

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 14-2039 & CASE NO. SC 14-582**

DANE PATRICK ABDOOL

Petitioner,

v.

**JULIE JONES
SECRETARY, DEPARTMENT OF CORRECTIONS**

Respondent.

DANE PATRICK ABDOOL

Appellant,

v.

STATE OF FLORIDA

Appellee.

**SUPPLEMENTAL INITIAL BRIEF OF APPELLANT REGARDING
*HURST V. FLORIDA***

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Abdool's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Abdool's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The supplemental record on appeal from Mr. Abdool's trial shall be referred to as "TRS", followed by the volume and page numbers. The post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

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STATEMENT OF THE CASE

Mr. Abdool, in his Petition for Writ of Habeas Corpus, which is pending before this Court, challenged the constitutionality of Florida's capital sentencing scheme alleging that it violated his federal constitutional rights under Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Furthermore, in his direct appeal, Mr. Abdool challenged the constitutionality of Florida's capital sentencing scheme arguing that it violated his Sixth Amendment rights pursuant to *Ring v. Arizona*¹. *Abdool v. State*, 53 So.3d 208 (Fla. 2010). The facts in Mr. Abdool's case are nearly identical to those presented to the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016) in that Mr. Abdool had no prior or contemporaneous felony convictions and had a non-unanimous vote for death. Under *Hurst*, Mr. Abdool is entitled to a life sentence, or at the very least, a new penalty phase pursuant to a constitutional statute.

Procedural History:

Mr. Abdool was convicted on a single count of first degree premeditated murder following a jury trial in February of 2008. During the course of trial proceedings, trial counsel challenged the constitutionality of Florida's capital sentencing scheme and argued that it violated Mr. Abdool's Sixth Amendment rights

¹ *Ring v. Arizona*, 536 U.S. 584 (2002).

as interpreted by *Ring v. Arizona* and further argued that it was unconstitutional pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). TR4:321-332; TR5:399-401, 420-552. The trial court denied all of the challenges². TR2:62-3; TR2:99-106; TR4:370-8. At the penalty phase the State sought to prove the existence of only two aggravating factors: HAC and CCP. Trial counsel requested interrogatory verdict forms in order to determine the jury vote on those two aggravating circumstances. The trial court denied this request. TR4:394-96, TR2:113. Mr. Abdool had no prior or contemporaneous felony convictions. The jury recommended death by a vote of 10 to 2, without identifying the vote on either of the aggravators. On May 12, 2008, the Court sentenced Abdool to death on the sole count of the indictment.

In his direct appeal, Mr. Abdool challenged the constitutionality of Florida's capital sentencing scheme arguing that it violated his Sixth Amendment rights pursuant to *Ring v. Arizona*, specifically arguing the unconstitutional lack of jury findings as to the aggravating and mitigating factors. Appellate counsel further argued that the recommendation of death was not unanimous and that it was unknown whether or not the jury unanimously determined that there were sufficient

² The trial court stated that the motions were denied based upon Florida Supreme Court precedent. TR2:62-3 and TR2:99-106. Specifically commenting on the record with respect to a motion challenging Florida's sentencing scheme based on violations of the Sixth and Eighth Amendments and *Ring v. Arizona*, the trial court commented that "The motion does pose some interesting issues, but they will have to be decided by a court other than me, because I believe the scheme at this point has been upheld. So the motion is denied." TR2:105.

aggravating factors. This Court, based on its jurisprudence at the time, rejected that claim. *Abdool* at 228. The United States Supreme Court denied certiorari on October 3, 2011. *Abdool v. Florida*, 132 S.Ct. 149, 181 L.Ed 2d 66 (2011).

