NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 6, 2017

LETTER OPINION

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Re: *Commonwealth of Virginia v Mark Eric Lawlor*, Case No. FE-2009-304

Dear Counsel:

The matter is before the Court on Defendant Mark Eric Lawlor (hereafter "Defendant" or "Lawlor") Motion to Vacate Sentencing Order as Void *Ab Initio*. The Defendant's motion presents the following substantive issue, which is a matter of first impression in the Commonwealth and can be summarized as follows: *Does the United States Supreme Court's recent decision in Hurst v. Florida, 136 S Ct. 616 (2016), render Virginia's death penalty sentencing statutes and procedures unconstitutional?*

OPINION LETTER

For two separate and distinct reasons, the Court DENIES the Defendant's motion. First, the motion is procedurally barred. *See Jones v. Commonwealth*, 795 S.E.2d 705 (2017). Second, even if the instant case is distinguishable from *Jones*, as defense counsel argues, the Court finds no merit in the Defendant's assertion that the United States Supreme Court's decision in *Hurst* renders Virginia's capital sentencing statutes and procedures unconstitutional.

1. Background and Procedural History

On or about September 24, 2008, Genevieve Orange was murdered. The Supreme Court of Virginia, in its opinion affirming the Defendant's conviction, described the crime as follows:

> The victim, Genevieve Orange, was found on the floor of the living area of her studio apartment. She was naked from the waist down, her bra and t-shirt had been pushed up over her breasts, and semen was smeared on her abdomen and right thigh. Her soiled and bloodied shorts and underpants had been flung to the floor nearby. She had been struck 47 times with one or more blunt objects.
>
> A bent metal pot was found near Orange's body. Its wooden handle had broken off and was found in the kitchen sink, near a bloody metal frying pan that had been battered out of its original shape. Some of Orange's wounds were consistent with having been struck with the frying pan. Subsequent medical examination established that she had aspirated blood and sustained defensive wounds, together indicating that she had been alive and conscious during some part of the beating.

*Lawlor v. Commonwealth*, 285 Va. 187, 209 (2013) [hereinafter *Lawlor*] (footnote omitted).

Lawlor was indicted on and convicted of one count of capital murder in the commission of, or subsequent to, rape or attempted rape (Count 1), and one count of capital murder in the commission of abduction with the intent to defile (Count 2). After his conviction in the guilt phase of the trial, the jury proceeded to consider the penalty. The jury found both the vileness and future dangerousness aggravating factors and sentenced Lawlor to death on each count. The case came before the presiding judge, the Honorable Jonathan C. Thacher, on June 23, 2011 and the Court imposed the death sentence. *See* Sentencing Order, dated July 1, 2011.[1]

On January 10, 2013, Lawlor's conviction and death sentences were affirmed by the Supreme Court of Virginia. *See Lawlor*, 285 Va. at 271. On October 15, 2013, the United States

[1] This Court was assigned to preside over the instant motion by the Chief Judge of the Fairfax Circuit Court, following Judge Thacher's retirement.

Supreme Court denied Lawlor's petition for a writ of certiorari. *See Lawlor v. Virginia*, 134 S. Ct. 427 (2013). On October 31, 2014, Lawlor's state petition for a writ of habeas corpus was denied by the Supreme Court of Virginia. *See Lawlor v. Davis*, 288 Va. 223 (2014). Lawlor filed his federal petition for a writ of habeas corpus on June 8, 2015. That matter is now pending in the United States District Court for the Eastern District of Virginia.

On December 29, 2016, Lawlor filed the instant Motion to Vacate Sentencing Order as Void *Ab Initio*. On January 10, 2017, the Commonwealth filed its response. On January 18, 2017, Lawlor filed a reply memorandum. The Court heard oral argument on the motion on March 1, 2017 and took the matter under advisement. The matter is now ripe for decision.

2. The Court's Jurisdiction to Hear this Motion

Lawlor seeks to have the Court vacate its Sentencing Order and "either resentence him to life imprisonment or conduct a new sentencing proceeding ...." Motion to Vacate at 6. There are two parts to the instant motion, one that addresses the Court's jurisdiction and authority to hear and act upon the motion and the other that asserts that, in light of *Hurst v. Florida*,[2] the sentencing procedure employed in this case was unconstitutional.

The Defendant acknowledges that the Sentencing Order which the Defendant now seeks to have vacated was entered more than five years ago. That order became final 21 days after it was entered by the Court, pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia. Nevertheless, Defendant asserts that the Court has the jurisdiction and authority to vacate the order because it is allegedly *void ab initio* and, therefore, can be corrected at any time.[3]

In essence, the Defendant's argument is as follows: (1) Lawlor was sentenced pursuant to Virginia's capital sentencing statutes and procedures; (2) those sentencing statutes and procedures are unconstitutional in light of *Hurst*; (3) the Sentencing Order is, therefore, void *ab initio;* and (4) the trial court has both the jurisdiction and the obligation to correct a void *ab initio* sentencing order.

The Commonwealth, in contrast, argues that the Sentencing Order is not void *ab initio*, relying principally but not exclusively on the Supreme Court of Virginia's recent decision in *Jones*. Specifically, the Commonwealth asserts that it is the absence of subject matter jurisdiction that renders a judgment void *ab initio* and, since a circuit court clearly has subject matter jurisdiction over felonies, the Sentencing Order is not void *ab initio*. The Commonwealth does not dispute that

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[2] 136 S. Ct. 616 (2016) [hereinafter *Hurst*].

[3] The Defendant asserts, correctly, that an order which is void *ab initio* is not subject to the twenty-one day time limit under Rule 1:1 of the Rules of the Supreme Court of Virginia. "An order that is void *ab initio* is a complete nullity that may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner." *Collins v. Shepherd*, 274 Va. 390, 402 (2007) (quoting *Singh v Mooney*, 261 Va. 48, 52 (2011)).

the Supreme Court of Virginia has recognized that, under certain circumstances, a sentencing order may be deemed void *ab initio* but argues that such a determination would only apply in rare situations not present in the instant case.

