoid having juries decide those facts that the legislature has identified as deserving of additional punishment. Further, it does not account for the lowering of the required standard of proof from beyond a reasonable doubt to a preponderance of the evidence.

Nor is it persuasive to say that in the past judges have enjoyed the ability to make factual findings in aid of their sentencing decisions as a basis for reallocating elements of a crime to sentencing. Judges enjoyed that discretion—at least in part, if not entirely—because people believed that it was impossible to identify *ex ante* those facts that ought to increase or decrease sentences.¹²²

122. See, e.g., Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1284–85 (1999) (debate between Rep. Asa Hutchinson and U.S. District Court Judge Stanley Sporkin); Peter A. Mancuso, *Resentencing After the "Fall" of Rockefeller: The Failure of the*

Sentencing was thought to be a complex, circumstance-driven, and defendant-specific endeavor. Judges could consider any evidence about the defendant and her crime, and appellate courts would not disturb those decisions.¹²³

But once jurisdictions reduce sentencing determinations to a clear list of relevant considerations, then there is no need to give judges broad, unfettered sentencing discretion. Perhaps most importantly, there is no excuse to deprive a defendant of a jury to make those findings that define the crime itself. It is, of course, true that having a jury find those facts will be more time consuming and expensive. But time and expense are a natural consequence of all criminal process rights. And if the state were able to dispense with individual rights simply based on the time and money necessary to ensure them, then the Constitution is all but worthless.

Hurst pushes back on the encroachment of Sixth Amendment sentencing rights that has occurred in recent years. It restores a balance between the historical origins of the Sixth Amendment doctrine and the reasons underlying the jury right, and it does so in formalistic terms that are sensible and easily administrable. It categorizes any finding that must be made in order for a judge to increase a sentence as a jury question. If a judge cannot exercise her sentencing discretion without first making a finding, then that finding triggers the Sixth Amendment. This reading stays true to the origins of the Sixth Amendment doctrine. It both ensures that the jury finding is not a “mere preliminary to a judicial inquisition” and retains the ability of judges to make findings in aid of their sentencing discretion. But it does so without allowing the doctrine to turn into little more than a drafting rule.

The next two Parts explain, in detail, how *Hurst* changes the Sixth Amendment sentencing doctrine. Part III focuses on *Hurst*'s rejection of any constitutional distinction between factual findings that “authorize” a sentence and other factual findings that are required to impose a sentence. Part IV addresses the possibility that *Hurst* expanded the jury right beyond mere findings of historical fact to any findings, including qualitative determinations, that are required to impose an increased sentence.

Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009, 73 ALB. L. REV. 1535, 1541 (2010).

123. See, e.g., *Williams v. New York*, 337 U.S. 241, 247–52 (1949).

III. THE MYTH OF “AUTHORIZING” SENTENCES

The first consequence of *Hurst* is that it eliminates the distinction between factual findings that “authorize” an increased sentence and other factual findings required to impose an increased sentence. But there are several sentencing systems that have relied on that distinction in order to continue requiring judges to make factual findings in the wake of *Ring* and *Blakely*.

These systems claim to comply with the Sixth Amendment because they “authorize” a judge’s higher sentence upon a jury finding of a single aggravating fact, and they require judges to engage in further factfinding only to determine what particular sentence to impose. Such systems arguably comply with *Ring* and *Blakely*, but they run afoul of *Hurst*. As this Part explains, the idea that only certain facts authorize the higher sentence, even though the statutory scheme requires other factual findings in order for the sentence to be imposed, rests on a mistaken understanding of the Sixth Amendment’s role in the selection of a defendant’s ultimate sentence. Although defendants do not have a Sixth Amendment right to have a jury select the ultimate sentence that will be imposed on them, they do have a right to have a jury decide all of the facts not incidental to a judge’s exercise of unfettered sentencing discretion.

This Part identifies those systems that purport to reserve factual findings that “authorize” a higher sentence for juries, but also require judges to engage in further factfinding to determine what particular sentence to impose. This Part then explains why there is no principled way to distinguish between findings that authorize a sentence and findings required to impose a sentence, especially in the wake of *Hurst*.

A. Cataloguing Sentencing Systems That Require Judicial Factfinding

1. Florida

The Supreme Court invalidated Florida’s capital sentencing system in January 2016 when it decided *Hurst*. In March 2017, the Florida legislature amended its death penalty statute. It now requires that juries find aggravating circumstances, state which specific aggravating factors exist, and weigh any mitigating factors against the aggravating factors before making a death sentence recommendation to a judge.¹²⁴ These jury decisions must be unanimous.¹²⁵ If a jury makes a recommendation of life in prison, then the

124. See FLA. STAT. § 921.141(2) (2017).

125. See *id.*

judge must impose a sentence of life.¹²⁶ If a jury makes a recommendation of death, then the judge can impose either a sentence of death or a sentence of life.¹²⁷ But the judge must make her own determination of the appropriate sentence: She must make her own findings about the existence of aggravating and mitigating circumstances, she must make her own finding of “whether there are sufficient aggravating factors to warrant the death penalty,” and she must weigh the aggravating and mitigating sentencing factors.¹²⁸ In other words, Florida changed its capital sentencing system so that the sentencing judge cannot disregard a jury recommendation of life; but the judge must still engage in independent factfinding and weighing before imposing the death penalty. The Florida Supreme Court has decided that so long as the jury’s findings and recommendations are unanimous, these changes satisfy the ruling in *Hurst*.¹²⁹ But, by continuing to require the judge to engage in independent factfinding and weighing, Florida has not cured the defect identified in *Hurst*.

2. Montana

Montana employs a capital sentencing scheme that involves both judge and jury, but it leaves the ultimate sentencing decision in capital cases up to judges.¹³⁰ After a guilty verdict or plea, the judge conducts a separate sentencing hearing to determine whether the defendant should receive the death penalty.¹³¹ As with Florida, there must be a jury finding that the “enhancing act, omission, or fact occurred beyond a reasonable doubt.”¹³² But this finding is not enough to impose a death sentence. The judge must make a

126. *See Id.* § 921.141(3)(a)(1).

127. *See id.*

128. *Id.* § 921.141(4) (“In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.”).

129. *See Perry v. State*, 201 So.3d 630 (Fla. 2016).

130. MONT. CODE ANN. § 46-1-401 (2017). Interestingly, Montana did not repeal its pre-*Ring* statute that requires judges to find aggravating facts, MONT. CODE ANN. § 46-18-301 (2017), but the new statute, § 46-1-401, clearly contemplates that the jury find aggravating facts in death cases. To date, Montana has not had any case that has established how these provisions should be applied, although one capital case is currently pending. *See Withdrawal of Notice of Intent to Seek Death Penalty, Montana v. Barrus*, No. CDC-2017-15 (Mont. 1st Jud. Dist. Ct. July 19, 2018).

131. MONT. CODE ANN. § 46-18-301 (2017).

132. *Id.* § 46-1-401.

separate finding that an aggravating fact is present and that the aggravating fact(s) outweigh mitigating evidence.¹³³

A straightforward application of *Hurst* shows that the Montana statute violates the Sixth Amendment.¹³⁴ By requiring the judge to find the presence of the aggravating fact, Montana violates the Sixth Amendment in the same way that Florida did in *Hurst*. Because Montana has not sentenced an offender to death since 1996, its courts have not to date addressed the potential impact of *Ring* or *Hurst* on its death-sentencing scheme.¹³⁵

3. Alabama

In April 2017, the Alabama legislature changed its capital sentencing scheme.¹³⁶ Under the new statute, the jury is responsible for sentencing in capital cases.¹³⁷ The jury makes all findings with respect to aggravating and mitigating sentencing factors, and it makes the final decision with respect to whether the defendant receives a LWOP sentence or a death sentence.¹³⁸ The new statute applies to all capital cases sentenced on or after April 11, 2017.¹³⁹

But prior to April 11, 2017, Alabama's capital sentencing scheme was, in many ways, like Florida's pre-*Hurst* scheme. The Alabama scheme required juries to make a recommendation as to the sentence.¹⁴⁰ After the jury's

133. *Id.* § 46-18-301.

134. It is likely that the capital scheme violates the Montana Constitution as well. See MONT. CONST. art. II, §§ 24, 26 (articulating the state constitutional right to trial by jury); *State v. Dawson*, 761 P.2d 352, 360 (Mont. 1988) (applying pre-*Ring* Sixth Amendment doctrine to Montana Capital cases); *State v. Smith*, 705 P.2d 1087, 1105–06 (Mont. 1985).

135. See *State v. Johnson*, 969 P.2d 925 (Mont. 1998) (sentence imposed in September 1996). A recent death penalty case has raised *Hurst* issues. See *Withdrawal of Notice of Intent to Seek Death Penalty*, *supra* note 130, at 1; see also *Montana*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/montana-1#sent> [<https://perma.cc/9Y4L-YF9D>]. In recent years, the Montana legislature has considered passing a statute to abolish the death penalty completely, which partially explains its failure to update its statute after *Ring* and *Hurst*. Montana has executed three people since 1976, and currently has only two individuals sentenced to death in its prisons. *Id.* The closest the state came to abolition was in 2015, when the bill died on a 50–50 house vote. *Montana Examines Death Penalty After Judge Blocks Executions*, FLATHEAD BEACON (Feb. 6, 2017), <http://flatheadbeacon.com/2017/02/06/montana-examines-death-penalty-judge-blocks-executions> [<https://perma.cc/FQR4-KZ6H>].

136. See ALA. CODE § 13A-5-46 (West 2017); see Kent Faulk, *Alabama Gov. Kay Ivey Signs Bill: Judges Can No Longer Override Juries in Death Penalty Cases*, AL.COM (Apr. 11, 2017), http://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html [<https://perma.cc/U8WD-FVND>].

137. ALA. CODE § 13A-5-46 (West 2017).

138. *Id.*

139. *Id.* § 13A-5-45.

140. *Id.* § 13A-5-47.

recommendation, the judge made an independent determination about the existence of aggravating factors and the appropriateness of the death penalty.¹⁴¹ The judge had the power to increase a life sentence to a death sentence, or alternatively, decrease a death sentence to a life sentence.¹⁴²

In the aftermath of *Hurst*, Alabama inmates that received the death penalty under Alabama's previous capital sentencing scheme filed petitions for certiorari with the Supreme Court for review of their cases. The Court initially denied certiorari in one of these cases, *Johnson v. Alabama*, on the day before it decided *Hurst*.¹⁴³ After the Court decided *Hurst*, it granted a motion for rehearing in *Johnson*, vacated the lower court's judgment, and instructed the Alabama courts to revisit the case in light of the holding in *Hurst*.¹⁴⁴ In the months after the *Hurst* decision, the Court reversed three other Alabama cases pending direct review, vacated the sentences, and remanded them back to the Alabama state courts.¹⁴⁵

Despite the Supreme Court's reversals, the Alabama courts continue to uphold their capital sentences in the wake of *Hurst*. One Alabama appellate court, three months after the Court decided *Hurst*, affirmed a remanded death sentence without considering the impact of *Hurst*.¹⁴⁶

In *Ex Parte Bohannon*, the Alabama Supreme Court did consider the effect of *Hurst* on Alabama's capital sentencing scheme.¹⁴⁷ Surprisingly, the *Bohannon* Court decided that Alabama's pre-April 2017 system—which was largely indistinguishable from the Florida system that was invalidated in *Hurst*¹⁴⁸—did not violate the Sixth Amendment. The *Bohannon* Court reasoned that a jury's finding of an aggravating circumstance “makes a defendant eligible for the death penalty.”¹⁴⁹ The Alabama Supreme Court explained:

Ring and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death

141. *Id.*

142. *Id.*

143. 136 S. Ct. 857 (2016) (mem.).

144. 136 S. Ct. 1837 (2016) (mem.).

145. See *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016) (mem.); *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016) (mem.); *Russell v. Alabama*, 137 S. Ct. 158 (2016) (mem.).

146. See *Lane v. Alabama*, No. CR-10-1343, 2016 WL 1728753 (Ala. Crim. App. Apr. 29, 2016). Two dissents raised the *Hurst* issue, but the majority opinion failed to address it.

147. 222 So. 3d 525 (Ala. 2016).

148. The only differences appear to be that Alabama required jury unanimity for the aggravating factor, and that the jury could only recommend a sentence of death if at least ten of twelve jurors agreed. ALA. CODE § 13A-5-47 (2015). But as discussed above, those features did not drive the *Hurst* decision. See *supra* text accompanying notes 79–81.

149. *Bohannon*, 222 So. 3d at 532.

penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama’s capital-sentencing scheme does not violate the Sixth Amendment.¹⁵⁰

The Alabama court did not grapple with the fact that Timothy Hurst also had such a jury finding, but instead characterized *Hurst* as simply applying the rule from *Ring*.¹⁵¹ The U.S. Supreme Court denied certiorari in *Bohannon*.¹⁵²

4. Missouri and Indiana

In Missouri and Indiana, the jury makes the capital sentencing determination in every case unless there is a hung jury.¹⁵³ If the jury cannot reach a sentencing decision, the judge then determines whether to sentence the offender to death.¹⁵⁴ As a result, the capital statute in both states authorizes the judge to make the capital sentencing determination in the case of a hung sentencing jury, meaning that the state can impose the statutory maximum of death without the required jury determination of the presence of aggravating factors and the determination that such factor(s) outweigh the mitigating evidence offered at sentencing.¹⁵⁵ Thus, both provisions violate the rules from *Ring* and *Hurst*.¹⁵⁶

5. Alaska and Arizona

Alaska and Arizona both have presumptive sentencing systems.¹⁵⁷ They require judges to impose presumptive sentences (or sentences within a presumptive range), unless aggravating or mitigating factors are present. Judges can only sentence above the presumptive sentence if at least one

150. *Id.*

151. “*Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible.” *Id.*

152. *Bohannon v. Alabama*, 137 S. Ct. 831 (2017).