Mr. Abdool timely filed a 3.851 motion and timely appealed the denial of 3.851 relief to this Court under case SC14-582. He simultaneously filed a writ of habeas corpus (SC14-2039). In that writ of habeas corpus, Abdool raised the claim that Florida's outlier status of allowing a death sentence based on a non-unanimous jury vote violates the Eighth Amendment. Specifically, Abdool claimed that Florida's death penalty statute, which allows a non-unanimous verdict is unconstitutional under the Eighth Amendment. He further argued that his death sentence was obtained in an unconstitutional manner which would render his execution unconstitutional, thus violating evolving standards of decency encompassed by the Eighth Amendment. On April 1, 2015, after certiorari had been granted in *Hurst*, Mr. Abdool filed a motion in this Court to stay his case until *Hurst* was decided. This Court denied that request. Oral argument was held on June 3, 2015. At oral argument, the State conceded that if *Hurst* was held to be retroactive, Mr. Abdool would be entitled to relief because he had a non-unanimous vote and no prior or contemporaneous felony convictions. *Hurst* was decided by the United States Supreme Court on January 12, 2016. Based upon the ruling in *Hurst*, Mr. Abdool subsequently filed a motion requesting supplemental briefing.

Supplemental briefing was ordered on February 8, 2016. This supplemental initial brief follows.

ARGUMENT

I. Hurst must be applied retroactively:

This Court determines retroactivity in post-conviction proceedings using the test set forth in *Witt v. State*, 387 So.2d 922, 931 (Fla. 1980). The retroactivity standard formulated in *Witt* states: “an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. Under a *Witt* analysis, *Hurst* is applicable to all individuals sentenced to death under the unconstitutional statute, including Mr. Abdool. The first two prongs of *Witt* are unquestionably satisfied, as *Hurst* emanates from the U.S. Supreme Court, and it is clearly constitutional in nature, as *Hurst* rejects as constitutionally infirm the process under which Florida defendants are sentenced to death and violates the Sixth Amendment.

Having satisfied the first two prongs of *Witt*, this Court must determine whether the change in the law affected by *Hurst* “constitutes a development of fundamental significance.” This Court explained in *Witt*, “most major constitutional changes are likely to fall within two broad categories: (1) changes in the law that ‘place beyond the authority of the state the power to regulate certain conduct or

impose certain penalties’ and (2) ‘those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199(1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 6010 (1965)].” *Witt*, 387 So. 2d at 929.

Hurst constitutes a “development of fundamental significance” because the change in the law is “of sufficient magnitude to necessitate retroactive application.” As summarized in *Witt*, the relevant three-fold test considers: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” *Witt*, 387 So. 2d at 926. With regard to the first consideration in the three-fold test, the purpose of *Hurst* is to protect the Sixth Amendment right of capital defendants for their sentences to be based on a jury’s verdict, as opposed to a judge’s fact-finding.

When the *Furman* Court abolished the death penalty, it did so under the Eighth and Fourteenth Amendments. However, no two justices in favor of the holding agreed on the rationale. *See Furman*, 408 U.S. 238 (Douglas, J., Brennan, J., Stewart, J., White, J., and Marshall, J., filing separate opinions in support of judgments; Burger, C.J., Blackmun, J., Powell, J., and Rehnquist, J., filing separate dissenting opinions). Three justices, in concurring opinions, raised the issue of the arbitrary application of the death sentence as reason to find the death penalty unconstitutional.

Id. at 240-57, 306-14 (Douglas, J., Stewart, J., White, J., concurring separately).

The legislature enacted a new statute following *Furman*, requiring a separate penalty phase hearing during which a judge and jury would weigh aggravating and mitigating evidence specific to the defendant. Fla. Stat. § 921.141 (1973). Ch. 72-724, Laws of Florida (1972). However, the legislature chose to make the jury's verdict only advisory. As *Hurst* now makes clear, in order to satisfy the Sixth Amendment's guarantee to a jury trial, "a jury's mere recommendation is not enough." *Hurst* at 619. The jury must find every fact necessary to expose the defendant to a greater punishment than that authorized by a guilty verdict. *Id.* at 3-4.

The right to trial by jury has been held sacred since the nation's founding.

"Trial by jury, as instituted in England, was to the Founders an integral part of a judicial system aimed at achieving justice." Accordingly, the Founders, mindful of "royal encroachments on jury trial" and fearful of leaving this precious right to the whims of legislative prerogative, included protection of the right in the Declaration of Independence and included three separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments.