In its memorandum opposing the relief sought by Lawlor, the Commonwealth relies on *Porter v. Commonwealth*, 276 Va. 203 (2008), in support of the proposition that the Sentencing Order in the instant case is not void *ab initio.* In *Porter*, the issue before the Court was Porter's claim that the trial court lacked subject matter jurisdiction (for reasons not pertinent to the instant motion). Ultimately, the Court concluded that the purported error was an issue of territorial jurisdiction, not subject matter jurisdiction. The distinction between the two types of jurisdiction was critical because a lack of subject matter jurisdiction is non-waivable, renders a judgment null and void and, most significantly, can be raised at any time. In contrast, lack of territorial jurisdiction, such as a venue defect, renders a judgment voidable, not void, and is waived if not properly and timely raised. The Supreme Court in *Porter* cited *Morrison v. Bestler*, 239 Va. 166, at 170 (1990) (internal citation omitted) for the proposition that "[o]ne consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved." In essence, argues the Commonwealth, this is what Lawlor is attempting to do in the instance case, i.e., to characterize an alleged procedural error as a defect which renders the Sentencing Order a nullity and permits it to be attacked *at any time.*

Subsequent to the filing of the briefs in this matter, the Supreme Court of Virginia issued its decision in *Jones.*[4]

Discussion with Regard to the Court's Jurisdiction

It is beyond question that there are limited circumstances in which a judgment is deemed void *ab initio*. For example, a judgment is void *ab initio* if it was "entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could not legally adopt." *Kelley v. Stamos*, 285 Va. 68, 75 (2013) (citation omitted) (internal quotation marks omitted).

The Supreme Court of Virginia has applied these principles to certain sentencing orders, holding that a "circuit court may correct a void or unlawful sentence at any time." *Rawls v Commonwealth*, 278 Va. 213, 218 (2009) (citing *Powell v. Commonwealth*, 182 Va. 327 (1944)). In *Rawls*, the defendant was sentenced above the statutory maximum. The Supreme Court held that "a sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio*

[4] Consistent with her ethical obligations to bring to the Court's attention adverse controlling legal precedent, Ms. Shahi presented the *Jones* opinion to the Court prior to beginning her oral argument.

because 'the character of the judgment was not such as the [C]ourt had the power to render.'" *Id.* at 221 (citation omitted). The Court of Appeals, in *Commonwealth v. Greer*, 63 Va. App. 561 (2014), applied *Rawls* to a case in which the Court imposed a sentence *below* the statutory minimum. Although *Rawls* involved a case in which the Court imposed a sentence *above* the statutory maximum, the Court of Appeals held that the "common law rule of jurisprudence" set out in *Rawls* applied to all criminal defendants whose punishments have been fixed in violation of the statutorily prescribed ranges. *See Rawls*, 278 Va. at 221; *see also Burrell v. Commonwealth*, 283 Va. 474, 480 (2012) (holding that a sentencing order that contained a provision that was beyond the authority of the Circuit Court was *ultra vires* and rendered the "entire sentencing order . . . void *ab initio*").

Thus, the question before the Court is not whether a trial court has the authority and jurisdiction to vacate a sentencing order that is void *ab initio*. Certainly, the case law set out above makes it abundantly clear that the Court does have that authority. Rather, the question before the Court is whether the Sentencing Order entered in the instant case is, in fact, void *ab initio*. That question, in turn, has two sub-components: first, is a sentencing order that arises out of an unconstitutional sentencing proceeding void *ab initio* and therefore subject to attack by a motion to vacate; and, second, was the sentencing proceeding in the instant case actually unconstitutional. The Supreme Court of Virginia's decision in *Jones* has now resolved the first question.

The pertinent facts in *Jones* are as follows: When Jones was 17, he shot and killed a convenience store clerk. He entered an Alford guilty plea to capital murder and related charges. He executed a plea agreement stipulating that he would receive a life sentence "without the possibility of parole" on the capital murder charge and a term of years on the remaining charges. He agreed further to waive his rights of appeal with respect to both substantive and procedural issues. Subsequently, he was sentenced to "Life + 68 years." Some 12 years later, Jones filed a motion to vacate his life sentence, relying on *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibited mandatory life without parole for juvenile offenders. The trial court and the Supreme Court of Virginia denied Jones relief, and while the matter was pending before the United States Supreme Court on Jones' petition for a writ of certiorari, the Supreme Court issued *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), holding that *Miller* was retroactive. Jones' case was remanded for further consideration in light of *Montgomery v. Louisiana*.

On February 2, 2017, the Supreme Court of Virginia issued its decision on the remand. A portion of that decision addresses the precise issue before the Court today.

First, the Court drew the distinction between matters that are void *ab initio* and matters that are merely voidable: "This distinction guards against the improper elevation of a court's failure 'to comply with the requirements for exercising its authority to the same level of gravity as a lack of subject matter jurisdiction.' In this sense, a trial court has 'jurisdiction to err' just as an appellate court has jurisdiction to correct such errors." *Jones*, 795 S.E.2d at *18–19 (citations omitted).

Second, the Court summarized the line of cases in which it has held certain sentencing orders to be void *ab initio*, including *Rawls* and *Burrell*. "[W]hen a trial court imposes a sentence outside the range set by the legislature, the court's sentencing order – at least to that extent – is void ab initio because the court has no jurisdiction to do so." *Jones*, 795 S.E.2d at *20 (citations omitted).

Third, the Court noted that the distinction between void *ab initio* orders and voidable orders have a "sharp impact" on criminal cases, noting that a defendant can waive claimed violations of constitutional rights by failing to preserve the issue in the trial court, including Fourth, Fifth and Sixth Amendment rights. *Id.* at *19. "None of these claims, even if conceded to be valid, renders the underlying judgment void ab initio." *Id*

Fourth, the Court addressed the matter most pertinent to the claims made in the instant case – whether a sentencing order is void *ab initio* where it is found to be contrary to a new substantive rule of constitutional law:

> Jones filed a motion to vacate in the sentencing court 12 years after his conviction, claiming that his sentence was cruel and unusual under the Eighth Amendment. There is no precedent under Virginia law for asserting such a claim in a motion to vacate. To be sure, we have never held, nor are we aware of any court that has held, that a motion to vacate (rather than a petition for habeas corpus) is a proper vehicle under Virginia law to challenge a conviction or sentence based solely on a federal constitutional challenge.
>
> If a motion to vacate had the reach that Jones asserts, the multitude of substantive and procedural requirements in our habeas corpus law would be permanently sidelined. * * * Statutes of limitations, as well as rules governing successive petitions, jurisdiction of courts to hear such claims, procedural defaults, service of process – none of these requirements would be relevant if a motion to vacate could be used in place of a petition for habeas corpus.
>
> Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions. Just as habeas corpus cannot be used as a substitute for a direct appeal, a motion to vacate cannot be used as a substitute for a habeas corpus petition. Except for the narrow band of situations in which we have recognized the efficacy of motions to vacate to remedy orders that are void ab initio, constitutional challenges like the one Jones asserts must be properly presented in a timely petition for habeas corpus.

*Id* at *24–26 (citations omitted).

*Jones*, therefore, is controlling and dispositive authority on the issue now before the Court. Simply put, Lawlor's sentencing order is not void *ab initio* and is not subject to attack by a motion to vacate. Nevertheless, at oral argument, defense counsel asserted that the instant case is distinguishable from *Jones*. Specifically, counsel argued that Lawlor's sentence was void *ab initio* because the court had no authority to render it, and employed a mode of procedure that the court could not lawfully adopt. While these assertions do track the language commonly used in cases concerning void *ab initio* orders, see, e.g., *Kelley v. Stamos*, 285 Va. 68, 75 (2013), they are simply different variants on the same assertion, i.e., that the United States Supreme Court's decision in *Hurst v. Florida* renders Virginia's capital sentencing statutes and procedures unconstitutional.