153. MO. REV. STAT. § 565.030 (2017); IND. CODE § 35-50-2-9(f) (2017).

154. MO. REV. STAT. § 565.030; IND. CODE § 35-50-2-9(f).

155. MO. REV. STAT. § 565.030; IND. CODE § 35-50-2-9(f).

156. Interestingly, the Missouri Supreme Court has recently granted certiorari on two capital cases challenging death sentences imposed by a judge after a hung jury at sentencing. See Joseph Welling, *Missouri’s Death Penalty Jury Deadlock Provision Is Unconstitutional*, ST. LOUIS POST-DISPATCH, Jan. 16, 2019. Indiana has never had a judge sentence a capital defendant with a hung jury at sentencing. *Id.*

157. ALASKA STAT. ANN. § 12.55.155(h) (2017); ARIZ. REV. STAT. ANN. § 13-701(C) (2017).

aggravating sentencing factor is either found by a jury or otherwise complies with *Blakely*.¹⁵⁸ But whether a single aggravating factor is present is not the only statutory requirement for whether judges can increase a defendant's sentence above the presumptive sentence. Alaska and Arizona also require judges to determine whether any other aggravating factors exist, and they require judges to weigh all of the aggravating and mitigating factors to determine whether an aggravated sentence is appropriate.¹⁵⁹

For example, Alaska instructs judges not to increase a defendant's sentence above the presumptive range of sentences unless one of the statutory aggravating factors is established.¹⁶⁰ But it also instructs judges that any sentence outside of the presumptive range "shall be based on the totality of the aggravating and mitigating factors" set out in the statute.¹⁶¹

Similarly, Arizona law provides that aggravated sentences "may be imposed only if one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant."¹⁶² But it also instructs judges that, "[i]n determining what sentence to impose, the court shall take into account the amount of aggravating circumstances."¹⁶³

It is significant that Alaska and Arizona both require judges to impose sentences based on a totality of aggravating factors, but both states only require that a jury find a single factor beyond a reasonable doubt or otherwise comply with *Blakely*. This is because judges may find additional aggravating factors without using the heightened reasonable doubt standard, and because they must consider those judge-found aggravating factors when deciding which

158. ALASKA STAT. ANN. § 12.55.155(h); ARIZ. REV. STAT. ANN. § 13-701(C). A factor complies with *Blakely* if it is found by a jury beyond a reasonable doubt or if the defendant admits to it. A factor is exempt from *Blakely* if it rests on the *Almandarez-Torres* exception to the Sixth Amendment. See *infra* text accompanying note 163.

159. ALASKA STAT. ANN. § 12.55.155(h); ARIZ. REV. STAT. ANN. § 13-701(C).

160. ALASKA STAT. ANN. § 12.55.155(h) ("If one of the aggravating factors in (c) of this section is established as provided in (f) (1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment.").

161. *Id.* § 12.55.155(b) ("Sentences under this section that are outside of the presumptive ranges set out in AS 12.55.125 shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.").

162. ARIZ. REV. STAT. ANN. § 13-701(C).

163. "If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances. In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term. If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence." *Id.* § 13-701(F).

sentence to impose. As a result, Alaska and Arizona make judge-found facts necessary to increase some defendants' sentences.¹⁶⁴

This feature of the two systems can result in defendants receiving aggravated sentences without any jury findings whatsoever, because both systems identify a defendant's prior conviction as an aggravating factor.¹⁶⁵ *Almendarez-Torres v. United States* exempts prior convictions from the Sixth Amendment jury requirement.¹⁶⁶ As a consequence, courts can sentence defendants with a prior conviction in the same way as they could before *Blakely*: Those defendants do not have a right to a jury finding of any aggravating facts that may ultimately result in the imposition of an aggravated sentence; the judge finds all of those facts.

6. New York's Persistent Offender Statute

The *Almendarez-Torres* exception for prior convictions is similarly at the heart of New York's persistent felony offender law. That statute allows for third-time felons to be sentenced as if they had committed a class A-I felony.¹⁶⁷ But the statute does not apply automatically to all third-time felons. Judges not only must determine whether a defendant has two prior felony convictions, but also must determine whether "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest."¹⁶⁸ Only if the court is "of the opinion" that such a lengthy sentence is appropriate will it impose the aggravated sentence, and "the reasons for the court's opinion shall be set forth in the record."¹⁶⁹

To be clear, like Alaska and Arizona, New York appears to allow a sentencing increase even if the sentencing court does not find additional facts that support a lengthy sentence.¹⁷⁰ But appellate courts have often reversed

164. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

165. ALASKA STAT. § 12.55.155(c) (7), (8), (12), (15), (18) (B), (19), (20), (21), (31); ARIZ. REV. STAT. ANN. § 13-701(D) (11).

166. 523 U.S. 224 (1998).

167. N.Y. PENAL LAW § 70.10(2) (McKinney 2017). This means that the prior convictions make the current conviction count, for sentencing purposes, as if it were a much more serious offense.

168. *Id.*

169. *Id.*

170. At the very least, the New York courts have interpreted the statute to permit a sentencing increase under those circumstances. *See People v. Rivera*, 833 N.E.2d 194, 197 (N.Y. 2005).

sentences where the trial judge has failed to make additional factual findings.¹⁷¹ Thus, it appears that additional factfinding is, as a practical matter, a requirement, even though as a formal matter, judges technically have the discretion to impose the higher sentence even when no other aggravating facts are present.¹⁷²

7. Federal Sentencing

The Federal Sentencing Guidelines assign narrow sentencing ranges within the broader statutory sentencing limits based on a defendant's "real offense conduct"—for example, the manner in which different defendants commit the same offense in different ways. The Guidelines Manual provides detailed rules indicating how various factual findings adjust the Guideline sentencing range.¹⁷³ Beginning in 1987, federal law required judges to make factual findings specified in the Guidelines Manual, and it required them to sentence within the narrow range that the adjustments prescribed.¹⁷⁴

The Supreme Court found this system unconstitutional in *United States v. Booker*.¹⁷⁵ But rather than requiring a jury to make the factual findings required by the Federal Sentencing Guidelines, the Court made those Guidelines advisory rather than mandatory.¹⁷⁶ Still, after *Booker*, trial judges are not free to

171. See *Portalatin v. Graham*, 624 F.3d 69, 101 n.18 (2d Cir. 2010) (Winter, J., dissenting) (collecting cases).

172. See ARIZ. REV. STAT. ANN. § 13-701(F) ("If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances. In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term. If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence.").

173. U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2014), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> [<https://perma.cc/56ZH-LRPL>].

174. Judges were permitted to depart from the Guidelines (for example, sentence outside the Guideline range) only in situations expressly identified by the Guidelines, see *id.* at 457–74 (identifying appropriate and inappropriate grounds for departure), or where the sentencing judge found that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (2018); see also STITH & CABRANES, *supra* note 106, at 101–03 (noting that this provision severely hampered district court ability to depart downward from the Guidelines even after *Koon* articulated the abuse of discretion standard).

175. 543 U.S. 220 (2005).

176. *Id.* at 245.

ignore the Guidelines altogether. Sentencing judges must begin each sentencing by calculating the correct Guideline range, and they must consider that range along with various other factors identified in 18 U.S.C. § 3553(a) when imposing a sentence.¹⁷⁷ Those factors include not only the sentencing range recommended by the Guidelines, but also the nature and circumstances of the offense, the history and characteristics of the defendant, the seriousness of the offense, and the need to deter criminal conduct and protect the public from further crimes of the defendant.¹⁷⁸

In addition to requiring trial judges to calculate the Guideline range and consider it in imposing sentences, the *Booker* Court also ensured a continuing role for the Federal Sentencing Guidelines through appellate review of sentencing decisions.¹⁷⁹ The Court instructed appellate courts to review sentences to determine whether they are reasonable with respect to § 3553(a)—that is, the list of factors (including the Guideline range) that district courts must consider in imposing a sentence.

Making the Guidelines advisory, rather than mandatory, arguably avoids the constitutional problem identified in *Apprendi* and *Blakely*. In an advisory guideline system, a factual finding is no longer required to sentence above the Guideline range.¹⁸⁰ A sentencing judge can, at least in theory, sentence

177. *Id.* at 259–60.

178. 18 U.S.C. § 3553(a) provides, in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

179. *Booker*, 543 U.S. at 261.

180. *Id.* at 259–60.

anywhere within the sentencing range without making any additional factual findings. But, in practice, judges continue to sentence most defendants in accordance with the Guidelines, and appellate courts routinely reverse judges who stray too far from the narrow Guideline ranges.¹⁸¹ Indeed, the Supreme Court appears to have endorsed those appellate practices, at least in dicta.¹⁸²

Because federal judges must find facts in order to make Guideline adjustments, and because judges who stray too far from the Guidelines' advisory range will be reversed on appeal, it is clear that judges are required to make factual findings before they may impose an increased sentence.

B. Authorization, Selection, and Discretion

When the systems described in this Part have been challenged on Sixth Amendment grounds, courts have drawn a distinction between those factual findings that “authorize” a higher sentence and factual findings that merely aid the judge in selecting a sentence from the available range. Once a defendant is eligible for a higher sentence, these courts reason, a judge can make any additional factual findings because defendants are not entitled to a jury determination of the ultimate sentence. But the distinction between factual findings that “authorize” the imposition of a higher sentence and other required factual findings is more artificial than real. Nor is recognizing a jury right to all required factual findings the equivalent of recognizing the right to a jury determination of the ultimate sentence.

1. The Elusive Distinction Between Findings That “Authorize” and Findings That Are “Required”

The idea that only those factual findings that “authorize” a higher sentence may trigger the Sixth Amendment jury right is consistent with reasonable readings of *Ring* and *Blakely*. *Blakely* made clear that the jury trial right arises when a judge sentences above “the maximum [sentence] he may impose without any additional findings.”¹⁸³ The Supreme Court appeared to confirm that the *Blakely* question was one of legal authorization to impose a

181. See, e.g., U.S. SENTENCING COMM'N, U.S. SENTENCING COMMISSION QUARTERLY DATA REPORT (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf [<https://perma.cc/6ALY-4EXY>].

182. See Hessick & Hessick, *supra* note 46, at 34–36 (discussing dicta in *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007)).

183. *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (emphasis omitted).

sentence in *United States v. Booker*.¹⁸⁴ *Booker* held that the Federal Sentencing Guidelines suffered from the same Sixth Amendment problem as the Washington state sentencing guidelines at issue in *Blakely*.¹⁸⁵ But the *Booker* Court remedied the Sixth Amendment problem, not by requiring sentencing juries, but rather by making the federal guidelines advisory.¹⁸⁶

After *Booker*, federal judges must still make the factual findings specified in the Guidelines, and they must “consider” those findings. But because the guidelines are advisory, rather than mandatory, judges may—at least in theory—impose heightened guidelines sentences without factual findings. It was this idea that judges had the authority to impose a sentence within the full statutory range, even if they had to engage in factfinding before actually selecting a sentence, that the remedial *Booker* majority said satisfied the Sixth Amendment.¹⁸⁷

But *Hurst* seriously undercuts that analysis. *Hurst* demonstrates that the mere presence of a jury finding is not enough to satisfy the Sixth Amendment; the Sixth Amendment may also apply if a statute requires judges to make additional factual findings and if it authorizes a higher sentence only after a judge weighs aggravating factors against mitigating factors. When systems such as Alaska, Arizona, and the federal system require judges to consider the existence of other aggravating sentencing factors found by judges, not juries,¹⁸⁸ it is difficult to argue that the jury has found all of the facts “which the law makes essential to the punishment.”¹⁸⁹

It is not enough that this additional factfinding and weighing occurs after an initial jury finding of a single aggravated factor (or a judicial finding of a prior conviction under *Almendarez-Torres*). If such a finding were sufficient, then the jury’s recommendation of death in *Hurst* would have cured any constitutional violation in that case.¹⁹⁰ The *Hurst* jury could have made that recommendation only because it found the presence of at least one aggravating factor beyond a reasonable doubt. But the *Hurst* Court dismissed as irrelevant

184. *Booker*, 543 U.S. 220.

185. *Id.* at 243.

186. *Id.* at 245.

187. *Id.*

188. See, e.g., ARIZ. REV. STAT. ANN. § 13-701(F) (2017) (“In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term.” (emphasis added)).

189. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

190. See discussion *supra* Subpart I.B (explaining that the Court did not treat *Hurst*’s claim as a facial challenge or an overbreadth claim).

the fact that the jury had made such a finding. The Florida scheme violated the Sixth Amendment, according to the Court, because “[t]he trial court *alone* must find ‘the facts . . . [t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’”¹⁹¹

It is this feature of the *Hurst* decision that makes the Alabama Supreme Court’s decision in *Bohannon* and the new Florida capital sentencing system appear unconstitutional. Both require independent judicial factfinding before the judge can impose a sentence of death, and so they appear to reintroduce the very feature that rendered the sentence imposed in *Hurst* unconstitutional. Although the sentencing judge in *Hurst* could have imposed a death sentence on Timothy Hurst even if the jury had recommended a life sentence, that decision sequence did not happen in the case. Hurst’s jury recommended the death penalty, which means that the jury necessarily found at least one aggravating factor. In other words, Timothy Hurst received the same procedural protections afforded under the pre-2017 Alabama system and the new Florida legislation,¹⁹² yet the Supreme Court held that those procedures violated his Sixth Amendment rights. Although the Florida legislature has changed the jury’s “advisory sentence” into a “recommended” sentence, the judge continues to play a “central and singular role” under the revised law.¹⁹³ Requiring a jury to make an eligibility finding and then requiring further findings by the judge to impose the death penalty still requires the judge to make factual findings before imposing a higher sentence. That is precisely what *Hurst* forbids.