Blair v. State, 698 So. 2d 1210, 1212-13 (Fla. 1997), *quoting* Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L.Rev. 723, 742, 744-45 (1993) (internal citations and footnotes omitted).

Justice is served when decisions are evenly applied and free from bias. A statutory capital sentencing scheme vesting the power to determine whether a person

can be sentenced to death in one judge, versus twelve of that person's peers, cannot be trusted to produce results lacking in arbitrariness and bias. It has been known at least since *Ring*, that such a system is constitutionally invalid.

It has also been clear for some time that the sentencing scheme ruled unconstitutional in *Hurst* has done nothing in the 40-plus years since *Furman* to correct the injustices that decision attempted to address. According to the 2015 Annual Report of the Death Penalty Information Center, “[o]utlier practices in 3 states, California (14), Florida (9), and Alabama (6) accounted for more than half of all new death sentences in the country.”³ Furthermore, “63% of the new death sentences (31) came from the tiny 2% of counties responsible for more than half of all the death-sentenced inmates in the United States,” and “[m]ore than 20% of death sentences imposed in the U.S. since 2010 have been the product of non-unanimous jury recommendations of death – a practice barred in all states but Florida, Alabama, and Delaware.”⁴ Thus, the simple fact that a capital defendant was sentenced in Florida means that his exposure to an arbitrarily-applied death sentence was impermissibly increased, and this exposure was the result of the sentencing scheme held to be unconstitutional in *Hurst*. The first consideration in the three-fold test

³ Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, 3, available at <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

⁴ *Id.* at 3-4.

weighs heavily in favor of retroactive application.

With regard to the second consideration, the extent of reliance on the old rule, while it is true that the State has relied for 40-plus years on an unconstitutional sentencing statute in obtaining death sentences and carrying out executions, at least since *Ring* was decided the decision to do so has been misguided. *See Hurst*, 2016 WL at 8-9. In *Johnson v. State*, 904 So. 2d 400, 405-13 (Fla. 2005), this Court simultaneously rejected *Ring* as having no applicability in Florida and determined that it would not be given retroactive effect. *Johnson* was based upon the faulty premise that *Ring* did not apply in Florida; therefore, the retroactivity of *Hurst* cannot be decided based on *Johnson*. However, in *Johnson* this Court, in considering the extent of reliance on the sentencing scheme now explicitly held unconstitutional, cited to the fact that 59 people had been executed between the reinstatement of the death penalty and the time of the *Ring* decision. *Id.* at 410. This Court reasoned that the number of executions showed the extent of the reliance. *Id.* The number of executions has now reached 91.⁵ Far from being a factor weighing against retroactive application, the fact that 91 people have been executed after being sentenced in violation of their constitutional rights should be a factor weighing strongly *in favor* of retroactivity, as it applies more to the first consideration in the

⁵ *See* Florida Department of Corrections, *Death Row*, available at www.dc.state.fl.us/oth/deathrow/#Statistics.

three-fold test of “sufficient magnitude” described in *Witt* than the second. The rule’s purpose, ensuring capital defendants are sentenced to death only after receiving the jury determination guaranteed by the Sixth Amendment, cannot be emphasized enough.

“In determining whether a change in the law should apply retroactively, this Court must balance . . . the need for decisional finality with the concern for fairness and uniformity.” *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2005). Although the State acquires an interest in the finality of a conviction once that conviction becomes final,

the doctrine of finality can be abridged when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Falcon, 162 So. 3d at 960, *quoting Witt*, 387 So. 2d at 925. In *Falcon*, a case in which this Court determined whether the interest in finality was sufficient to justify depriving a person of liberty after being sentenced under an unconstitutional scheme, fairness and uniformity trumped finality. *Id.* When the thing at stake is not just liberty, but *life*, surely the interests of fairness and uniformity trump the State’s interest in finality.