There are two responses to this, one procedural and one substantive:

First, the clear import of *Jones* is that even if it were true that Lawlor's sentencing order was constitutionally infirm, the order is not void *ab initio* and is not subject to a motion to vacate. See these passages from *Jones*:

> [E]ven if the trial court (retroactively) violated Miller by imposing the stipulated life-without-parole sentence on Jones, the sentencing order would not be void ab initio and, thus, subject to annulment by a motion to vacate filed many years after the trial court lost active jurisdiction over the criminal case. Instead, the putative Miller violation, if proven, would render the sentence merely voidable – that is, vulnerable to being judicially declared void – upon review either via direct appeal timely made or in a habeas corpus proceeding.
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> ***
>
> In Virginia, a Miller violation can be addressed on direct review or in a habeas proceeding. Because the violation, if proven, does not render the sentence void ab initio but merely voidable, it cannot be addressed by a motion to vacate filed years after the sentence became final.

795 S.E.2d at 28–29 (citation omitted).

At oral argument, however, defense counsel asserted that the Supreme Court of Virginia might have reached a different result had it been presented with the facts in *Lawlor* – a death penalty case – rather than the facts in *Jones*. The Court disagrees. Both cases concern sentencing orders that are alleged to be unconstitutional based on subsequent decisions of the United States Supreme Court and whose legality is attacked through a motion to vacate. It is true, of course, that Jones is not a death penalty case. But the *rationale* of *Jones* – that a sentencing order alleged to be in violation of the Constitution is not void *ab initio,* but merely voidable, and may not be attacked in a motion to vacate filed long after the trial court lost active jurisdiction – applies with equal force to the instant case. On this ground alone, the Court holds that the defendant is not entitled to the relief he now seeks.

This brings the Court to the second response to the Defendant's assertions. Because this is a death penalty case, and out of an abundance of caution, the Court will reach the substantive issue raised by Lawlor, i.e., the Defendant's assertion that *Hurst* renders Virginia's capital sentencing statutes and procedures unconstitutional. The Court holds this argument to be without merit. This is the subject of the remainder of this Opinion.

3. The Impact of *Hurst v Florida* on Virginia's Death Penalty Sentencing Procedure

A. Virginia's Death Penalty Sentencing Procedure

**Virginia Code Section 19.2-264.2 (2016)**[5] sets out the circumstances under which the death penalty may be imposed. It reads as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Thus, the fact-finder (the court or jury) must find one or both of the aggravating factors to exist and, further, must recommend the penalty of death. These are separate and distinct requirements; in other words, a jury has the absolute authority to find one or both of the aggravating factors to exist and still conclude that the appropriate penalty is life in prison without parole.

The burden of proving the existence of the aggravating circumstances is on the prosecution and the circumstances must be proved beyond a reasonable doubt. *See, e.g, Smith v Commonwealth*, 219 Va. 455, 472 (1978).

**Virginia Code Section 19.2-264.3 (2016)** provides for bifurcation of the guilt and sentencing phases of a case in which the offense may be punishable by death and further provides that the same jury which determined the defendant's guilt shall also determine whether the sentence of death should be imposed.

[5] The statutes referenced in this section are the same as those in place at the time of Lawlor's trial.

**Virginia Code Section 19.2-264.4 (2016)** provides for the procedure governing the sentencing phase of a case in which the jury has found the defendant guilty of an offense which may be punishable by death. Pertinent among its provisions are the following:

(1) The proceeding "shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment";

(2) Upon the defendant's request, the jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life;

(3) If the jury does not recommend a sentence of death, the defendant shall be sentenced to imprisonment for life;

(4) "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim"; and, finally,

(5) In the event the jury cannot agree as to the penalty, the court shall dismiss the jury and impose a sentence of life imprisonment. *Id.* § 19.2-264.4(A)–(D).

Significantly, the Supreme Court of Virginia has held that the verdict form submitted to the jury must expressly provide the jury the option of imposing a life sentence rather than death even where it has found one or both of the aggravating factors to be present. *See Powell v. Commonwealth*, 261 Va. 512 (2001); *Morrisette v. Warden of the Sussex I State Prison*, 270 Va. 188, 199 (2005). Failure to do so is reversible error. *See Prieto v. Commonwealth*, 278 Va. 366, 375 (2009) [hereinafter *Prieto I*].

Moreover, the Supreme Court of Virginia has also held that where a jury has found an aggravating factor to exist, it must agree unanimously and beyond a reasonable doubt on the particular aggravating factor. A jury does not meet the unanimity or the beyond a reasonable doubt requirement where some jurors might find that the "future dangerousness" aggravator existed and other jurors might find that the "vileness" aggravator existed. As the Supreme Court of Virginia stated in *Prieto I*, this would "present[] the troubling possibility that six or more of the jurors based their decision on the 'future dangerousness' factor, while the other six or fewer based their decision on the 'vileness' factor." 278 Va. at 413. Consequently, the Supreme Court of Virginia has held "that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating facts of 'vileness'

or 'future dangerousness' beyond a reasonable doubt." *Id* Use of a verdict form that does not do this explicitly is reversible error. *Id.*

Finally, **Virginia Code Section 19.2-264.5 (2016)** states in part that where the jury has fixed a defendant's sentence at death, the court shall, before imposing sentence, order a presentence investigation report and "[a]fter consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life."

This provision has repeatedly withstood constitutional challenge. *See Bassett v. Commonwealth*, 222 Va. 844, 860 (1981) ("[Bassett] complains that Code § 19.2-264.5 unconstitutionally discriminates against him because its 'good cause' provision imposes upon him a heavier burden in reducing a capital verdict than in reducing a non-capital verdict. We do not accept this argument. No jury verdict is subject to the trial judge's unlimited discretion. The phrase 'upon good cause shown' merely reiterates the rule applicable in all cases, misdemeanor, felony, or capital, when the court must consider altering a jury verdict. The same criterion applies in capital as well as non-capital cases."); *Breard v. Commonwealth*, 248 Va. 68, 76 (1994) (rejecting the argument that Virginia's death penalty procedure is unconstitutional because discretion is unlimited and there are no guidelines for the trial court to follow in determining when the death penalty is appropriate: "We think the provisions of Code § 19.2-264.5 are clear and provide a meaningful review by a trial court of a death sentence. In the present case, the trial court made an independent review of Breard's death sentence and concluded that there was no 'good cause' to set it aside. Consequently, we hold that Code § 19.2-264.5 is facially constitutional and was constitutionally applied in the present case."); *Chandler v. Commonwealth*, 249 Va. 270, 276 (1995) ("Allowing, but not requiring, a trial judge to reduce a sentence of death to life imprisonment on a showing of 'good cause' is not unconstitutional."). *See also Prieto I*, 278 Va. at 416; *Commonwealth v. Juniper*, 271 Va. 362, 389 (2006).