While the new Florida capital sentencing system and the pre-April 2017 Alabama systems repeat the central defect of the system struck down in *Hurst*, one could attempt to distinguish the Alaska and Arizona sentencing systems. As the *Hurst* Court noted, Florida defendants were not “eligible for death until [there were] ‘findings *by the court* that such person shall be punished by

191. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

192. The new legislation did add two procedural protections that Timothy Hurst did not have: The jury must find the existence of each aggravating factor beyond a reasonable doubt, and the jury’s decision must be unanimous. Compare FLA. STAT. § 921.141(2) (2017) (including these protections), with FLA. STAT. § 921.141(2) (2015) (not mentioning these protections). See also *Hurst*, 136 S. Ct. at 620 (“The jury recommended death by a vote of 7 to 5.”). But the *Hurst* Court did not mention the burden of proof or juror unanimity when explaining why the Florida system violated the Sixth Amendment; it focused instead on the allocation of authority between judge and jury.

193. *Hurst*, 136 S. Ct. at 622 (“The State fails to appreciate the central and singular role the judge plays under Florida law.”).

death.”¹⁹⁴ The Alaska and Arizona sentencing statutes suggest that courts can increase sentences based on the presence of a single aggravating factor.¹⁹⁵ For example, if there were only a single aggravating factor present in a particular case, and if a jury found that factor, the judge could impose an aggravated sentence in that case. As a result, state courts have insisted that any subsequent judicial factfinding does not trigger the Sixth Amendment because it is not necessary to authorize or to permit the imposition of an aggravated sentence.¹⁹⁶ Instead, the factfinding is merely necessary for the judge to select a particular sentence within the now-expanded statutory sentencing range.¹⁹⁷

But it is not really clear what the courts mean by the words “authorize” or “permit” if judges must determine the sentence itself through additional factfinding and weighing. Both the Alaska and Arizona statutes use mandatory

194. *Id.*

195. See ALASKA STAT. § 12.55.155(h) (“If one of the aggravating factors in (c) of this section is established as provided in (f) (1) and (2) of this section, *the court may increase* the term of imprisonment up to the maximum term of imprisonment.” (emphasis added)). The Arizona statute reads:

The minimum or maximum term imposed pursuant to § 13-702, 13-703, 13-704, 13-705, 13-708, 13-710, 13-1406, 13-3212 or 13-3419 *may be imposed only if* one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant, except that an alleged aggravating circumstance under subsection D, paragraph 11 of this section shall be found to be true by the court, or in mitigation of the crime are found to be true by the court, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

ARIZ. REV. STAT. ANN. § 13-701(C) (emphasis added).

196. See *Cleveland v. State*, 143 P.3d 977, 987 (Alaska Ct. App. 2006); *State v. Martinez*, 115 P.3d 618, 623–24 (Ariz. 2005).

197. As the Arizona Supreme Court explained:

The Sixth Amendment requires that a jury find beyond a reasonable doubt, or a defendant admit, any fact (other than a prior conviction) necessary to establish the range within which a judge may sentence the defendant. If, however, additional facts are relevant merely to the exercise of a judge’s discretion in determining the specific sentence to impose on a defendant *within* a given statutory sentencing range, the Sixth Amendment permits the judge to find those facts by a preponderance of the evidence. Under A.R.S. § 13-702, the existence of a single aggravating factor exposes a defendant to an aggravated sentence. Therefore, once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute.

Martinez, 115 P.3d at 625. Washington courts have relied on this analysis. See *Cleveland*, 143 P.3d at 987–88 (citing and quoting *Martinez*).

language in instructing judges how to sentence.¹⁹⁸ Unless the state courts are reading this mandatory language out of their statutes, it is difficult to understand how they can interpret these statutes as giving judges discretion to sentence anywhere within the aggravated range on the basis of a single *Blakely*-compliant or *Blakely*-exempt factor.¹⁹⁹

Imagine, for example, a defendant who has a prior conviction, and who may have other aggravating factors associated with his crime. A prosecutor could insist that a judge conduct a hearing to learn about those other aggravating factors. If the judge refused to conduct such a hearing and imposed a presumptive or mitigated sentence on the defendant, then the state could appeal. The appellate court would reverse because the trial judge failed to follow the statutorily-imposed sentencing procedure; the statute tells the judge that she must conduct the hearing, she must find all of the possible aggravating factors, and then she must weigh those aggravating factors against mitigating factors. In other words, the judge cannot enter a sentence unless she first makes those additional findings and engages in the weighing process required by the statutes.

This question of authorization also plagues the New York persistent offender law. When faced with a challenge to the law in the wake of *Blakely*, New York's highest court construed the statute to make defendants "eligible for persistent felony offender sentencing based *solely* on whether they had two prior felony convictions."²⁰⁰ It claimed that the statutory requirement that the judge base her decision to increase sentences on "the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" was merely a "procedural rule[]"

198. ALASKA STAT. ANN. § 12.55.155(b) ("Sentences under this section that are outside of the presumptive ranges set out in AS 12.55.125 shall be based on the totality of the aggravating and mitigating factors . . ." (emphasis added)); ARIZ. REV. STAT. ANN. § 13-701(F) ("In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term." (emphasis added)). Indeed, prior to the decision in *Martinez*, an intermediate appellate court stated "Arizona law does not authorize an aggravated sentence upon the mere finding of one aggravating circumstance but, rather, authorizes an aggravated sentence only if all of the aggravating circumstances taken together outweigh the mitigating factors found by the court." *State v. Alire*, 105 P.3d 163, 165 (Ariz. Ct. App. 2005); see also *State v. Aleman*, 109 P.3d 571, 581 (Ariz. Ct. App. 2005) (quoting this language approvingly).

199. See *Martinez*, 115 P.3d at 624 (stating that, after finding a single aggravator, the judge has "discretion to impose any sentence within the statutory sentencing range").

200. *People v. Rivera*, 833 N.E.2d 194, 198 (N.Y. 2005).

that was designed to give a defendant “a right to an airing and an explanation” and to “facilitate the exercise” of appellate review for abuse of discretion.²⁰¹

But as with the Alaska and Arizona sentencing schemes, it is difficult to understand precisely how the New York courts have concluded that “under New York’s scheme, a defendant is subject to an enhanced sentence based solely on the existence of two prior felony convictions.”²⁰² While courts say that the existence of prior felony convictions alone authorize higher sentences, they also state:

[T]he New York sentencing scheme, after a defendant is deemed eligible to be sentenced as a persistent felony offender, requires that the sentencing court make a qualitative judgment about, among other things, the defendant’s criminal history and the circumstances surrounding a particular offense in order to determine whether an enhanced sentence, *under* the statutorily prescribed sentencing range, is warranted.²⁰³

It is difficult to understand how the statute simultaneously authorizes a higher sentence without any further findings, while at the same time requires that further findings be made before a judge decides to impose the higher sentence.²⁰⁴

The Florida system in *Hurst* helps illustrate this latter point. The Florida system empowered judges to impose the death penalty if they found that “sufficient aggravating circumstances exist” and that “there are insufficient

201. *Id.* at 197–98, 199 n.7.

202. *People v. Quinones*, 906 N.E.2d 1033, 1040 (N.Y. 2009); *see also Rivera*, 833 N.E.2d at 197 (reading the statute to say that “the prior felony convictions”—rather than the judge’s conclusions about the defendant and his crime—“are the *sole determinant* of whether a defendant is subject to recidivist sentencing as a persistent felony offender”). As the dissenting justices in *Rivera* made clear, this was a novel construction of the statute that was articulated only to save the statute from invalidation on Sixth Amendment grounds. *See id.* at 201, 202 (Kay, C.J., dissenting) (“[T]he statute as construed by the majority was not before today the law in New York.”). The construction does appear to have played a determinative role in saving the statute; in upholding the statute against a Sixth Amendment challenge, the Second Circuit relied on this characterization of the statute from *Rivera* despite the subsequent New York Court of Appeals decision in *Quinones* making clear that the statute’s requirement is not purely procedural. *See Portalatin v. Graham* 624 F.3d 69, 85–86 (2d Cir. 2010) (en banc).

203. *Quinones*, 906 N.E.2d at 1041.

204. Perhaps this statement is meant to suggest that these additional findings about the defendant and her crime are only intended to aid the judge in deciding whether to impose a lower sentence—that is the sentence that the defendant would have been subject to, if not for the prior conviction. This reading would explain why the *Quinones* Court capitalized the word “under,” and it would arguably fit within various U.S. Supreme Court language that has emphasized how the Sixth Amendment applies to facts that increase a sentence or impose a mandatory minimum sentence, but not to facts that decrease a sentence.

mitigating circumstances to outweigh the aggravating circumstances.”²⁰⁵ The judge enjoyed significant discretion in deciding whether a fact qualified as an aggravating circumstance²⁰⁶ and significant discretion in deciding whether mitigating circumstances outweighed those circumstances. But the statute required the judge to make those findings in order to exercise that discretion, and thus the Supreme Court held that the system was unconstitutional. The mere existence of some discretion is not sufficient to satisfy the Sixth Amendment; any limitation on that discretion triggers the Sixth Amendment.²⁰⁷

Federal sentencing is more complicated, but it also requires judges to engage in factfinding before they impose a sentence. In the federal system, a judge can sentence, at least in theory, anywhere within the sentencing range without making any additional factual findings. One could argue that the factfinding necessary to calculate the Guideline range is not “essential” for the sentence that a defendant receives. The Supreme Court has, on occasion, characterized the judicial factfinding as a procedural sentencing requirement.²⁰⁸

But the Court also ensures that the factfinding process is an important substantive component of sentencing through appellate review. Appellate courts must reverse “unreasonable” sentences, and the Supreme Court has indicated that the magnitude of difference between the Guideline range and the sentence imposed is one feature of that substantive review.²⁰⁹ In particular, it has instructed appellate courts to consider whether the sentencing court’s explanation for sentencing outside the Guideline range is sufficiently compelling to justify the magnitude of difference between the Guideline range and the sentence imposed.²¹⁰

205. FLA. STAT. § 921.141(3) (2015).

206. In particular, the judge would have exercised significant discretion in deciding whether a defendant’s crime is “especially heinous, atrocious, or cruel.” *Id.* § 921.141(5) (h).

207. *Cf. Blakely v. Washington*, 542 U.S. 296, 305 (2004) (“Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.”).

208. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

209. *Id.*

210. *See id.* at 50 (stating that “it [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one”). This rule likely encourages district courts that elect to sentence outside of the Guideline range not to stray too far from that range because it tells them that appellate review of their reasoning will be more searching. *Cf. Hessick & Hessick, supra* note 46, at 13, 34 (noting that this language from *Gall* was in conflict with the holding in the case, which instructed appellate courts to defer to district court sentencing decisions).

To be sure, the Guidelines are not mandatory. Federal judges have at least some discretion to impose sentences that do not fall within the Guideline range. The Supreme Court ensures district court discretion by instructing sentencing courts that they may not presume that the Guideline range contains the appropriate sentence,²¹¹ and by allowing district courts to impose sentences outside of the Guideline range based only on judicial disagreement with the policies underlying the Guidelines.²¹² But reversals in the circuit courts make clear that district courts do not actually possess the authority to sentence anywhere within the statutory sentencing range. Circuit courts reverse sentences at the top of the range in the absence of aggravating sentencing facts,²¹³ and they reverse sentences at the bottom of the range in the absence of mitigating facts.²¹⁴

Importantly, the current federal system is different from the other systems discussed above. In the federal system, the judge has the authority to impose a sentence anywhere within the sentencing range at the moment of conviction, whereas a judge in the other systems must have a jury finding or a prior conviction in order for the higher, aggravated portion of the range to be available. But it is not entirely clear why this difference should matter for Sixth Amendment purposes. We could, for example, analogize the Alaska and Arizona systems to a separate, aggravated offense that broadens the sentencing range—that is to say, we could treat the jury finding or prior conviction as if the defendant had been convicted of a different crime than defendants without such findings or convictions.²¹⁵ If we use that analogy, then the state defendant with a jury finding or a prior conviction looks no different than a federal

211. See *Nelson v. United States*, 555 U.S. 350 (2009).

212. See *Kimbrough v. United States*, 552 U.S. 85 (2007). Several of the Court's opinions have included dicta suggesting that certain policy disagreements could trigger heightened appellate review. See *Spears v. United States*, 555 U.S. 261, 264–65 (2009) (per curiam) (disagreeing with the crack-powder cocaine guideline differential); *Kimbrough*, 552 U.S. at 574–75 (same). Such review could raise serious Sixth Amendment concerns under the Court's pre-*Hurst* doctrine. See Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 742–44 (2009). But because the Court has never actually endorsed such heightened review, we do not consider it here.

213. See, e.g., *United States v. Castro Juarez*, 425 F.3d 430 (7th Cir. 2005). Importantly, the circuits appear to be more willing to reverse below-Guidelines sentences than above-Guidelines sentences. See Douglas A. Berman, *Tracking Reasonableness Review Outcomes... Final Update?*, SENT'G L. & POL'Y (July 31, 2006), http://sentencing.typepad.com/sentencing_law_and_policy/2006/07/tracking_reason.html [<http://perma.cc/MW45-TW2Y>].

214. See, e.g., *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012); see also Carissa Byrne Hessick, *Child Pornography Sentencing in the Sixth Circuit*, 41 U. DAYTON L. REV. 381, 400–02 (2016) (raising Sixth Amendment concerns about appellate sentencing reversals).

215. Cf. *supra* text accompanying notes 107–109.

defendant in the current system. Both defendants are supposedly subject to any punishment that falls within the range; but the judge cannot impose any sentence without first making factual findings. It is hard to see how the Sixth Amendment ought to apply differently to these two defendants.

