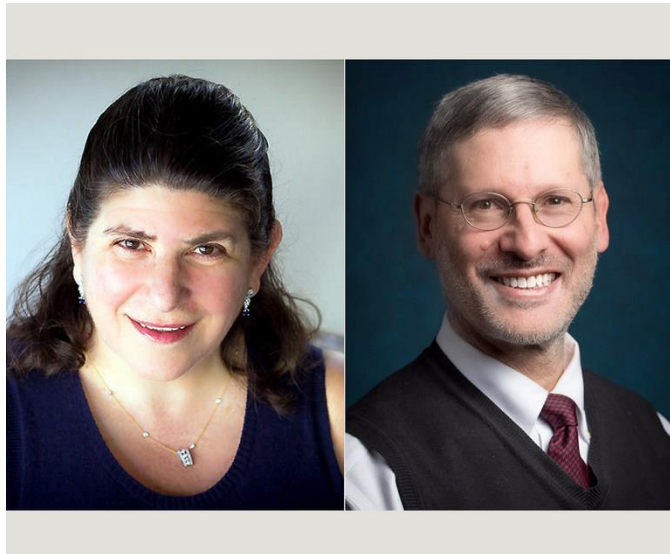


TEXAS LAWYER

COMMENTARY

Is a death sentence recommendation from a non-unanimous jury constitutional?

Elisa Reiter and Daniel Pollack | January 30, 2024



Recently, Florida’s Fifth Judicial Circuit State Attorney William Gladson announced that a Lake County grand jury indicted Joseph Andrew Giampa and that Gladson would pursue the death penalty in the case. Gladson’s [website](#) states:

“Giampa has been indicted for six counts of Sexual Battery Upon a Person Under Twelve Years of Age and three counts of Promoting a Sexual Performance by a Child. Given the severity of the crime and its impact on

the community, the Fifth Judicial Circuit State Attorney's Office has filed a notice that it intends to seek the death penalty pursuant to Florida Statutes 794.011(2)(a) and 921.1425. The decision to pursue the highest penalty reflects the gravity of the charges and the State Attorney's Office's dedication to holding criminals accountable for their actions."

Florida and Alabama are presently the only two states that permit juries to recommend the death penalty by a non-unanimous vote. Although the U.S. Supreme Court has addressed numerous facets regarding the circumstances under which the death penalty can and cannot be imposed, it has not yet directly addressed the question of jury unanimity being a requirement.

In 2016, the Supreme Court, in *Hurst v. Florida*, found Florida's death-penalty law unconstitutional. The *Hurst* court held that, "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." In *Hurst*, the Supreme Court ruled that Florida's capital sentencing scheme violated the fundamental tenets of the Sixth Amendment. The decision was based on the fact that the underlying law allowed a judge, rather than a jury, to find the facts necessary to sentence a defendant to death, in contravention of the Sixth Amendment. Any fact that could lead to harsher punishment than that authorized by the jury's verdict of guilty must be submitted to a jury. The impact? Florida's capital sentencing statute was held unconstitutional and led to resentencing of many death row inmates.

Timothy Hurst, the petitioner in the *Hurst* case, was convicted of first-degree murder and was recommended the death penalty by a jury

twice. However, the trial court judge ultimately found the facts necessary to sentence him to death. The Supreme Court held in *Hurst* that the Florida sentencing scheme violated the Sixth Amendment by allowing a judge to play a central role in the sentencing process, rather than leaving that task to the jury. As a result of the court's ruling, Hurst was resentenced to life in prison, with no possibility of parole.

According to Statista, Texas, Oklahoma, Virginia and Florida led the nation in capital punishment executions between 1976 and 2022. Texas—by far the leader—had 578.

We asked two criminal defense attorneys to reflect on the Giampa case and the underlying Florida law. We did not ask for a morality check regarding the nature of the allegations against Giampa. We asked simply for the defense lawyers' views on the importance of jury unanimity regarding capital offenses.

Attorney Sheridan Lewis observed that:

“The Supreme Court was clear in *Ramos* that jury unanimity is required by the Sixth Amendment and equally applicable to state and federal criminal jury trials. The majority opinion relied on, among other things, a great deal of historical jurisprudence wherein jury unanimity was implicit within the right to a fair jury trial. It must have surprised many people that there were still two states (Oregon and Louisiana) that didn't require a unanimous jury verdict until a few years ago, but that federal criminal courts had required unanimity in their jury verdicts since the late 1800s. Notably, *Ramos* was not retroactive and it did not extend to sentencing. In dealing with death penalty cases, of the 20 states that allow the death penalty (and are not under moratorium), Florida is one

of only two states that allows for a non-unanimous jury verdict to recommend a sentence of death. A new law passed in April requires only 8 of 12 jurors to make that recommendation. According to the Death Penalty Information Center, Florida leads the nation in death row exonerations.

Adding another layer to this issue, Florida has also passed this state law directly contradicting the Supreme Court's ruling in *Kennedy v. Louisiana* and making sexual battery of a minor a capital offense. The Giampa case is the first time Florida prosecutors have sought the death penalty under that statute and are undoubtedly using this as a test case to challenge *Kennedy*. *Kennedy* appeared to be a straightforward ruling—the Eighth Amendment says a state cannot put someone to death whose crime did not cause the death of another person, and the victim's death was not the intended result. The court was clear in the long-held idea that only an intentional death could possibly (if ever) justify a state-sanctioned intentional death. In recent years, Florida has also legislated drug trafficking to be a capital offense, though to date, I don't believe that they ever prosecuted anyone under the statute. It is going to be important to watch what happens with the Giampa case because, even though the charges may be far more palatable to many in favor of the death penalty, it is far too easy to lower the bar in cases like this and create awful precedent. That could open the door for the creation of more 'capital offenses' in Florida (and elsewhere), more prosecution under current statutes like the capital drug trafficking statute, and, of course, more wrongful convictions due to non-unanimous jury verdicts."

Attorney Chris Mulder opined regarding the new Florida law: "Very on-brand for Florida."

Professors Daniel Epps and William Ortman wrote that: “Theory, empirical studies, and especially historical evidence all support the idea that when juries know that a defendant may face excessive punishment if found guilty, they become less likely to convict.”

Epps and Ortman contend that an informed jury serves as the best decision makers. They argue that in each criminal case, the trial judge should advise the jury of “the maximum sentence authorized by statute, whether there was a mandatory minimum, and whether the sentence would (or could) run consecutively with other sentences.” Would doing so assure unanimity in jury verdicts? Would doing so lead to a division and the inability to reach a unanimous verdict? Is Florida simply trying to create its own brand of justice?

The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Sixth Amendment states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

The Giampa case seemingly indicates that Florida is seeking to change the requirements regarding how to define capital crimes for which a defendant can be subjected to the death penalty. Will defendants be

entitled to a unanimous jury verdict in such cases in order to be subjected to the death penalty in Florida and elsewhere? Will this new law be found to contravene fundamental liberties currently guaranteed by the U.S. Constitution? Undoubtedly, the U.S. Supreme Court will be grappling with this and other death penalty issues for many years to come.

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Original link: <https://www.law.com/texaslawyer/2024/01/30/is-a-death-sentence-recommendation-from-a-non-unanimous-jury-constitutional/>