B. The Death Penalty Sentencing Procedure Used in *Lawlor*

The sentencing procedure used in Lawlor's trial that culminated in the imposition of the death penalty strictly complied with Virginia's statutory scheme.

1. Jury Instructions

First, both the written jury instructions provided to the jury in the sentencing phase of the case and the oral instructions read to the jury fully complied with the requirements of the statute. Specifically, these instructions included the following:

(1) **Instruction No. S-2a**, which related to the Defendant's capital murder conviction on Count 1 of the indictment, instructed the jury that it had three possible sentences it could impose: "You must now decide whether he shall be sentenced to death, or to imprisonment for life without the possibility of

parole, or to imprisonment for life without the possibility of parole and a fine of a specific amount, but not more than $100,000." Record at 2247.

(2) **Instruction No. S-2a** further instructed the jury that "[b]efore the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt and the jury must find unanimously one or both of the [aggravating factors]." *Id.*

(3) **Instruction No. S-2a** further instructed the jury with regard to each of the aggravating factors, i.e., "future dangerousness" and "vileness" and, as to each of the factors, instructed the jury that "[y]our decision as to whether this aggravating factor has been proven beyond a reasonable doubt must be unanimous." *Id.*

(4) **Instruction No. S-2a** further instructed the jury that if the jury found both of the aggravating factors beyond a reasonable doubt and unanimously, the jury "may fix the punishment of the defendant at death." *Id.*

(5) **Instruction No. S-2a** further instructed the jury that "even if you find that the Commonwealth has proved both of the aggravating factors beyond a reasonable doubt and the jury has so found unanimously, if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant" at either life without parole or life without parole and a specific fine of not more than $100,000. *Id.* at 2247–48.

(6) **Instruction No. S-2a** further instructed the jury that if the jury found one of the aggravating factors beyond a reasonable doubt and unanimously, the jury "may fix the punishment of the defendant at death." *Id* at 2248.

(7) **Instruction No. S-2a** further instructed the jury that "even if you find that the Commonwealth has proved one of the aggravating factors beyond a reasonable doubt and the jury has so found unanimously, if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant" at either life without parole or life without parole and a specific fine of not more than $100,000. *Id.*

(8) **Instruction No. S-2a** further instructed the jury that if the Commonwealth had failed to prove beyond a reasonable doubt either of the aggravating factors, "then you shall fix the punishment of the defendant" at either life without parole or life without parole and a specific fine of not more than $100,000. *Id*

(9) **Instruction No. S-2a** further instructed the jury that "[a]ny verdict you make on punishment must be unanimous." *Id*

(10) **Instruction No. S-3a**, which related to the Defendant's capital murder conviction on Count 2 of the indictment, had identical language to Instruction No. S-2a. *Id.* at 2249–50.

(11) **Instruction No. S-4** instructed the jury that "[t]he words 'imprisonment for life' mean imprisonment for life without possibility of parole." *Id.* at 2251.

(12) **Instruction No. S-C** instructed the jury that "[t]he Commonwealth has the burden of proving beyond a reasonable doubt the aggravating factor or factor(s) as to each capital murder conviction." Further, the instruction told the jury that the "burden of proof beyond a reasonable doubt as to these aggravating factors remains on the Commonwealth throughout the penalty phase." *Id.* at 2255.

(13) **Instruction No. S-K** instructed the jury "that nothing in these instructions nor in the law requires you to sentence Mark Lawlor to death." *Id.* at 2261.

(14) **Instruction S-M** instructed the jury that if it found that the Commonwealth proved beyond a reasonable doubt the existence of an aggravating factor, the jury should "consider any mitigating fact or circumstances which, while it does not justify or excuse the offense, in fairness or mercy may extenuate or reduce Mark Lawlor's degree of moral culpability or punishment." Further, the instruction told the jury that the defense had no burden to prove any mitigating fact or circumstance by "any particular standard" and that the jury "need not be unanimous" about the existence of any "single or particular mitigating fact or circumstance in order for any one of you to consider that fact or circumstance in your sentencing decision." *Id.* at 2262.

These instructions were provided to the jury in writing and orally.[6] *See* Transcript of March 14, 2011 at 52–61.

2. Verdict Forms

The verdict forms used in this case were entirely in conformity with both the capital sentencing statutes and case law. For example, as to Count 1, the jury was given seven options:

- **Verdict Form I-1** applied if the jury did not unanimously and beyond a reasonable doubt find either of the aggravating factors to be present. It states in part: "[H]aving considered all the evidence in aggravation and mitigation of the offense, fix Mr. Lawlor's punishment for Count One at: . . . imprisonment for life or imprisonment for

[6] With respect to Instruction S-2a and Instruction S-3a, the jury was told that the two instructions were identical and, therefore, the Court would not read them both to the jury. The jury was further told that the only difference between the two instructions is that one concerned premeditated killing of Genevieve Orange in the commission of or subsequent to rape or attempted rape and the other concerned the willful, deliberate, and premeditated killing of Genevieve Orange in the commission of abduction with the intent to defile. Transcript of March 14, 2011 at 56–57. Both the Commonwealth and defense counsel confirmed to the Court that they were satisfied with the Court not reading both instructions to the jury in light of the explanation he provided to the jury. Transcript of March 14, 2011 at 59–60.

life and a fine of $____ (fine must not be more than $100,000)." This verdict form was unsigned by the foreperson. Record at 2231.