There is, perhaps, another way to distinguish the federal defendant from the defendants in Alaska and Arizona—namely, the federal judge’s ability to make sentencing decisions based on policy disagreements with the Guidelines. Alaska and Arizona require judges to impose sentences based on the presence or absence of aggravating and mitigating sentencing factors.²¹⁶ In contrast, federal judges, in theory, can base decisions on their own policy preferences.²¹⁷

Imagine, for example, a federal judge who disagrees with the policy decisions underlying the Federal Sentencing Guidelines ranges associated with drugs. Those Guidelines instruct the judge to calculate a range based on, *inter alia*, the amount of drugs that the defendant trafficked.²¹⁸ As a result, the presentence report that the judge receives will include evidence about the amount of drugs involved in the defendant’s crime. A judge, though, could announce that she is not going to consider that information. She could decide that she thinks the Guidelines are too harsh when it comes to drug crimes, and she could elect to impose the average sentence received by state drug defendants in the state in which she sits (assuming that sentence is within the relevant federal range). Under the *Booker* remedy, the federal judge has the authority (at least in theory) to impose such a sentence. But judges in Alaska and Arizona do not appear to have such authority. Their factual findings must inform their sentencing decisions, whereas the federal judge is free to sentence based on policy considerations alone.

This distinction between the federal system and the Alaska and Arizona systems matters for Sixth Amendment purposes. In particular, it demonstrates that federal judges may entirely disregard factual findings—especially if they may even decline to make those findings in the first instance—which means that the factfinding process is arguably not required. And it is only required factual findings that run afoul of *Hurst*.

The problem with this distinction is that, while it may exist in theory, it is unclear whether federal judges possess this sort of authority in practice. Federal

216. See ALASKA STAT. ANN. § 12.55.155(b) (2017); ARIZ. REV. STAT. ANN. § 13-701(F) (2017); *supra* text accompanying note 198.

217. See generally Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 198–202 (2014) (describing the different amounts and types of discretion in various sentencing systems).

218. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (U.S. SENTENCING COMM’N 2016).

appellate courts have the authority to review all federal sentences for “reasonableness,” and it is unclear whether those appellate courts would say that it is reasonable for a district court judge to impose a sentence without considering the Guidelines’ advisory range.²¹⁹ Various post-*Booker* Supreme Court cases appear to require judges to make factual findings and to consider the Guidelines when selecting sentences.²²⁰ Indeed, some circuit courts appear to police district court decisions to sentence outside of the Guidelines rather closely.²²¹ To the extent those courts routinely reverse sentencing decisions that are based only on policy considerations, it may not be possible to distinguish the federal sentencing system from the Alaska and Arizona sentencing systems on anything other than theoretical grounds.

Importantly, a recent Supreme Court case on the Federal Sentencing Guidelines—*Beckles v. United States*²²²—may suggest a shift in federal law that could save the federal system from a post-*Hurst* challenge. *Beckles* involved the question of whether the Due Process Clause’s prohibition on vague laws applied to the advisory Guidelines.²²³ The Court held that it did not.²²⁴ The majority opinion explained that the vagueness doctrine did not apply, in part, because although the Guidelines “continue to guide district courts in exercising their discretion,” the Guidelines “do not constrain th[at] discretion.”²²⁵ The *Beckles* opinion is notable because the idea that the Guidelines do not constrain judicial sentencing discretion came not from any of the Court’s majority opinions, but rather from one of Justice Thomas’s post-*Booker* dissents. If *Beckles* signals a shift in the Court’s post-*Booker* approach to federal sentencing—that is to say, if the Court begins to treat the Guidelines as purely voluntary²²⁶—then it will be much easier to separate the federal system from the

219. See, e.g., *Gall v. United States*, 552 U.S. 38, 49–51 (2007); *Rita v. United States*, 551 U.S. 338, 347–48, 350–51 (2007).

220. See, e.g., *Peugh v. United States*, 569 U.S. 530, 548–49 (2013) (suggesting that district courts commit procedural error if they fail to consult the Guidelines and if they deviate too far from the advisory range without a “sufficiently compelling” justification); *Gall*, 552 U.S. at 51 (suggesting that appellate courts should reverse sentencing for “procedural unreasonableness” if the sentencing judge failed to perform the Guidelines calculation).

221. See *supra* note 214.

222. 137 S. Ct. 886 (2017).

223. *Id.* The Court has held that vague statutes are unconstitutional because they fail to “provide a person of ordinary intelligence fair notice of what is prohibited.” *United States v. Williams*, 553 U.S. 285, 304 (2008); see also *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (noting that vague statutes can lead to arbitrary enforcement).

224. *Beckles*, 137 S. Ct. at 894.

225. *Id.* (quoting *Peugh*, 569 U.S. at 552 (Thomas, J., dissenting)).

226. See Hessick & Hessick, *supra* note 217, at 217–18, 218 n.174 (distinguishing the current federal system from a purely voluntary guideline system).

state systems that run afoul of *Hurst*. Federal judges will enjoy the “broad discretion” that the Court has repeatedly said does not trigger the Sixth Amendment.²²⁷

2. Preserving a Distinction Between Sentencing “Requirements” and the Ultimate Selection of Sentence

The decision to impose a higher sentence, once such a sentence has been authorized, is difficult to separate from the decision about the precise sentence to impose. In light of this, some courts have argued that these nonauthorization factual findings do not fall within the Sixth Amendment jury right.²²⁸ To do otherwise, so the argument goes, would essentially require jury sentencing.²²⁹

But this difficulty in separating the decision of whether to increase a sentence from the decision about the ultimate sentence is not insurmountable. So long as judges choose to engage in that factfinding of their own accord, and so long as the statute does not limit their discretion to impose a sentence based on what facts they find, then the judicial factfinding does not trigger the Sixth Amendment.²³⁰ And focusing on whether statutory requirements limit judicial discretion, rather than whether a particular factfinding “authorizes” a sentence, provides an administrable standard. Perhaps, more importantly, it avoids the possibility of legislatures drafting around the Sixth Amendment.

227. See *infra* note 234.

228. See, e.g., *State v. Fry*, 126 P.3d 516, 533–34 (N.M. 2005); *State v. Gales*, 658 N.W.2d 604, 626–27 (Neb. 2003).

229. *Id.*

230. Colorado’s capital sentencing system provides an example of how a jurisdiction separates and distinguishes qualitative determinations from the ultimate selection of sentence. As Sam Kamin and Justin Marceau explain:

The Colorado capital sentencing statute has been interpreted to require four distinct steps at the penalty phase. First, the jury must find one of seventeen enumerated aggravating factors to be true beyond a reasonable doubt. Second, the jury considers evidence proffered by the defendant to determine “whether any mitigating factor exists.” Third, the prosecution is permitted to rebut the presented mitigating evidence and the jury is to assess whether the mitigating evidence outweighs the aggravating factors found by the jury. Only if the jury finds beyond a reasonable doubt that mitigation does not outweigh the aggravating factor(s) previously found does the case proceed to the fourth stage at which the jury is presented with additional evidence and ultimately makes a decision as to whether death is the appropriate punishment.

Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 1017 (2015) (footnotes omitted) (quoting *People v. Tenneson*, 788 P.2d 786, 789 (Colo. 1990) (en banc)). Although Colorado has a jury perform each of these steps, the fourth step could be given to a judge without running afoul of *Hurst*, because this step does not require any factfinding. See discussion *supra* Part II.

The Supreme Court has repeatedly held that there is no Sixth Amendment right to a jury determination of the ultimate sentence.²³¹ Although the cases that state this rule are of a relatively recent vintage,²³² we would be surprised if the Court were to suddenly discover an absolute right to jury sentencing—that is, a right to have a jury decide the ultimate sentence to impose on a defendant in every case.

There is a long history of judicial sentencing in this country.²³³ In all of the cases that expanded the right to jury findings at sentencing, the Court has been quite adamant that judges may find sentencing facts if those facts will allow them to exercise their sentencing discretion.²³⁴ The repeated acknowledgement

231. See *Libretti v. United States*, 516 U.S. 29, 49 (1995) (“Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.”); *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) (“[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.”); *Cabana v. Bullock*, 474 U.S. 376, 385 (1986) (“The decision whether a particular punishment . . . is appropriate in any given case is not one that we have ever required to be made by a jury.”); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (“[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.” (citations omitted)).
232. Although the *Apprendi* line of cases has overruled several cases in which the Supreme Court held that there is no Sixth Amendment right to a jury determination of the ultimate sentence, it still seems unlikely that the Court would find that defendants have such a right. *McMillan* and *Spaziano* have been explicitly overruled. See *Alleyne v. United States*, 570 U.S. 99, 105–07, 116 (noting that much of the holding from *McMillan* had been overruled by *Apprendi*, a narrow aspect of the holding had been upheld by *Harris v. United States*, 536 U.S. 545 (2002), and overruling *Harris*); *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016) (overruling *Spaziano*). And some judges have questioned whether *Bullock* survived *Apprendi*. See *infra* text accompanying note 245.
233. See, e.g., *State v. Reeder*, 60 S.E. 434, 435 (S.C. 1908) (“The American cases lay down the principle that, where it devolves upon the court to determine the punishment either upon the finding or upon the plea of guilty, it is the correct practice for it to hear evidence in aggravation or mitigation, as the case may be, where there is any discretion as to the punishment.”); *Kistler v. State*, 54 Ind. 400, 403 (1876) (“According to the old law, all the jury had to do was to determine the question of guilt or innocence. It was the duty of the court, after a verdict of guilty, to declare the punishment which the law imposed. If any discretion was permitted as to the punishment, that discretion was exercised by the court alone.”); see also *Iontcheva*, *supra* note 100, at 316–23 (noting that only a few states had jury sentencing in early America).
234. See, e.g., *Alleyne*, 570 U.S. at 116 (“[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.”); *Booker v. United States*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . [W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (“We should be clear that nothing in this history

that judicial factfinding is constitutional if it assists in judicial sentencing discretion would make no sense if all judicial sentencing were itself unconstitutional. In other words, in limiting the Sixth Amendment right to jury findings in sentencing schemes that restrict judicial sentencing discretion, the Supreme Court has, by implication, affirmed the constitutionality of judicial sentencing. And if judicial sentencing is constitutional, then the Sixth Amendment does not require jury sentencing.

But the repeated affirmance of the constitutionality of judicial sentencing discretion can also serve to bolster our reading of *Hurst* and to save it from the concern that it is impossible to disentangle postauthorization factfinding from selection of the ultimate sentence. *Hurst* relies on the very foundation that the Court has repeatedly used to invoke or avoid the Sixth Amendment—judicial discretion.²³⁵ Thus, *Hurst* recognizes a jury right only for findings required before a judge may impose a particular sentence. It does not recognize a jury right for findings that are part of a judge's unfettered sentencing discretion. *Hurst* requires a jury only for those factual findings required by statute or by constitutional doctrine. If a judge is truly free to increase a sentence without any factual findings at all, then the Sixth Amendment does not apply. In this way, *Hurst* does not upset the rule that the Sixth Amendment does not create a right to jury sentencing; it merely continues to impose a jury requirement when sentencing discretion is removed from judges.

C. Judicial Findings That Survive *Hurst*

Those familiar with capital sentencing will have noticed two glaring exceptions to the preceding discussion about sentencing systems that require judicial factfinding: (1) the findings required to impose the death penalty on defendants convicted of felony murder and (2) the Ohio capital punishment system for defendants who plead guilty. While both of these sentencing regimes require judicial factfinding, they may still be permissible in the wake of *Hurst*. That is because there are constitutional doctrines at play other than the Sixth Amendment sentencing doctrine, and those other doctrines complicate the constitutional question.

suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.”).

235. See Hessick & Hessick, *supra* note 217, at 203–05.

1. *Hurst* and Felony Murder

The Supreme Court has recognized some Eighth Amendment limits on the ability of states to impose capital sentences for felony murder—that is, homicides that occur during the course of a felony, rather than intentional homicides.²³⁶ *Enmund v. Florida*²³⁷ held the imposition of the death penalty for felony murder violated the Eighth Amendment because the state failed to prove that the defendant had killed or attempted to kill.²³⁸ *Tison v. Arizona*,²³⁹ by contrast, narrowed the holding of *Enmund* by finding that felony murder could serve as the basis for a death sentence in certain cases and not violate the Eighth Amendment.²⁴⁰ Specifically, the *Tison* court held that individuals who are major participants in a crime and who demonstrate reckless indifference could receive the death penalty, even if they did not kill or attempt to kill the victim.²⁴¹

After deciding *Enmund* and *Tison*, but before *Apprendi*, the Court denied a Sixth Amendment challenge to the ability of a judge to make determinations required by *Enmund* and *Tison*.²⁴² Defendants argued that the *Enmund* and *Tison* factors were elements, like aggravating factors, and so the Sixth Amendment required a jury to find them.²⁴³ The Court rejected this challenge, holding that these determinations were an additional constitutional limitation under the Eighth Amendment, and they did not constitute an element of capital felony murder.²⁴⁴

Even after *Apprendi*, lower courts have largely held that the Sixth Amendment does not require a jury determination of the *Enmund* and *Tison* felony murder requirements.²⁴⁵ Courts distinguished the facts required in

236. See generally Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449–60 (1985) (recounting the history and major justifications for the felony murder doctrine).

237. 458 U.S. 782 (1982).

238. *Id.* at 797.

239. 481 U.S. 137 (1987).

240. *Id.* at 157–58.

241. See *id.* at 158.

242. See *Cabana v. Bullock*, 474 U.S. 376, 381 (1986).

243. *Id.*

244. *Id.* at 385.

245. See, e.g., *People v. Hyatt*, 891 N.W.2d 549, 572 (Mich. Ct. App. 2016); *State v. Galindo*, 774 N.W.2d 190, 236 (Neb. 2009); *Brown v. State*, 67 P.3d 917, 920 (Okla. Crim. App. 2003); *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003); 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(i), at 1018–19 (4th ed. 2015) (“So far, lower courts have rejected arguments to equate the factors which as a matter of Eighth Amendment law are required for death eligibility with elements. The rules in *Tison* and *Atkins* have instead been treated as defenses to, not elements of, capital murder.”). Notably, some judges have questioned whether *Cabana v. Bullock* survived *Apprendi*. See *Palmer v. Clarke*, 293 F. Supp. 2d 1011,

Apprendi from the *Enmund* and *Tison* facts in several ways. First, courts described the *Enmund* and *Tison* facts—whether a defendant’s participation in a felony murder made him eligible for the death penalty—as “constitutional facts,” as opposed to facts that were an element of the crime.²⁴⁶ The second distinction is that *Enmund* and *Tison* facts were mitigating—facts that excluded one from eligibility for a sentence, as opposed to prerequisites for inclusion in the group able to receive a sentence.

Although we see no relevant distinction between elements and “constitutional facts,”²⁴⁷ characterizing *Enmund* and *Tison* findings as a mitigation issue complicates the Sixth Amendment question. That is because the Sixth Amendment sentencing doctrine applies only to findings that increase a defendant’s sentence, not to findings that decrease a sentence. In this respect, the *Enmund* and *Tison* findings could bear more of a resemblance to a defense than to an element of a crime. The Supreme Court has sometimes applied different Sixth Amendment standards to defenses and elements.²⁴⁸ Most notably, while the Court has required the prosecution to prove all elements of a crime beyond a reasonable doubt,²⁴⁹ it has permitted states to impose the burden of proof on defendants for affirmative defenses.²⁵⁰ There are serious reasons to doubt whether that line of cases can be squared with *Apprendi* and its progeny,²⁵¹ but that issue is beyond the scope of this Article, and *Hurst* does not really speak to that question.

1057 (D. Neb. 2003) (finding that the Sixth Amendment required a jury finding on the *Enmund/Tison* factors), *rev'd on other grounds*, 408 F.3d 423, 441 (8th Cir. 2005); *In re Coley*, 283 P.3d 1252, 1282 (Cal. 2012) (Liu, J., concurring) (“*Booker* further suggests the absence of any bright line limiting *Apprendi*’s applicability to essential facts established by a legislative enactment.”). See generally Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553 (2015) (exploring the intersection between the Sixth and Eighth Amendments).

246. See, e.g., *Cabana*, 474 U.S. at 385; *State v. Ring*, 65 P.3d 915, 945 (2003).

247. See *supra* text accompanying notes 88–90.

248. See *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975); *In re Winship*, 397 U.S. 358, 364 (1970).

249. See *Mullaney*, 421 U.S. at 704; *In re Winship*, 397 U.S. at 364.

250. See *Smith v. United States*, 568 U.S. 106, 110 (2013); *Martin v. Ohio*, 480 U.S. 228, 233 (1987); *Patterson v. New York*, 432 U.S. 197, 205–06 (1977).

251. Compare PFAFF, *supra* note 37, at 321 (noting the tension between *Mullaney*, *Patterson*, and *Apprendi*), with King & Klein, *supra* note 10, at 1478 (“[T]he holding in *Apprendi* leaves intact *In re Winship* and *Mullaney v. Wilbur*, as well as *Leland v. Oregon*, *Patterson v. New York*, and *Martin v. Ohio*.” (footnotes omitted)).

2. Ohio and Plea Bargaining

Ohio typically sentences offenders by jury in capital cases.²⁵² But if a defendant pleads guilty to aggravated murder, then Ohio law assigns the sentencing decision to a three-judge panel rather than a jury.²⁵³ In *State v. Belton*,²⁵⁴ the Ohio Supreme Court defended this sentencing scheme against a Sixth Amendment challenge from a defendant who had pleaded no contest to aggravated murder.²⁵⁵ The *Belton* Court reasoned, in part, that because defendants have no right to plead guilty or no contest, the state could condition the acceptance of such a plea upon the waiver of sentencing by a jury.²⁵⁶ But the *Belton* Court also defended its statutory scheme on Sixth Amendment grounds. It noted that the defendant pleaded no contest, not only to the charge of aggravated murder, but also to two “death specifications”—that is, two aggravating circumstances.²⁵⁷ It was the presence of these two circumstances that made the defendant eligible for the death penalty, and so all the panel of judges needed to do was “hear the mitigating evidence presented by the defense and identify any factors that militate against a sentence of death. Then the panel must determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.”²⁵⁸

In concluding that this process did not violate the Sixth Amendment, the *Belton* Court focused on the eligibility question. It said that, because the “the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence,” any factfinding that occurred during the selection phase did not trigger the Sixth Amendment. Because the defendant was already eligible for the death sentence, additional factual findings did not “expose a defendant to greater punishment.”²⁵⁹

252. OHIO REV. CODE ANN. § 2929.03 (West 2018).

253. *Id.*

254. 74 N.E.3d 319 (Ohio 2016).

255. *Id.*

256. *Id.* at 334–35.

257. *Id.*

258. *Id.* at 335.

259. *Id.* at 337. The *Belton* Court also distinguished weighing from factfinding. “Weighing is not a fact-finding process subject to the Sixth Amendment Instead, the weighing process amounts to ‘a complex moral judgment’ about what penalty to impose upon a defendant who is already death-penalty eligible.” *Id.* (quoting *United States v. Runyon*, 707 F.3d 475, 515–16 (4th Cir. 2013)). Although we believe that weighing, if required to impose a sentence, may trigger the Sixth Amendment, see *infra* Subpart IV.B, this Ohio scheme may nonetheless be constitutional because there is no right to a plea bargain, see *infra* text accompanying notes 261–267.

Even though the Sixth Amendment “eligibility” analysis in *Belton* relies on the same flawed “authorization” argument that has been used by Arizona, Alaska, and other states, Ohio’s system may nonetheless be constitutional. That is because the judicial sentencing process is limited to those defendants who plead guilty or no contest. Because courts have not recognized a right to enter a guilty plea,²⁶⁰ there are few (if any) limitations on the rights that a defendant may waive.²⁶¹ Prosecutors routinely require defendants to waive a large number of rights in plea bargains, including the right to trial by jury.²⁶² So long as Ohio can require a defendant to waive her right to a jury trial *in toto*, and so long as courts are unwilling to place restrictions on what rights the government may require a defendant to waive in return for a plea bargain,²⁶³ then the Ohio system is constitutional. That is to say, Ohio defendants have a right to insist that a jury make the relevant death penalty determinations. But if they wish to invoke that right, then they must also proceed to trial on the question of guilt and death eligibility.

Recently, a unanimous Ohio Supreme Court reaffirmed the holding in *Belton* and concluded that its capital system did not violate the Sixth Amendment.²⁶⁴ Looking at the role of the jury in capital cases, the Court explained that the jury, unlike in *Ring* and *Hurst*, was required to make the final factual finding with respect to the aggravating factor(s) mandated by the statute.²⁶⁵ As the Court explained, “Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*.”²⁶⁶

IV. QUALITATIVE FINDINGS AND THE JURY RIGHT

It is quite clear that *Hurst* expanded the Sixth Amendment sentencing doctrine by eliminating the distinction between facts that “authorize” a sentencing increase and other factual findings required to impose a sentence.

260. *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“There is, of course, no absolute right to have a guilty plea accepted.”).

261. *See, e.g., United States v. Ruiz*, 536 U.S. 622 (2002) (upholding waiver of right to know about impeachment evidence).

262. *See, e.g., Susan R. Klein, Aleza S. Remis & Donna Lee Elm, Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 92 (2015) (reporting that “a significant number of prosecutors seek waivers of all statutory and constitutional claims regardless of whether such violations occurred pre-trial, during the entry of a guilty plea, at the sentencing hearing, or thereafter”).

263. *See id.* at 78–83.

264. *State v. Mason*, 108 N.E.3d 56 (Ohio 2018).

265. *Id.*

266. *Id.* at 8. *See* OHIO REV. CODE ANN. § 2929.03(C)(2).

But it may also have expanded the doctrine beyond findings of historical facts. Although *Apprendi* and *Ring* both suggest that a jury is necessary only for factual findings, *Hurst* also seems to characterize the finding of whether aggravating factors outweigh mitigating factors as a factual determination that triggers the Sixth Amendment. In holding the Florida death penalty scheme unconstitutional, the *Hurst* Court mentioned that the judge not only had to engage in factfinding, but also had to weigh aggravating and mitigating factors: “The trial court *alone* must find ‘the facts...[t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.’”²⁶⁷ In other words, *Hurst* suggests that the weighing of aggravating and mitigating factors should not have been assigned to the judge.

To be sure, this is not the only plausible reading of *Hurst*. The Florida statute at issue in *Hurst* labeled the weighing of aggravating and mitigating factors a “fact.”²⁶⁸ So, it is possible to read the Court’s opinion as simply repeating the statutory language, rather than independently characterizing the weighing determination as a factual finding. Nor did the Court indicate whether the statute would have violated the Sixth Amendment if it only required the judge to make the weighing determination, as opposed to first determining whether aggravating factors were present. Nonetheless, it is possible to read this language in *Hurst* as eliminating a distinction between factual findings that increase a sentence and other types of required findings, including those that might be characterized as “findings of law.”

As a general matter, the line between findings of fact and findings of law is far from clear.²⁶⁹ And in the sentencing context, many systems rely on aggravating factors that resemble mixed questions of law and fact, rather than pure questions of historical fact. Indeed, Minnesota recently relied on the law-fact distinction in order to characterize its aggravating sentencing factors as legal questions that do not require jury findings.²⁷⁰ Minnesota’s approach

267. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) (quoting Act of Oct. 1, 1996, ch. 96, sec. 921.141, § 3, 1996 Fla. Laws 1352, 1353).

268. FLA. STAT. § 921.141 (2015), 1996 Fla. Laws at 1353. The relevant text read:
 [I]f the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
 (a) That sufficient aggravating circumstances exist . . . and
 (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

FLA. STAT. § 921.141 (2015).

269. See discussion *supra* Subpart II.A.

270. See *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009), which is discussed in more detail *infra* text accompanying notes 324–333.

demonstrates how distinguishing between questions of fact and questions of law at the sentencing stage can be inconsistent with treating aggravating sentencing factors as the functional equivalent of elements of a crime. Criminal offenses routinely include elements that appear to be questions of law, rather than questions of fact, such as whether a defendant's actions were "reasonable" or whether certain information was "material." There is little doubt that juries, rather than judges, must answer those questions to prevent states from circumventing the jury requirement.²⁷¹

If we read *Hurst* to extend the Sixth Amendment jury right beyond questions of historical fact to include any findings that are required by law, that calls into question the constitutionality of a number of sentencing systems. That is because many systems require judges to weigh aggravating sentencing factors against mitigating factors and to make other qualitative judgments before increasing sentences. Indeed, all of the sentencing systems identified in Part III that require additional judicial factfinding do so in order to have the judge make a qualitative determination. This Part begins by identifying additional jurisdictions that require weighing or other qualitative findings before a judge may increase a sentence. And it explains how those systems may run afoul of *Hurst*.

A. Cataloging Sentencing Systems That Require Weighing and Other Qualitative Findings

Several state sentencing schemes require judges to make a qualitative finding before imposing an increased sentence. Some states require judges to weigh the aggravating and mitigating circumstances and conclude that the aggravating circumstances outweigh the mitigating circumstances before increasing a sentence. Other states require judges to make a less clearly defined qualitative determination, such as whether the aggravating circumstances are "extraordinary," before imposing an increased sentence. In addition, the Eighth Amendment may require a qualitative finding prior to the imposition of juvenile life without parole sentences after the recent decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*.

271. See, e.g., *United States v. Gaudin*, 515 U.S. 506 (1995) (requiring jury to assess materiality of false statements).

1. Minnesota

In non–death penalty cases, Minnesota judges must impose a sentence within the state sentencing guidelines’ presumptive range. Judges may depart from the guidelines and impose a sentence above or below the presumptive guideline range only if “there exist identifiable, substantial, and compelling circumstances to support a sentence outside” of the presumptive range.²⁷² When a judge sentences outside of the presumptive range, she must “disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.”²⁷³ A judge may impose a sentence outside of the presumptive range “only if aggravating or mitigating circumstances are present.”²⁷⁴ The state guidelines include a nonexclusive list of aggravating and mitigating “departure factors.”²⁷⁵ As the guidelines’ commentary explains, “the aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the Guideline’s sentence.”²⁷⁶

After the Supreme Court decided *Blakely v. Washington*,²⁷⁷ the Minnesota Supreme Court held that its sentencing system violated the Sixth Amendment.²⁷⁸ Minnesota cured the defect by providing for sentencing juries to find aggravating factors.²⁷⁹ And the relevant state statute contemplates that the jury findings be made in one of two possible ways: (1) Either the “existence of each aggravating factor shall be determined by use of a special verdict form” submitted to the jury at the time that they decide on guilt or innocence, or (2) the court “shall bifurcate the proceedings, or impanel a resentencing jury, to allow for the production of evidence, argument, and deliberations on the existence of factors in support of an aggravated departure after the return of a guilty verdict.”²⁸⁰ In other words, Minnesota appeared to have addressed the Sixth Amendment sentencing doctrine by providing for a jury to make all of the factual findings necessary to increase a defendant’s sentence.

272. MINN. SENTENCING GUIDELINES § 2.D.1 (MINN. SENTENCING GUIDELINES COMM’N 2017).

273. *Id.* § 2.D.1(c).

274. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989)).

275. MINN. SENTENCING GUIDELINES § 2.D.3 (MINN. SENTENCING GUIDELINES COMM’N 2017); see also *id.* § 2.D.1(d) (describing this list of factors as “advisory”).

276. *Id.* § 2.D.1 cmt. 2.D.103.

277. 542 U.S. 296 (2004).