- **Verdict Form I-2** applied if the jury found unanimously and beyond a reasonable doubt the vileness aggravating factor to be present. It states in part: "[H]aving considered all the evidence in aggravation and mitigation of the offense, fix Mr. Lawlor's punishment at: . . . imprisonment for life or imprisonment for life and a fine of $____ (fine must not be more than $100,000)." This verdict form was unsigned by the foreperson. *Id* at 2232.
- **Verdict Form I-3** applied if the jury found unanimously and beyond a reasonable doubt the future dangerousness factor to be present. It states in part: "[H]aving considered all the evidence in aggravation and mitigation of the offense, fix Mr. Lawlor's punishment for Count One at: . . . imprisonment for life or imprisonment for life and a fine of $____ (fine must not be more than $100,000)." This verdict form was unsigned by the foreperson. *Id.* at 2233.
- **Verdict Form I-4** applied if the jury found unanimously and beyond a reasonable doubt both the vileness factor and the future dangerousness factor to be present. It states in part: "[H]aving considered all the evidence in aggravation and mitigation of the offense, fix Mr. Lawlor's punishment for Count One at: . . . imprisonment for life or imprisonment for life and a fine of $____ (fine must not be more than $100,000)." This verdict form was unsigned by the foreperson. *Id.* at 2234.
- **Verdict Form I-5** applied if the jury found unanimously and beyond a reasonable doubt the vileness factor to be present. It states in part: "[H]aving considered all the evidence in mitigation of the offense, unanimously fix Mr. Lawlor's punishment for Count One at death." This verdict form was signed by the foreperson. *Id* at 2225.
- **Verdict Form I-6** applied if the jury found unanimously and beyond a reasonable doubt the future dangerousness factor to be present. It states in part: "[H]aving considered all the evidence in mitigation of the offense, unanimously fix Mr. Lawlor's punishment for Count One at death." This verdict form was signed by the foreperson. *Id.* at 2226.
- **Verdict Form I-7** applied if the jury found unanimously and beyond a reasonable doubt both the vileness factor and the future dangerousness factor to be present. It states in part: "[H]aving considered all the evidence in mitigation of the offense, unanimously fix Mr. Lawlor's punishment for Count One at death." This verdict form was signed by the foreperson. *Id.* at 2223.

The verdict forms for Count 2 were identical to the Count 1 verdict forms, except of course to the reference to the offense for which the defendant stood convicted. *Id.* at 2235–38 and 2227–28 and 2224. Thus, the verdict forms: (1) gave the jury every option required by statute and case law; (2) required unanimity on each aggravating factor; (3) required that proof of each aggravating factor be "beyond a reasonable doubt"; (4) required unanimity on the ultimate decision whether to fix the sentence at life or death; and, finally, (5) imposed upon

the jury the duty to "fix" the defendant's sentence. This was not an "advisory" sentence or a mere "recommendation" of sentence; rather the jury's duty was to make factual findings regarding each of the aggravating factors and then actually "fix" the defendant's sentence.[7]

3. Return of the Verdicts

The verdicts were returned in open court. The Court accepted the verdicts, excused the jury, and set the matter for sentencing. Transcript of Proceedings at 23–29, March 16, 2011.[8]

4. Sentencing Proceedings

The matter came before the Court for sentencing on June 23, 2011. The Commonwealth requested the Court to impose the death sentence fixed by the jury. Defense counsel requested the Court to set aside the jury's sentence of death for "good cause shown," pursuant to Virginia Code Section 19.2-264.5, and impose a sentence of life in prison without parole.

Defense counsel argued, among other matters, the following: (1) that imposition of the death penalty in Lawlor's case was disproportional to the treatment of similarly situated defendants; (2) that a juror's affidavit indicated the juror did not correctly understand the Court's instruction with regard to future dangerousness; (3) that the trial court now had "new evidence" of "Mark's remorse, his humanity, his brain deficits, the opinions of Dr. Hopper, Dr. James, and Dr. Cunningham, and there are other important considerations the jury could not have undertaken"; and (4) that while the jury "had to choose between life and death," the trial court had the additional option of imposing a life sentence on one count and a suspended sentence of death on the other count. Transcript of Proceedings at 67–68, 71, 74, 81, June 23, 2011. The defendant was then given the opportunity to address the Court, which he did. *Id* at 85–89.

The Court then announced its decision, finding that there was no basis to set aside the jury's sentences and imposed the two death sentences fixed by the jury on the defendant. Transcript of Proceedings at 89–94, June 23, 2011.

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[7] This point is illustrated by the language used in Virginia Code Section 19.2-264.5. The statute states that the Court may "set aside the sentence of death" that has been fixed by the jury upon good cause shown. In other words, a jury that determines a death sentence to be appropriate, is not *recommending* a death sentence, or *advising* the Court on a death sentence. Rather, pursuant to statute, the jury is actually fixing a sentence of death which the Court may, in appropriate circumstances, "set aside." Or, as the Supreme Court of Virginia stated in Lawlor's direct appeal, a trial court at sentencing in a death penalty case is deciding "whether to intercede and *overrule the jury's determination*." *Lawlor*, 285 Va. at 266 (emphasis added).

[8] Because the jury found both of the aggravating factors to exist as to each Count of the indictment, the only verdict forms read in open court were Verdict Forms I-7 and II-7.

C. Appellate Proceedings in the Instant Case

1. Direct Appeal

The Supreme Court of Virginia affirmed Lawlor's two death sentences. *Lawlor v. Commonwealth*, 285 Va. 187 (2013), *cert denied*, 134 S. Ct. 427 (2013). Pertinent to the instant motion, the Supreme Court of Virginia addressed a number of constitutional challenges to Virginia's death penalty sentencing procedure:

- Lawlor argued that the United States Constitution requires bifurcation of the penalty phase, with the first phase limited to the jury determining whether the Commonwealth had proven the existence of one or both of the aggravating factors and, in the event the jury so found, a second phase limited to a determination whether to impose a sentence of death or life imprisonment without parole in light of the mitigating evidence presented. In making this argument, Lawlor relied on *Ring v. Arizona*, 536 U.S. 584 (2002). The Supreme Court rejected the argument, holding that "there is no basis for Lawlor's claim that the Constitution requires bifurcation of the penalty phase." *Lawlor*, 285 Va. at 235–38.
- Lawlor argued that the vileness aggravating factor was unconstitutionally vague. The Supreme Court noted that it had previously considered and rejected this argument and found no reason to modify the views it had previously expressed. *Id* at 255.
- Lawlor argued that the "composite sub-factors to the vileness aggravating factor must be individually proven beyond a reasonable doubt and agreed upon unanimously by the jury." The Supreme Court noted that it had rejected this argument in *Commonwealth v. Prieto*, 283 Va. 149 (2012) [hereinafter *Prieto II*], and declined to revisit it.
- Lawlor challenged the constitutionality of Virginia Code Section 19.2-264.5, which permits the trial court to set aside the jury's sentence of death upon good cause shown. Lawlor argued "that permitting the court such discretion is unconstitutional." *Lawlor*, 285 Va. at 262. The Supreme Court noted that it had previously rejected this argument, citing *Prieto I*, 278 Va. at 416, and other cases. The Supreme Court stated that it found no reason to modify the views it had previously expressed. *Lawlor*, 285 Va. at 262.
- Lawlor argued that Virginia Code Section 19.2-264.5 was unconstitutional as applied, asserting that the court erred in the exercise of its sentencing discretion because it consider improper factors in denying the defendant's motion to set aside the jury's sentence of death. *Lawlor*, 285 Va. at 262. The Supreme Court noted that the trial court had referenced Lawlor's denial of responsibility over the 22 months of pretrial litigation and that, "[w]hile it is proper for a court to consider a defendant's 'present tense refusal to accept responsibility or show remorse,' it may not be linked to his 'prior claim of innocence or not guilty plea or exercise of his

right to remain silent.'" *Id* at 265 (citations omitted) (emphasis omitted). Nevertheless, there was no abuse of discretion by the trial court:

> [T]he consideration under Code § 19.2-264.5 is whether there is good cause to set aside the jury's sentence of death; the court correctly noted that the question before it was whether to intercede and overrule the jury's determination. It is clear from the record that in evaluating that question the court considered and gave the greatest weight to the statutory sentencing report; the evidence adduced at trial, including Lawlor's mitigating evidence in the penalty phase; the duration of voir dire and the resulting impartiality of the jury; the seriousness with which the jurors undertook and completed their deliberations; the jury's finding of both aggravating factors; and the egregiousness of the offense. These are all proper factors for the court's consideration. While Lawlor's defense strategy was not a proper factor, the court did not give it significant weight in relation to the many other factors stated from the bench when it determined that Lawlor had not shown good cause to set aside the jury's sentences. Accordingly, the court did not abuse its discretion in denying Lawlor's motion.

*Id.* at 266–67 (citation omitted).

- Lawlor argued that Virginia Code Section 18.2-31 was unconstitutional for failing to narrow the class of murders for which a sentence of death may be imposed. The Supreme Court held that the argument was without merit. *Lawlor*, 285 Va. at 266.
- Lawlor argued that Virginia's death penalty was unconstitutional because both of the Commonwealth's methods of execution – electrocution and lethal injection – constituted cruel and unusual punishment. The Supreme Court rejected the argument. *Id.* at 268.
- Lawlor argued that Virginia's death penalty statutory scheme was unconstitutional because it failed to provide defendants with an opportunity for meaningful appellate review. The Supreme Court noted that it had previously rejected this argument and found no reason to modify the views it had previously expressed. *Id.*

2. State Habeas Proceedings

On December 16, 2013, Lawlor filed a petition for a writ of habeas corpus. The Commonwealth filed a motion to dismiss the writ. The petition asserted that Lawlor was denied the effective assistance of counsel and also asserted certain alleged violations of the Commonwealth's obligation to produce exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). As to some of the claims, the Supreme Court found that the claims were non-jurisdictional issues that could have been raised at trial and on direct appeal and, thus,

were not cognizable in a petition for a writ of habeas corpus. As to other claims, the Supreme Court held that the claims failed to satisfy either or both of the "performance" or "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, the Supreme Court of Virginia held that the Commonwealth's motion to dismiss should be granted and that the writ of habeas corpus should not issue. *Lawlor v. Davis*, 288 Va. 223 (2014).[9]

*D. Hurst v Florida*

1. Florida's Death Penalty Sentencing Scheme

To understand the import and implications of the United States Supreme Court's decision in *Hurst*, it is first necessary to summarize the essential elements of the Florida death penalty sentencing scheme under review in *Hurst*. The Supreme Court described that scheme as follows:

> First-degree murder is a capital felony in Florida. Under state law, the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment. 'A person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.' 'Otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.' The additional sentencing proceeding Florida employs is a 'hybrid' proceeding 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.' First, the sentencing judge conducts an evidentiary hearing before a jury. Next, the jury renders an 'advisory sentence' of life or death without specifying the factual basis of its recommendation. '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.' If the court imposes death, it must 'set forth in writing its findings upon which the sentence of death is based.' Although the judge must give the jury recommendation 'great weight,' the sentencing order must 'reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors.

136 S. Ct. at 620 (citations omitted).[10]

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[9] Federal habeas corpus proceedings are now pending in the United States District Court for the Eastern District of Virginia.

[10] The pertinent Florida statutes appear in *Hurst v. State*, 202 So. 3d 40 (Fla., 2016):

**Florida Statute Section 775.082(1) (2012) provides**: "A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according

Thus, in several material respects, Florida's statutory scheme is fundamentally different than Virginia's statutory scheme:

- In Florida, a person convicted of capital murder can be punished by death only if there is an additional sentencing proceeding in which there are "findings by the court" that such person shall be punished by death. In Virginia, the "findings" that increase a sentence from life in prison to death are not made by the court but by the jury.
- In Florida, the jury renders what is called an "advisory sentence." In Virginia, the jury renders the actual sentence. The fact that a trial judge in Virginia can "set aside" or "overrule" the jury's verdict for "good cause shown" does not mean the verdict is advisory.
- The Florida jury in Hurst was told that its punishment recommendation was "advisory in nature and not binding, but would be given great weight." *Hurst v. State*, 202 So. 3d at 47. A Virginia jury is not instructed that its decision is advisory or a "mere recommendation," see *Hurst*, 136 S. Ct. at 619, nor is the jury instructed that the Court has the authority to set aside a death sentence for good cause shown.

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to the procedure set forth in s.921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."

**Florida Statute Section 921.141 (2012) provides in part**:
"(1) SEPARTE 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 Florida, the jury does not make factual findings. In Virginia, the jury must find either or both aggravating factors in order to impose a sentence of death.
- In Florida, the judge makes the decision whether to impose a sentence of life in prison or death. A Florida judge can accept or reject the jury's advisory sentence regardless of whether it is a sentence of life in prison or death. In Virginia, a judge may only reduce the jury's sentence from death to life in prison. Unlike in Florida, a Virginia judge has no authority to impose a death sentence when the jury has imposed a sentence of life in prison.
- In Florida, the jury's advisory sentence need not be unanimous.[11] In contrast, Virginia requires unanimity at each stage of the sentencing process: the decision whether aggravating factors exist must be unanimous; the decision as to the particular aggravating factor that exists must be unanimous; and the decision whether to impose a death sentence must be unanimous.

2. The United States Supreme Court's decision in *Hurst v Florida*

On January 12, 2016, the United States Supreme Court held that the death sentence imposed by a Florida court on Timothy Lee Hurst violated Hurst's Sixth Amendment rights. "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.*

The Supreme Court's decision in *Hurst* flowed directly from the Supreme Court's two seminal decision affirming a defendant's Sixth Amendment and Due Process Clause right that "each element of a crime be proved to a jury beyond a reasonable doubt." 136 S. Ct. at 621 (citations omitted). The first of these decisions was *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Supreme Court "held that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst*, 136 S. Ct. at 617–18 (citing *Apprendi*, 530 U.S. at 494). *Apprendi* was followed by *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Supreme Court held "that Arizona's capital sentencing scheme violated *Apprendi's* rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Id* at 621. In *Hurst*, the Supreme Court described its holding in *Ring* as follows:

> An Arizona jury had convicted Timothy Ring of felony murder. Under state law, 'Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made.' Specifically, a judge

[11] Indeed, in Hurst's case, the first jury to consider the death penalty returned an advisory verdict recommending the death penalty by a vote of 11-1. *Hurst v. State*, 202 So. 3d at 46. When the case was presented to a second jury (due to ineffective assistance of counsel in the first sentencing proceeding), the jury returned an advisory verdict recommending the death penalty by a vote of 7-5. *Id.* at 52.