278. *Shattuck*, 704 N.W.2d at 141–42 (Minn. 2005), as amended on *reh’g in part* (Oct. 6, 2005).

279. MINN. STAT. § 244.10 (2016); *State v. Chauvin*, 723 N.W.2d 20, 29 (Minn. 2006).

280. MINN. STAT. § 244.10(5) (2016).

But a 2009 Minnesota Supreme Court opinion, *State v. Rourke*,²⁸¹ complicated the Sixth Amendment question. The defendant had been given an aggravated sentence based on a finding that he had treated the victim with “particular cruelty” when he committed assault.²⁸² “Particular cruelty” is an aggravating factor that is enumerated in both the state sentencing guidelines and state statute.²⁸³ In resolving a dispute over whether this factor was unconstitutionally vague, the *Rourke* Court held that “particular cruelty” was a reason that supported the trial court’s decision to impose a sentence above the presumptive range, rather than an additional fact to be found by a jury.²⁸⁴ The Court identified as an example of such facts whether the defendant handcuffed the victim and sprayed her with chemicals.²⁸⁵ Such “additional facts, which were neither admitted by the defendant, nor necessary to prove the elements of the offense,” the *Rourke* Court explained, must be proven to a jury beyond a reasonable doubt.²⁸⁶ But once those facts are found, the judge alone must make the decision whether those additional facts constitute “particular cruelty,” which would warrant an aggravated sentence.²⁸⁷

2. Ohio

In Ohio, the death penalty statute allows the defendant to choose a jury or a three-judge panel to try and sentence the case.²⁸⁸ If a defendant chooses a jury, the jury must find the defendant guilty of aggravated murder, with one or more capital specifications, to be eligible for death.²⁸⁹ If the jury makes such a finding at trial, the court will then hold a sentencing hearing in which the jury will consider the aggravating and mitigating evidence, weigh that evidence, and recommend a sentence of death or life imprisonment.²⁹⁰ If the jury recommends death, then the court must then weigh the aggravating and mitigating circumstances itself in deciding whether to accept or reject the jury’s recommendation.²⁹¹ This weighing determination, as explained above, could

281. 773 N.W.2d 913 (Minn. 2009).

282. *Id.* at 916–17.

283. MINN. SENTENCING GUIDELINES § 2.D.3(b)(2) (2017); MINN. STAT. § 244.10(5)(a)(2) (2016).

284. *Rourke*, 773 N.W.2d at 920–22.

285. *Id.* at 922.

286. *Id.* at 921.

287. *Id.*; MINN. SENTENCING GUIDELINES § 2.D.3(b)(2) (2017); MINN. STAT. § 244.10(5)(a)(2) (2016).

288. See OHIO REV. CODE ANN. §§ 2929.03, 2929.04 (West 2018).

289. See *id.* § 2929.03.

290. See *id.*

291. See *id.*

violate the Sixth Amendment because it conditions the receipt of a death sentence on a final qualitative determination made by a judge, not a jury.

In *Ohio v. Mason*,²⁹² a 2018 case, the Ohio Supreme Court held that a qualitative determination by a judge was not a factual finding for purposes of the Sixth Amendment.²⁹³ The Court further opined that even if it were a factual finding, it was a different kind of finding than the one prohibited by the Supreme Court in *Hurst*.²⁹⁴ The weighing by the trial judge did not determine the question of death, according to the court; the jury's recommendation did.²⁹⁵ The Court also suggested that the *Hurst* issue did not exist because the Court had no authority to increase the recommended sentence.²⁹⁶ The Court ignored, however, the requirement that the judge affirm the death sentence in order for it to be imposed. Without the judicial qualitative weighing determination, the defendant could not receive the punishment of death. Thus, the availability of the death sentence is conditioned upon a judge's finding. As in *Hurst*, the jury determination in Ohio is necessary, but not sufficient, for a defendant to receive a death sentence. The only difference between the regime in *Hurst* and in Ohio is that the judge in Ohio does not find aggravating facts, but instead weighs those facts. As such, we question the correctness of the Ohio Supreme Court's decision in *Mason* in light of *Hurst*.

3. Nebraska

The Nebraska death statute consists of multiple phases. There is a separate hearing between the guilt and sentencing phases to determine whether one or more aggravating circumstances are present.²⁹⁷ The jury must find each aggravating circumstance beyond a reasonable doubt, and the jury's finding must be unanimous.²⁹⁸ If the jury finds no aggravating factors, the defendant receives a life sentence.²⁹⁹ If a jury finds at least one aggravating circumstance, then the case proceeds to a sentencing hearing.³⁰⁰ At the sentencing hearing, three judges "receive evidence of mitigation and sentence excessiveness or disproportionality."³⁰¹ It appears that the judges may consider aggravating

292. 108 N.E.3d 56 (Ohio 2018).

293. *Id.* at 65–66.

294. *Id.* at 66.

295. *Id.*

296. *Id.*

297. See NEB. REV. STAT. § 29-2520(1) (2016).

298. *Id.* § 29-2520(4)(f).

299. *Id.* § 29-2520(4)(h).

300. *Id.*

301. *Id.* § 29-2520(4)(h); *Id.* § 29-2521(1), (3).

facts that are not found by the jury at the eligibility hearing;³⁰² and it is quite clear that the judges must base their sentencing determination on a weighing of aggravating and mitigating factors, as well as a judgment about whether a sentence of death would be “excessive or disproportionate . . . considering both the crime and the defendant.”³⁰³

The Nebraska scheme appears to be unconstitutional after *Hurst*. The scheme relies on a jury finding of “eligibility” for the death penalty based on factual findings about whether aggravating circumstances exist. But a jury’s finding of the presence of one or more aggravating circumstances is not the only finding that the statute requires to impose the death penalty. The statute also requires the judges to make two qualitative findings: (1) “Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances” and (2) “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”³⁰⁴

Notably, in the wake of *Ring*, the Nebraska Supreme Court entertained a Sixth Amendment challenge on precisely this ground. In *State v. Gales*,³⁰⁵ the court rejected a defendant’s argument that the statutory scheme “fails to meet the Sixth Amendment requirements defined in *Apprendi v. New Jersey*, because

302. The judges are permitted to consider information in a presentence report that is prepared after the finding of death-eligibility, *id.* § 29-2521(2); *State v. Gales*, 658 N.W.2d 604, 627 (Neb. 2003) (upholding the constitutionality of judges considering such a presentencing investigation and report “only in the selection phase of the capital sentencing”), and the judges are permitted to hear any evidence “which the presiding judge deems to have probative value” about the question of mitigation and the question whether a death sentence would be excessive or disproportionate, NEB. REV. STAT. § 29-2521(3) (2016).

While the statutory scheme appears to *permit* the judges to consider additional aggravating circumstances above and beyond those found by the jury, it may also *require* the judges to make their own findings about the existence of aggravating factors. The statute that directs judges how to determine whether death is an appropriate sentence does not refer to the jury’s death-eligibility finding as a limitation on the aggravating circumstances that the panel should consider. NEB. REV. STAT. § 29-2522 (“In each case, the determination of the panel of judges shall be in writing and refer to the aggravating and mitigating circumstances weighed in the determination of the panel.”); *id.* § 29-2522 (1) (“[The] sentence determination shall be based upon the following considerations: (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death . . .”). One could read this language to direct judges to make their own findings about the existence of aggravating circumstances, or one could read it to *permit* such findings. If it *requires* judges to make their own, independent findings about the existence of additional aggravating circumstances, then the Nebraska scheme raises the same Sixth Amendment problems as the Alaska and Arizona sentencing schemes discussed in Part III.

303. NEB. REV. STAT. § 29-2522(2), (3) (2016).

304. *Id.*

305. 658 N.W.2d 604 (Neb. 2003).

[it] does not authorize a jury to weigh aggravating circumstances against mitigating circumstances or conduct a proportionality review prior to the determination of the sentence.”³⁰⁶ The *Gales* Court noted that *Ring* did not address weighing at sentencing.³⁰⁷ And it went on to defend the Nebraska system by distinguishing the determination of “death eligibility” from the weighing and proportionality determinations, stating that the former is what subjects the defendant to the increased sentence, while the latter “[is] part of the ‘selection decision’ in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined.”³⁰⁸ In other words, the *Gales* Court considered whether the Sixth Amendment requires a jury determination of every required finding.

Although it rejected this argument in the wake of *Ring*, the Nebraska Supreme Court has not addressed the argument in the wake of *Hurst*. To date, the only post-*Hurst* challenge to Nebraska’s capital sentencing scheme came in *State v. Vela*.³⁰⁹ *Vela*, however, did not raise the claim in his petition for postconviction relief in the state district court, so the Nebraska Supreme Court declined to consider it on appeal.³¹⁰

4. North Carolina

North Carolina has a presumptive noncapital sentencing system. It requires a jury to make all factual findings for sentencing determinations other than the fact of a prior conviction³¹¹ But the jury’s factual findings, standing alone, are not enough to justify a sentence above the presumptive range. The judge must also find that those aggravating factors “are sufficient to outweigh any mitigating factors that are present.”³¹² In other words, North Carolina requires the judge to make the qualitative determination about the relative weight of aggravating and mitigating sentencing factors in order to increase the defendants’ sentence above the presumptive range.³¹³

306. *Id.* at 626 (citation omitted).

307. *Id.*

308. *Id.*

309. 900 N.W.2d 8 (Neb. 2017).

310. *Id.* at 14.

311. N.C. GEN. STAT. § 15A-1340.16(b) (2017) (requiring a jury finding of aggravating factors or a judicial finding of aggravation under N.C. GEN. STAT. § 15A-1340.16(d) (12a) or (18a), which identify a judicial finding of probation violation and a prior adjudication of delinquency, respectively, as aggravating factors).

312. *Id.* § 15A-1340.16(b).

313. *State v. Facyson*, 758 S.E.2d 359, 362 (N.C. 2014) (“Our Structured Sentencing Act provides that if the jury finds that one or more aggravating factors exist, and if the trial

5. Colorado, Kansas, Oregon, and Washington

Several states require judges to make nonweighing qualitative determinations in order to increase noncapital sentences.³¹⁴ Kansas, for example, requires juries to make all factual findings other than the fact of a prior conviction.³¹⁵ But the jury's factual findings, standing alone, are not enough to justify a sentence above the presumptive range; the judge must also determine whether there are "substantial and compelling reasons to impose a departure sentence."³¹⁶ In other words, Kansas requires a qualitative determination by the judge about whether the facts found by the jury are "substantial and compelling reasons" to increase the defendants' sentence above the presumptive range. Colorado,³¹⁷

court determines that the aggravating factors outweigh the mitigating factors, then the court may impose a sentence in the statutorily-prescribed aggravated range.").

314. The New York persistent offender law has this problem. The New York Court of Appeals acknowledges that the persistent offender law "requires that the sentencing court make a qualitative judgment about, among other things, the defendant's criminal history and the circumstances surrounding a particular offense in order to determine whether an enhanced sentence . . . is warranted." *People v. Quinones*, 906 N.E.2d 1033, 1041 (N.Y. 2009) (emphasis added). Because New York also requires judges to make factual findings, their sentencing systems violate the Sixth Amendment even under a narrower reading of *Hurst*. In cases in which a New York judge did not find additional facts, see *supra* text accompanying notes 171, 202–204, then this qualitative judgment requirement could still raise Sixth Amendment problems.

315. KAN. STAT. ANN. § 21-6815(b) (2017).

316. *Id.* § 21-6815(a).

317. Colorado requires judges to impose a sentence within a presumptive range unless an aggravating factor is found by a jury beyond a reasonable doubt or unless there are aggravating factors that otherwise satisfy *Blakely*. *Lopez v. People*, 113 P.3d 713, 716 (Colo. 2005). But the factfinding is not the end of the inquiry. Judges can sentence outside of the presumptive range only if they conclude "extraordinary mitigating or aggravating circumstances are present." COLO. REV. STAT. § 18-1.3-401(6) (2017).

Importantly, the Colorado cases interpreting this statute are unclear. The leading cases have alternatively framed the question whether an aggravating circumstance is "extraordinary" as a question of law in the discretion of the trial court, *Lopez*, 113 P.3d at 726 n.11 ("We do not hold that a defendant must admit that relevant facts are extraordinary aggravating circumstances. We conclude that this determination is a conclusion of law that remains within the discretion of the trial court if it is based on *Blakely*-compliant or *Blakely*-exempt facts."), and as a reservation of sentencing discretion—namely, the decision whether to stay within the presumptive range or to increase the sentence—that is not subject to appellate review. See *People v. Leske*, 957 P.2d 1030, 1044–45 (Colo. 1998) ("We have never imposed the additional requirement that, before a sentencing court may consider psychological or other adverse impacts of a crime on victims and their families as an extraordinary aggravating circumstance, there must be evidence that the impact is greater than that which is 'normally' experienced. Such a requirement would be inconsistent with the legislative intent that sentencing courts be granted broad discretion in distinguishing between 'ordinary' and 'extraordinary'

Oregon,³¹⁸ and Washington³¹⁹ have similar requirements, as do the Alaska, Arizona, and New York systems described above in Part III.

circumstances depending upon the specific facts of each case.” (citation omitted)); *see also Lopez*, 113 P.3d at 725 (“[T]he General Assembly intended to provide trial judges with discretion that would maximize defendants’ chances for a fair and individualized sentence.”); *id.* (citing *Leske* for the proposition that “the General Assembly intended the trial judge to maintain discretion to distinguish between ordinary and extraordinary factors and ‘exercise its independent judgment’ in making that distinction”). This apparent inconsistency has significant Sixth Amendment consequences. If judges are required to make the “extraordinary” determination in order to sentence above the presumptive range, then Colorado is not different than Kansas, Oregon, and Washington. But if the statute does nothing more than signal that judges are free to continue to sentence within the presumptive range even if the jury finds an aggravating factor, then there is no “statutory requirement” that could trigger the Sixth Amendment under *Hurst*.