> could sentence Ring to death only after independently finding at least one aggravating circumstance. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death. The Court had little difficultly concluding that the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" Had Ring's judge not engaged in any fact finding, Ring would have received a life sentence. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

*Id* (citations omitted).

In *Hurst*, the Supreme Court held that Florida's death penalty sentencing scheme suffered from the same constitutional defect as Arizona's:

> Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely.") 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.

136 S. Ct. at 622.

The Supreme Court focused particular attention on "the central and singular role the judge plays under Florida law," and then goes on to state the following:

> [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 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." *Spaziano*

> *v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

*Id.* (emphasis in original).

The majority opinion concludes as follows: "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." *Id.* at 624.

The Supreme Court remanded the case to the State, leaving it to the Florida Supreme Court to determine whether the error in question was harmless beyond a reasonable doubt.

3. The Remand of *Hurst v Florida* to the Florida Supreme Court

On remand, the Florida Supreme Court held that the error in Hurst's sentencing was not harmless beyond a reasonable doubt and remanded the case to the trial court for a new penalty phase proceeding. *See generally Hurst v. State*, 202 So. 3d 40 (2016).

In reaching this conclusion, the Florida Supreme Court held that, in light of *Hurst v. Florida*, "all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury . . . [including] the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d at 44. Moreover, "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id*

In determining that the error in *Hurst* was not harmless beyond a reasonable doubt, the Florida Supreme Court relied substantially on the fact that "[t]he jury recommended death by only a seven to five vote, a bare majority." *Id.* at 69. "Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances. Nevertheless, the fact that only seven jurors recommended death strongly suggests to the contrary." *Id.* at 68. [12]

[12] So significant is the requirement of jury unanimity that the Florida Supreme Court recently upheld a death sentence where the advisory jury was, in fact, unanimous. See *Hall v. State*, 2017 Fla. LEXIS 287 (Fla. Feb. 9, 2017) (emphasis in original) ("[T]his is one of those rare cases in which the Hurst error was harmless beyond a reasonable doubt. We initially must emphasize the unanimous jury recommendation of death in this case. This unanimous recommendation lays a foundation for us to conclude beyond a reasonable doubt that a rational jury would have

4. Litigation Since *Hurst v Florida*

*Hurst v. Florida* was issued a little over one year ago. While there is no case law in the Commonwealth of Virginia applying *Hurst* to Virginia's death penalty sentencing scheme, a number of state and federal courts have addressed the impact of *Hurst*:

In *Rauf v. State*, 145 A.3d 430 (Del. 2016), the Court did hold that Delaware's death penalty statute violated the Sixth Amendment's right to trial by jury in light of *Hurst v. Florida*. Lawlor relies on *Rauf v. State* in support of his argument that *Hurst* renders Virginia's capital sentencing statutes and procedures unconstitutional. Delaware's death penalty statute, however, is fundamentally different than the law in Virginia.

First, in Delaware, the judge's role is preeminent, as is illustrated by this excerpt from Delaware Code Title 11, Section 4209(d)(1): "The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court."

Second, in Delaware, unanimity is not required on the weighing decision.[13]

Third, in Delaware, while the jury is required to report its view to the Court, it is the trial judge, not the jury, that "has the final say in deciding whether a capital defendant is sentenced to death and need not give any particular weight to the jury's view." *Rauf*, 145 A.3d at 457 (Strine, J., concurring).

In sum, Delaware's capital sentencing statutes and procedures are so materially different than Virginia's statutes and procedures that *Rauf v. State* cannot be read as constituting persuasive authority on the issue now before this Court. In contrast, several other states have rejected *Hurst's* challenges because their death penalty statutes – like Virginia's, but unlike Delaware's and Florida's – make the role of the jury preeminent and meet *Ring's* fundamental requirement that the jury determine each element that can increase a defendant's sentence.

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unanimously found that there were sufficient aggravators to outweigh the mitigating factors."). *See also Evans v. State*, 2017 Fla. LEXIS 358 (Fla. Feb. 20, 2017).

[13] *See* Delaware Code Title 11, Section 4209(c)(3)(b)(2) ("The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.").

In Ohio, for example, the Supreme Court rejected a *Hurst* challenge to Ohio's capital sentencing scheme because in Ohio a capital case does not proceed to sentencing "until after the fact-finder has found a defendant guilty of one or more aggravating circumstances" and "if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence." *State v. Belton*, 2016 Ohio LEXIS 958, *P59 (Ohio, Jan. 26, 2016).

In California, for another example, the Supreme Court rejected a *Hurst* challenge to California's capital sentencing scheme: "'[A] jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict that 'impose[s] a sentence of death' or life imprisonment without the possibility of parole. Unlike Florida, this verdict is not merely 'advisory.' If the jury reaches a verdict of death, our system provides for an automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole. At the point the court rules on this motion, the jury 'has returned a verdict or finding imposing the death penalty.' The trial court simply determines 'whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.'" *People v. Jackson*, 376 P.3d 528, 603–04 (Cal. 2016) (citing *People v. Rangel*, 367 P.3d 649, 681 n.16 (2016)).

5. Position of the Parties with Regard to the Impact of *Hurst v. Florida*

Lawlor argues that *Hurst* renders Virginia's capital sentencing statutory scheme unconstitutional, and cites two reasons for this assertion: First, he argues, Virginia's statute is unconstitutional because it does not impose a "beyond a reasonable doubt" requirement on the jury's ultimate determination whether to fix the defendant's sentence at death or life in prison without parole. Second, he argues, the judge's authority to set aside the jury's verdict of death for "good cause shown" renders the statute unconstitutional because it assigns to the judge a responsibility that *Hurst* gives exclusively to the jury.[14]

The Commonwealth argues that Lawlor has not established any violation of *Hurst* and that *Hurst* merely applied *Apprendi* and *Ring* to Florida's death penalty sentencing scheme.

Discussion with Regard to the Impact of *Hurst v Florida*

The Court finds Lawlor's arguments with respect to the impact of *Hurst v. Florida* to be without merit.

[14] At oral argument, defense counsel asserted that these two arguments are not separate and distinct but linked to each other. In other words, it appears to be defense counsel's position that what makes the judge's authority under Virginia Code Section 19.2-264.5 particularly problematic is the fact that the jury is not statutorily-required to apply a "beyond a reasonable doubt" standard to its determination whether a death-eligible defendant should be sentenced to death. Whether linked or not, and for the reasons stated below, this Court does not find either of the arguments to be persuasive.

With regard to the first contention – that *Hurst* requires that the jury's ultimate sentencing decision be made "beyond a reasonable doubt" – *Hurst* simply does not say this, neither explicitly nor implicitly. The issue before the *Hurst* Court was not the burden of proof required for a fact-finder to fix a defendant's sentence at death; rather, the issue before the *Hurst* Court was the identity of that fact-finder. *Hurst* applied *Apprendi* and *Ring* to Florida's capital sentencing statutory scheme by holding that it was the jury, not the judge that must make the findings necessary to expose a defendant to a greater sentence. A sentencing scheme that consigned the jury to a merely advisory role was constitutionally defective.

Two recent cases make this point.

In *Garza v. Ryan*, 2017 U.S. Dist. LEXIS 4031 (D. Ariz. Jan. 11, 2017), the District Court declined to grant a stay of a federal habeas corpus proceeding based on a claim, inter alia, that *Hurst* constituted a significant change in the law that would probably lead to his death penalty being overturned in state court. "*Hurst*... did nothing to transform Arizona law. * * * The Supreme Court simply applied *Ring* to Florida's capital sentencing statutes. *Hurst* does not hold, as Garza suggests, that a jury is required to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. *Hurst* held only that Florida's scheme, in which the jury rendered an advisory sentence but the judge made the findings regarding aggravating and mitigating factors, violated the Sixth Amendment." *Id.* at *8 (citations omitted).

Even more recently, in a case applying *Hurst* to the federal death penalty statute, the United States District Court for the Eastern District of Virginia held that *Hurst* did not represent an intervening change in the law set forth in *Ring* with respect to whether a "beyond a reasonable doubt" standard must be used by a jury weighing aggravating and mitigating factors. "*Hurst* does not mention the weight a jury should give to the aggravating and mitigating factors, as it is concerned with whether a judge may take over the jury's role in determining these factors." *Runyon v. United States*, 2017 U.S. Dist. LEXIS 15886 (E.D.Va. Jan. 19, 2017).

Moreover, Lawlor's argument fundamentally misapprehends the task before a jury confronting the decision whether to impose on a death-eligible defendant a sentence of life or a sentence of death. That determination is ultimately a discretionary judgment, not a factual determination. This point was made by Justice Scalia in his majority opinion in *Kansas v Carr*, 136 S. Ct. 633 (2016), a decision issued just a week after *Hurst*. At issue was the question of whether the Eighth Amendment required capital-sentencing courts to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. The opinion reads in part as follows:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor

> determination (the so-called "eligibility phase"), because that is a purely factual determination. The facts justifying death set forth in the Kansas statute either did or did not exist – and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy – the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

*Id.* at 642 (emphasis in original). *See also United States v. Sampson*, 2016 U.S. Dist. LEXIS 72060 (D. Mass. June 2, 2016) (holding that *Kansas v. Carr* undermines the claim that *Hurst* requires that the weighing of mitigating and aggravating factors be subject to the "beyond a reasonable doubt" standard).[15]

While Virginia's death penalty sentencing scheme is not identical to the one at issue in *Kansas v Carr*, the Supreme Court's recognition of the role of mercy and discretion in the exercise of the jury's ultimate sentencing judgment is equally applicable in the instant case. *See also Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (citations omitted) ("In sum, 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process. 'Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.' Indeed, the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'").

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[15] This Court recognizes that Virginia's capital sentencing statutes do not have an explicit requirement that the jury weigh the mitigating evidence against the aggravating evidence and determine whether the aggravating evidence outweighs the mitigating evidence. Nevertheless, case law addressing whether *Hurst* imposes a "beyond a reasonable doubt" requirement in the context of the exercise of a jury's weighing obligation are instructive.

With regard to the second contention – that Virginia's capital sentencing statutory scheme, in general, and Section 19.2-264.5, in particular, is unconstitutional because it empowers a judge to set aside the jury's death sentence – the Court holds that *Hurst* neither compels, nor even suggests, such a conclusion.

First, the central holding of *Apprendi*, *Ring*, and *Hurst* is that all factual determinations which have the potential to expose a defendant to a greater sentence must be submitted to the jury. *See, e.g.*, *United States v. Bazemore*, 839 F.3d 379, 393 (5th Cir. 2016) (holding that *Hurst* "applies only to statutory schemes in which judge-made findings increase the maximum sentence that a defendant can receive") (emphasis added). Virginia Code Section 19.2-264.5 empower a judge to impose a lesser sentence, not a greater sentence. For this reason alone, the argument fails.

Second, when the jury has fixed a defendant's sentence at death, the trial judge has just two sentencing options: either impose the jury's death sentence or, "[a]fter consideration of the [pre-sentence] report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life." VA. CODE § 19.2-264.5. There is no third option – as existed under Florida law and Delaware law – where the judge was empowered to impose a sentence of death even though the jury had chosen life.

Third, consider what Lawlor is arguing: that a state violates a defendant's Sixth Amendment and Due Process rights when it chooses to provide the defendant a precious and potentially life-saving opportunity to persuade the Court that there is good cause to overrule the jury's death sentence and impose a life sentence instead. It is undoubtedly the possibility that the Court might avail itself of this opportunity that led Lawlor's trial counsel to make extensive efforts to persuade the Court to exercise its discretion to set aside the jury's death sentence. As described above, those efforts included providing the Court what was termed "new evidence," submitting an affidavit from a juror, making a disproportionality argument, and suggesting an additional sentencing option to the Court. That defense counsel was ultimately unsuccessful in this effort should not detract from the recognition that the statute provides a defendant who is a facing a death sentence a last opportunity in the trial court to obtain a sentence of life.

Finally, the defendant's argument is that the power assigned to the judge by Virginia Code Section 19.2-264.5 can only – consistent with the Constitution – be assigned to the jury. But the power at issue is the power to overrule the jury and set aside its sentence of death. It obviously makes no sense to give the jury both the authority to impose a sentence of death and the authority to then overrule itself.

CONCLUSION

For two independent reasons, the Court DENIES the defendant's motion. First, under *Jones*, Lawlor's sentencing order is not void *ab initio* and is not subject to attack by a motion to vacate. Second, even if the Court was deemed to have jurisdiction, the defendant is not entitled to relief because *Hurst* does not render Virginia's capital sentencing statutes and procedures unconstitutional.

An ORDER in accordance with this Letter Opinion shall issue today.

Sincerely

[redacted]

Randy I. Bellows
Circuit Court Judge

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| COMMONWEALTH OF VIRGINIA | ) | CRIMINAL NUMBER FE-2009-304 |
| VERSUS | ) | |
| MARK E. LAWLOR | ) | INDICTMENT - CAPITAL MURDER (COUNT I and COUNT II) |

**ORDER**

Before the Court is the Defendant's Motion to Vacate Sentencing Order as Void *Ab Initio*. For the reasons stated in the Letter Opinion issued this day, the motion is **DENIED**.

This is a FINAL ORDER.

Entered on March 6, 2017.

[redacted]

JUDGE RANDY I. BELLOWS

RIB/ccs
FE-2009-304