318. An Oregon defendant is entitled to have a jury to make all factual findings that would increase a sentence above the presumptive range. *See* OR. REV. STAT. § 137.669 (2017) (providing that the sentencing guidelines “shall control the sentences for all crimes committed,” and that the guidelines “shall be mandatory and constitute presumptive sentences”); *id.* § 136.770 (explaining how to prove aggravating factors that “relat[e] to an offense charged in the accusatory instrument”); *id.* § 136.773 (explaining how to prove aggravating factors that “relat[e] to the defendant”); *see also* *State v. Speedis*, 256 P.3d 1061, 1064 (Or. 2011) (describing the “procedures for determining whether, in a particular case, an aggravating factor exists that will warrant an enhanced sentence”). But the statute makes clear that, whether an aggravated sentence may be imposed depends on whether the sentencing judge “finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence.” OR. REV. STAT. § 137.671(1) (2017). In other words, as the Oregon Supreme Court has explained, “it is the court, not the jury that makes the ultimate decision whether aggravating or mitigating facts justify a sentence beyond or below the presumptive range.” *State v. Upton*, 125 P.3d 713, 719 (Or. 2005) (en banc); *see also id.* at 718 (“Under *Blakely*, the Sixth Amendment entitles a defendant to have a jury determine any aggravating factor that a court may then use to justify a sentence that exceeds the presumptive range. Nothing in *Blakely* precludes a sentencing court from deciding whether jury-determined aggravating factors constitute a substantial and compelling reason to impose a sentence that exceeds the presumptive range.”).
319. A Washington defendant is entitled to have a jury make all factual findings that would increase a sentence above the presumptive range. WASH. REV. CODE § 9.94A.537(3) (2016) (“The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.”). But the sentencing statute makes clear that it is not simply the existence of an aggravating factor that authorizes an exceptional sentence, but rather a finding by the sentencing judge “that the facts found are substantial and compelling reasons justifying an exceptional sentence.” *Id.* § 9.94A.537(6) (“If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.”). The Washington courts have made clear that, while the existence of aggravating factors is a question of fact that must be decided by a jury, whether those facts “are sufficiently substantial and compelling to

B. The Elusive Distinction Between Questions of Law and Fact

Prior to *Hurst*, state courts routinely rejected the idea that weighing sentencing factors could trigger the Sixth Amendment.³²⁰ As one court explained, “a weighing of imponderables” is different than “a finding of historical fact.”³²¹ Another court clarified that the Sixth Amendment right recognized in *Apprendi* “rests on the notion that the ‘truth of every accusation’ should be decided by the jury under a reasonable doubt standard” and that “there is no ‘truth’ in the balancing of the proper sentence for the crime and the defendant.”³²² The prevailing view among these courts was that “‘the weighing process is not a factfinding one based on evidence’ but is instead ‘purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine . . . the appropriate punishment in the particular case.’”³²³

But the distinction between questions of law and fact is not particularly clear. And that lack of clarity has, at times, watered down the Sixth Amendment sentencing doctrine. The Minnesota Supreme Court’s decision in *State v. Rourke*,³²⁴ for example, relied on the law-fact distinction in a manner that appears to circumvent the doctrine.

The result in *Rourke* is difficult to defend. It is not consistent with either the state statute or the state guidelines, both of which state that a defendant has the right to a jury determination on the existence of “aggravating factors.”³²⁵ Neither frames the right in terms of facts that a court could use to support a decision to impose an aggravated sentence. The case is also very difficult to

warrant imposing an exceptional sentence . . . is a legal judgment which, unlike factual determinations, can still be made by the trial court.” *State v. Hughes*, 110 P.3d 192, 202 (Wash. 2005) (en banc), *abrogated on other grounds by* *Washington v. Recuenco*, 548 U.S. 212 (2006); *see also* *State v. Suleiman*, 143 P.3d 795, 800 (Wash. 2006); *State v. Sage*, 407 P.3d 359, 371 (Wash. Ct. App. 2017). What is more, Washington law requires that judges must enter written findings when imposing an exceptional sentence; oral rulings are insufficient. *See* *State v. Friedlund*, 341 P.3d 280, 282–83 (Wash. 2015).

320. *See* Kamin & Marceau, *supra* note 94, at 561, n.118 (discussing cases). The question about the scope of the Sixth Amendment arises not only in the allocation of decisionmaking power between judges and juries, but also in the context of whether the weighing of sentencing factors and other qualitative determinations are subject to the proof beyond a reasonable doubt standard. *See* *Nunnery v. State*, 263 P.3d 235, 251 (Nev. 2011).

321. *Carlson v. State*, 128 P.3d 197, 210 (Alaska Ct. App. 2006).

322. *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005).

323. *Nunnery*, 263 P.3d at 252 (quoting *Oken v. State*, 835 A.2d 1105, 1151 (Md. Ct. App. 2003) (collecting cases)).

324. 773 N.W.2d 913 (Minn. 2009).

325. MINN. STAT. § 244.10(5) (2016); MINN. SENTENCING GUIDELINES COMM’N, MINN. SENTENCING GUIDELINES AND COMMENTARY § 2(D)(1), cmt. 2.D.102 (2017) (citing *Blakely*).

reconcile with *Blakely v. Washington*.³²⁶ *Blakely* involved a presumptive sentencing system with a nonexhaustive list of aggravating factors, and the defendant's sentence was increased based on the enumerated factor of "deliberate cruelty."³²⁷ Indeed, the state had argued that the statute's nonexhaustive list of aggravating and mitigating factors were not properly understood as facts to be found, but instead were included in the statute as "mere proffered 'consider[ations]'" for the court "in the exercise of its discretion to impose an exceptional sentence."³²⁸ But the *Blakely* Court characterized the finding of "deliberate cruelty" as an "aggravating fact,"³²⁹ and it is difficult to see how Minnesota's "particular cruelty" factor is any different.

Perhaps most importantly, in attempting to separate pure questions of historical fact, such as whether the defendant handcuffed the victim, from mixed questions of law and fact, such as whether the defendant acted with "particular cruelty," the Minnesota approach treats sentencing factors differently than elements of a crime.³³⁰ When elements present a mixed question of law and fact, the U.S. Supreme Court has explicitly rejected the approach adopted by Minnesota in *Rourke*. Specifically, in *United States v. Gaudin*,³³¹ the Court held that a defendant was entitled to a jury determination about whether a false statement he had made was "material." The government argued that materiality was a legal question, and thus defendants were not entitled to a jury finding.³³² The *Gaudin* Court responded that materiality was a mixed question of law and fact, and it noted that courts had never asked juries to "come forth with 'findings of fact' pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of 'guilty' or 'not guilty.'"³³³

Relatedly, an appellate court in Washington rejected a Sixth Amendment challenge to the state's structured sentencing system by relying on the law-fact distinction.³³⁴ The defendant in that case argued that the Washington scheme ran afoul of *Hurst*.³³⁵ But the court rejected the argument on the grounds that the jury made the factual determination about the existence of aggravating

326. 542 U.S. 296 (2004).

327. *Id.* at 299–301.

328. Brief for the State of Washington at 23–24, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632).

329. *Blakely*, 542 U.S. at 305.

330. *See supra* note 325.

331. 515 U.S. 506 (1995).

332. *Id.*

333. *Id.* at 512–13.

334. *See State v. Sage*, 407 P.3d 359 (Wash. App. 2017).

335. *See id.* at 372 n.86.

circumstances, while the judge made “the legal, not factual, determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an [aggravated] sentence.”³³⁶

To be sure, the conventional wisdom is that juries make factual findings, while judges make legal findings.³³⁷ But there has long been confusion about the role of the jury in deciding issues that are not purely factual.³³⁸ Court decisions in this area are far from uniform, and labeling determinations “questions of fact” or “questions of law” tends to create more, rather than less, confusion.³³⁹ It is sometimes quite difficult to distinguish between questions of law and questions of fact. Some questions are easy: Did the defendant have a gun? How much cocaine did the conspirators traffic? These are obviously questions of historical fact, and they are questions that the jury must answer. But other questions are more difficult: Did the defendant’s conduct create a substantial and unjustifiable risk of injury to others? Did the defendant have a reasonable belief that the victim was about to use unlawful force against her? These questions require not just determinations of what happened. They also require determinations that resemble legal judgments.

Even before *Hurst*, the Sixth Amendment extended to sentencing findings that appeared to require not only a finding of historical fact, but also some qualitative judgment. As mentioned above, the sentencing factor at issue in *Blakely v. Washington* was not simply whether the defendant used a gun or possessed a certain amount of drugs. It was instead whether the defendant “had

336. *Id.* at 371.

337. See Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 897 (2005) (“The maxim that judges do not decide questions of fact and juries do not decide questions of law is probably as old as the common law. Like most maxims, it is not true—at least not all the time.”).

338. See Allen & Pardo, *supra* note 96, at 1771 (“The ubiquitous distinction [between law and fact], despite playing many key doctrinal roles, is muddled to the point of being conceptually meaningless.”); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 994 (1986) (noting that “nicely compartmentalized separations of law from fact . . . belie more complex distinctions between the categories”); Monaghan, *supra* note 95, at 232 (noting that “the ‘vexing’ distinction between ‘questions of law’ and ‘questions of fact.’ . . . has long caused perplexity in such diverse areas as contracts, torts, and administrative law”).

339. See Colleen P. Murphy, *Context and the Allocation of Decisionmaking: Reflections on United States v. Gaudin*, 82 VA. L. REV. 961, 968 (1996) (“[T]he Court muddied the waters when it used the terms ‘question of law’ and ‘mixed question of law and fact’ without explaining the analytic difference, if any, between them.”); Weiner, *supra* note 95, at 1876 (arguing that “[c]larity of thought is not advanced by debating whether” certain determinations are “law-making or fact-finding, as commentators have done”). See generally Allen & Pardo, *supra* note 96.

acted with ‘deliberate cruelty,’ a statutorily enumerated ground for departure in domestic-violence cases.³⁴⁰ The sentencing judge held an evidentiary hearing and made a series of findings about historical facts to make that determination.³⁴¹ But what constitutes “cruelty” clearly involved a qualitative judgment, rather than a question of pure fact.

Despite some sentencing facts requiring legal (rather than purely factual) judgments, if juries need to weigh aggravating and mitigating factors or need to decide whether there are “substantial and compelling reasons” to increase a defendant’s sentence, the Sixth Amendment sentencing doctrine would obviously expand. Previous Supreme Court opinions suggest that such qualitative language bestowed discretion on judges,³⁴² and the exercise of judicial discretion itself does not violate the Sixth Amendment.³⁴³

Although it would represent an expansion of the doctrine, and although it is not necessarily required by *Hurst*,³⁴⁴ applying the Sixth Amendment to *any* finding required to increase a sentence, rather than simply findings of historical fact, nonetheless makes sense. For one thing, it simplifies the question of when a jury must make a determination. The dividing line between “questions of law” and “questions of fact” is so unclear that many scholars have questioned whether we can rely on the categories at all.³⁴⁵ Thus, if the Sixth Amendment

340. *Blakely v. Washington*, 542 U.S. 296, 300 (2004).

341. *Id.* at 300–01. Those facts included that the defendant “used stealth and surprise, and took advantage of the victim’s isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife.” *Id.* at 301.

342. For example, in *Blakely*, the judge could have issued a sentence above the presumptive sentence not only if he found an aggravating factor, but also if he found “substantial and compelling reasons justifying an exceptional sentence.” WASH. REV. CODE § 9.94A.535 (2004). The state characterized the “substantial and compelling reasons” determination that the judge was required to make as “a question of law.” Brief for the State of Washington at 24, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632). The *Blakely* Court appeared to share the state’s assumption that telling a judge to determine whether certain facts represented a “substantial and compelling” reason to increase a sentence was a discretionary decision properly reserved for the judge. See *Blakely*, 542 U.S. at 305 n.8 (“Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.”). The Court found a Sixth Amendment violation only because the judge had to support that qualitative judgment with factual findings. *Id.*

343. See *supra* note 233 (collecting sources).

344. See *supra* text accompanying notes 267–268.

345. See *supra* notes 338–339.

were uniformly applied in the way we suggest, then there would be more consistency among courts, and courts would not have to grapple with the gray area of whether an issue is a question of law or a question of fact.

For another, applying the Sixth Amendment to all findings required to increase a sentence is consistent with the formalistic approach that the Supreme Court has taken in other Sixth Amendment cases. In those cases, the Court has said that even if a legislature labels something as a “sentencing factor,” the Court will treat it as an element if it is necessary to increase a defendant’s sentence.³⁴⁶ During the guilt phase of a trial, courts routinely ask juries to make findings about elements that are not purely factual. Asking a jury to determine whether a defendant acted negligently or whether a defendant’s belief was “reasonable” are questions that are qualitative, rather than factual. And courts routinely reject arguments that elements can be (or are) legal questions that judges can decide.³⁴⁷ If we take seriously the admonition to treat these sentencing considerations as elements, then juries should make all of the findings, including the qualitative determinations.

Put simply, if we read *Hurst* to shift the Sixth Amendment inquiry from *factual* findings to *any* finding that is required to increase a sentence, then the Sixth Amendment sentencing doctrine would be simpler and more conceptually coherent. And we are not the only ones to have read *Hurst* in this way. When the Delaware Supreme Court recently struck down its capital sentencing system, several justices indicated that they believed *Hurst* prohibited not only sentencing increases based on required judicial factfinding, but also based on required judicial weighing.³⁴⁸

Before *Hurst*, Delaware required two separate capital sentencing phases. In the first phase, a jury determined whether any statutory aggravating circumstances existed.³⁴⁹ If the jury found aggravating factors, then the defendant was eligible for the death penalty.³⁵⁰ At the second stage, the jury decided whether the aggravating circumstances outweighed the mitigating

346. See, e.g., *Alleyne v. United States*, 570 U.S. 99, 114 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000).

347. See, e.g., *United States v. Gaudin*, 515 U.S. 506 (1995) (holding that a jury must determine whether a defendant’s false statement was “material”); *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007) (holding that a jury must determine, beyond a reasonable doubt, whether the defendant’s conduct affected, or would have affected, interstate commerce); see also *Kamin & Marceau*, *supra* note 94, at 562–64.

348. *Rauf v. State*, 145 A.3d. 430 (Del. 2016).

349. See DEL. CODE ANN. tit. 11 § 4209(c)–(d) (2015), *declared unconstitutional by Rauf*, 145 A.3d.

350. See *id.*

circumstances, and that information was conveyed to the judge.³⁵¹ The judge then made her own determination about which aggravating and mitigating factors were present and whether the aggravating factors outweighed the mitigating factors.³⁵² The judge also made the final decision whether to impose the death penalty.³⁵³

Because the judge had to make her own determination about the presence of aggravating factors, the Delaware Supreme Court held that the Delaware capital scheme was unconstitutional after *Hurst*.³⁵⁴ All of the justices rejected the “authorization” or “eligibility” argument, which is discussed in Part III,³⁵⁵ but several Justices also expressed concern that the judge was required to conduct an independent weighing.³⁵⁶ Those justices interpreted *Hurst* to require a jury to find both aggravating factors and weigh the evidence.³⁵⁷

Those Delaware justices are the exception, rather than the rule. State courts have repeatedly rejected Sixth Amendment challenges to their sentencing schemes. Those courts have characterized the weighing of sentencing factors and other qualitative judgments as related to the ultimate sentence question. For example, the Nebraska Supreme Court rejected a Sixth Amendment challenge to the portion of its capital sentencing scheme that instructed judges to weigh aggravating and mitigating factors and to determine whether a sentence of death would be “excessive or disproportionate” before deciding whether to impose the death penalty.³⁵⁸ The Court distinguished between these findings, which it characterized as “part of the ‘selection decision’ in capital sentencing,” and the finding of aggravating factors, which it characterized as “the eligibility determination.”³⁵⁹ The Court concluded that while the latter determination triggered the right to a jury under *Apprendi*, the former did not.³⁶⁰

351. *See id.*

352. *See id.*

353. *See id.*; *Brice v. State*, 815 A.2d 314, 320 (Del. 2003).

354. *Rauf v. State*, 145 A.3d 430 (Del. 2016). *See* Erik Eckholm, *Delaware Supreme Court Rules State’s Death Penalty Unconstitutional*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/us/delaware-supreme-court-rules-states-death-penalty-unconstitutional.html>.

355. *Rauf*, 145 A.3d. at 433–34.

356. *Id.*

357. In concurring, Chief Justice Strine wrote:

But, I am reluctant to conclude that the Supreme Court was unaware of the implications of requiring ‘a jury, not a judge, to find each fact necessary to impose a sentence of death.’ If those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility.

Id. at 464 (Strine, C.J., concurring) (quoting *Hurst v. Florida*, 136 U.S. 616, 619 (2016)).

358. *State v. Gales*, 658 N.W.2d 604, 622–23 (Neb. 2003).

359. *Id.* at 626–27.

360. *Id.*

As discussed in detail above, there is no right to have a jury select the ultimate sentence.³⁶¹ But weighing aggravating and mitigating factors, as well as other qualitative determinations, is distinguishable from the ultimate selection of a sentence. So long as judges choose to engage in that weighing of their own accord, and so long as the statute does not limit their discretion to impose a sentence by a particular outcome of the weighing, then the judicial determination does not trigger the Sixth Amendment. And focusing on whether statutory requirements limit judicial discretion, rather than whether a particular requirement is a factual question, provides both consistency with previous doctrine and an administrable standard.

Nor is there any reason to think that a jury is not equipped to engage in weighing or to make these qualitative determinations. Courts routinely instruct juries to weigh conflicting evidence introduced at trial when making decisions about a defendant's guilt.³⁶² And several jurisdictions assign these determinations to juries in their death penalty systems.³⁶³

Put simply, if *Hurst* expands the Sixth Amendment beyond factual findings to other findings, it still takes seriously the initial constraints of *Apprendi*. The Sixth Amendment applies when legislatures limit judicial discretion by requiring certain findings in order to impose certain sentences. If states do not limit judicial discretion, then no jury is necessary for those findings. In this way, *Hurst* does not upset the rule that the Sixth Amendment does not create a right to jury sentencing; it merely continues to impose a jury requirement when legislatures remove sentencing discretion from judges.

C. A Possible Additional Application: Juvenile Life Without Parole

Recent Supreme Court cases have placed significant restrictions on the imposition of life without parole (LWOP) sentences for juveniles. *Graham v. Florida*³⁶⁴ prohibited LWOP sentences for juveniles convicted of nonhomicide crimes, and *Miller v. Alabama*³⁶⁵ prohibited mandatory LWOP sentences for

361. See discussion *supra* Subpart I.B.

362. See, e.g., *United States v. Twomey*, 884 F.2d 46, 52–53 (1st Cir. 1989) (describing and affirming trial court's instructions to jury about how to weigh inconsistencies in the evidence at trial); *United States v. Nelson*, 847 F.2d 285, 288 (6th Cir. 1988) (noting that the trial “jury was generally instructed that it was to weigh the evidence and that it could ‘accept or reject the testimony of any witness in whole or in part.’”).

363. See, e.g., IDAHO CODE § 19-2515(7)(b) (2017); OHIO REV. CODE ANN. § 2929.04(C) (West 2018).

364. 560 U.S. 48 (2010).

365. 567 U.S. 460 (2012).

juveniles.³⁶⁶ These decisions indicate that juveniles and juvenile LWOP sentences are different from other noncapital sentences, and thus the Eighth Amendment restricts the imposition of such sentences on juveniles.³⁶⁷ In particular, as the Court explained in *Miller*, even a child who commits a heinous crime might still undergo rehabilitation and change in a meaningful way. To this end, the Court emphasized the need to consider a juvenile offender’s “immaturity, impetuosity, and failure to appreciate risks and consequences.”³⁶⁸

The Court reaffirmed the general inappropriateness of juvenile LWOP sentences in *Montgomery v. Louisiana*,³⁶⁹ which held that the decision in *Miller* applied retroactively.³⁷⁰ In explaining its retroactive application, the *Montgomery* Court stated that a LWOP sentence is unconstitutionally excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption.”³⁷¹

This language from *Miller* and *Montgomery* may create a jury right at resentencing under the Sixth Amendment after *Hurst*.³⁷² When resentencing offenders who received mandatory juvenile LWOP sentences prior to *Miller*, several state courts have used the language from *Montgomery* as a standard for assessing whether the new sentence should be LWOP or something less severe.

366. *Id.*

367. See William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053 (2013) (exploring the implications of expanding the differentness designation under the Eighth Amendment).

368. *Miller*, 567 U.S. at 477–78. Some courts referred to these as “*Miller* factors” and require their consideration. The Court’s full explanation is as follows:

To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id.

369. 136 U.S. 718 (2016).

370. *Id.*

371. *Id.* at 734 (citations omitted).

372. Indeed, Missouri found that such a right existed after *Miller*. *State v. Hart*, 404 S.W.3d 232, 235 (Mo. 2013).

Specifically, some state courts determine whether the offender is “irreparably corrupt” and thus deserving of LWOP.³⁷³ But not all courts require such a finding. Some only require that a judge have the opportunity to consider mitigating evidence before deciding whether to sentence a juvenile to LWOP.³⁷⁴ And many states have simply banned juvenile LWOP entirely.³⁷⁵

The state courts that have made a finding of irreparable corruption a requirement for a LWOP sentence at these *Miller* resentencing hearings have created a *Hurst* issue. If courts are correct that *Miller* and *Montgomery* require a particular finding—such as “irreparable corruption”—prior to imposing a LWOP sentence, then that determination is necessary to impose the increased

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373. See, e.g., *People v. Padilla*, 209 Cal. Rptr. 3d 209 (2016), *vacating as moot In re Cowan*, 419 P.3d 535 (2018) (finding Eighth Amendment requirement of finding of irreparable corruption, mooted after legislature abolished juvenile LWOP); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (finding Eighth Amendment requirement of finding of irreparable corruption); *Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016) (same); *Landrum v. State*, 192 So.3d 459, 469 (Fla. 2016) (same).
374. See, e.g., *People v. Gutierrez*, 324 P.3d 245, 268–69 (Cal. 2014) (“*Miller* discussed a range of factors relevant to a sentencer’s determination of whether a particular defendant” is irreparably corrupt); *State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015) (quoting *Miller*’s list of characteristics); *Landrum v. State*, 192 So.3d 459, 469 (Fla. 2016) (finding Eighth Amendment requirement of irreparable corruption); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (finding Eighth Amendment requirement of irreparable corruption); *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015); *State v. Null*, 836 N.W.2d 41, 74–76 (Iowa 2013) (listing factors and stating that *Miller* provided “clearer guidance on the considerations to be given in sentencing”); *State v. Ali*, 855 N.W.2d 235, 256–57 (Minn. 2014) (stating that “mitigating circumstances might include, but are not limited to,” the characteristics in *Miller*); *State v. Hart*, 404 S.W.3d 232, 237–38 (Mo. 2013) (en banc) (holding that the juvenile defendant’s life sentence was unconstitutional because “the sentencer [must] consider whether this punishment is just and appropriate in light of [his] age, maturity and the other factors discussed in *Miller*”); *Luna v. State*, 387 P.3d 956, 962 (Okla. Crim. App. 2016) (quoting *Miller* and labeling three of the listed characteristics “important youth-related considerations”); *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (finding that the judge could weigh the factors, but that a LWOP sentence for *Batts* was disproportionate and violated the Eighth Amendment in light of the evidence considered at resentencing); *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. Super. Ct. 2012) (stating that “although *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it should consider” a paraphrased version of the listed characteristics); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (quoting the factors listed in *Miller*); *State v. Houston*, 353 P.3d 55, 69–70 (Utah 2015) (finding that the jury finding of facts was enough to satisfy the Sixth Amendment); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (quoting the factors listed in *Miller* and stating that those factors are “not exhaustive”).
375. See, e.g., Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT’G PROJECT (Oct. 13, 2017), <https://www.sentencingproject.org/publications/juvenile-life-without-parole> [https://perma.cc/6UY7-2UFQ] (reporting that twenty-one states have abolished juvenile LWOP since *Miller*).

sentence. Pursuant to *Hurst*, the Sixth Amendment mandates that the jury, not the judge, decide whether an offender is irreparably corrupt.

The question of whether a person is irreparably corrupt requires more than simply a finding of historical fact.³⁷⁶ It is an application of law to fact; it requires a decisionmaker to find various facts about a defendant and his crime, and then to make a judgment, based on those facts, about whether the defendant is likely to rehabilitate or whether he is irreparably corrupt. That factfinding, followed by qualitative judgment, is no different than what was required in *Blakely v. Washington*, where the sentencing increase depended on a judge finding facts to determine whether the defendant had acted with “deliberate cruelty.”³⁷⁷

Whether the Sixth Amendment extends to the juvenile LWOP question may ultimately turn not on whether the “irreparably corrupt” standard is framed as a question of law or a question of fact, but rather on whether the LWOP question is framed as a question of increasing a defendant’s sentence or decreasing it. If *Miller* and *Montgomery* merely require that judges be permitted to consider mitigating evidence before deciding whether to impose a LWOP sentence on a juvenile, then the Sixth Amendment will not apply.³⁷⁸ As the felony murder discussion above explains, the Sixth Amendment applies only to findings that increase a sentence, not factors that decrease a sentence.³⁷⁹ But if *Miller* and *Montgomery* actually require judges to make an affirmative finding before they may impose a sentence—such as a finding that a defendant is “irreparably corrupt”—then that finding is necessary to the harsher sentence, and it must be made by a jury beyond a reasonable doubt.

CONCLUSION

The Supreme Court’s decision in *Hurst v. Florida* expanded the Sixth Amendment sentencing doctrine. It rejected a constitutional distinction between factual findings that “authorize” a sentencing increase and other required factual findings. *Hurst* may also have expanded the doctrine beyond findings of historical fact to any finding, including weighing sentencing factors and other qualitative determinations.

376. See discussion *supra* Subpart IV.B.

377. See *supra* text accompanying notes 326–329.

378. Indeed, a number of courts have taken this approach in rejecting *Apprendi* challenges to juvenile LWOP sentencing. See *People v. Hyatt*, 891 N.W.2d 549 (Mich. Ct. App. 2016); *People v. Blackwell*, 207 Cal. Rptr. 3d 444 (2016); *Beckman v. State*, 230 So. 3d 77 (Fla. Dist. Ct. App. 2017).

379. See *supra* text accompanying notes 249–251.

These expansions will have wide-ranging consequences on sentencing in the United States. In the wake of *Hurst*, several state legislatures have amended their capital sentencing schemes,³⁸⁰ and at least one state supreme court struck down its capital punishment statute.³⁸¹ But more change is almost certainly on the way. Several capital and noncapital sentencing systems continue to rely on a distinction between factual findings that “authorize” a sentencing increase and other required factual findings—a distinction that *Hurst* rejected. And many other states require judges to weigh sentencing factors or make other qualitative findings, which may also be unconstitutional after *Hurst*.

Since the Supreme Court first recognized the Sixth Amendment sentencing doctrine in 2000, it has undergone several expansions and contractions. *Hurst* not only expands the doctrine, but it may also simplify and improve Sixth Amendment sentencing.

380. See *supra* text accompanying notes 124–129, 136–139 (discussing amendments to the Alabama and Florida capital sentencing schemes).

381. *Rauf v. State*, 145 A.3d. 430 (Del. 2016).