The third consideration, “the effect on the administration of justice of a retroactive application of the new rule,” also strongly favors retroactive application. The number of individuals who would be affected by retroactive application of *Hurst* is limited and easily determinable, as it would be limited to the individuals currently on death row whose cases are in the postconviction posture. There are currently 389 people on death row, and while the Department of Corrections does not divide them by case procedural posture on its roster, it is clear that the number of people who are in the postconviction phase is less than 389.⁶

If the sentences of every death-sentenced prisoner were automatically commuted to life sentences, Florida would suffer very little in terms of an impact on its administration of justice. In Fiscal Year 2014-2015, there were an average of 100,563 prisoners housed in the Florida Department of Corrections.⁷ The death row population therefore represents less than half of one percent of the Florida prison population. Such a small percentage would be easily absorbed by the general population facilities.⁸

⁶ Florida Department of Corrections, *Death Row Roster*, available at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited 2/23/16).

⁷ Florida Department of Corrections, *Average Daily Population Fiscal Year 2014-2015*, available at <http://www.dc.state.fl.us/pub/pop/facility/avg1415.html>.

⁸ After *Furman*, 100 death-sentenced prisoners were resentenced to life in prison without any reported negative effect on the administration of justice. See *In re Baker*, 267 So. 2d 331.

Conducting new penalty phase trials for those affected also would not be a staggering undertaking. This Court indicated in *Johnson v. State*, 904 So.2d 400 (Fla. 2005) that the retroactive application of *Ring* would result in problems due to the age of many of the cases and the resulting diminished ability of attorneys to locate witnesses and present evidence. *Johnson*, 904 So. 2d at 411-12. Of the 389 people on death row, nearly half were sentenced after the year 2000⁹. Attorney files in capital cases are well- preserved and maintained due to the fact that Florida has provided for collateral representation in those cases. See Fla. Stat. § 27.701; §27.702. The concern about the effect on the administration of justice should be given far less weight against retroactive application than provided for in *Johnson*. Furthermore, new penalty phase proceedings would be spread out amongst every county with prisoners sentenced to death under the unconstitutional statute and would not be unduly burdensome on the courts' resources when weighed against the constitutional rights being protected.

Equal protection concerns are at issue in the determination of retroactivity as well. See *In re Baker*, 267 So. 2d 331, 334 (Fla. 1972) (“We have already granted this requested relief to 27 members of the class of persons under sentence of death.

⁹ Seventy-seven (20%) were sentenced in the 2010's and 113 (29%) were sentenced in the 2000's, 132 (34%) were sentenced in the 1990's, 59 (15%) were sentenced in the 1980's, and 13 (3%) were sentenced in the 1970's. See *Death Row Roster, supra*, n.6.

There appears to be no reason why the remaining members of the class need be treated differently.”). Each of the 389 prisoners currently on death row was sentenced under an unconstitutional sentencing scheme. Under *Hughes v. State*, 901 So. 2d 837, 839 (Fla. 2005), *Hurst* will apply to convictions that are not yet final. If *Hurst* is not applied retroactively to post-conviction cases, prisoners whose direct appeals are still pending will have their death sentences vacated, while prisoners with otherwise indistinguishable cases whose sentences are final will have no mechanism for relief. Justice requires that *Hurst* apply retroactively.

The essential principle of Florida’s retroactivity law is that only the very important cases apply retroactively. Only a “sweeping change of law” of “fundamental significance” constituting a “jurisprudential upheaval” will qualify. *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citing *Witt v. State*, 387 So. 2d 922, 925, 929, 931 (Fla. 1980)). *Hurst*, perhaps more so than virtually any other case, satisfies this standard. *Hurst* must be found to apply retroactively under Florida law. *Hurst* states unequivocally that “[w]e hold [Florida’s] sentencing scheme unconstitutional.” *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016). *Hurst* was an eight-to-one, resoundingly unified pronouncement from the Supreme Court that Florida’s sentencing of capital defendants has long been

unconstitutional and vindicates arguments that have been made repeatedly to this Court regarding that infirmity at least since *Ring*¹⁰, if not before that.

Finally, in deciding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012) was entitled to retroactive effect under *Witt*, this Court explained:

As this Court stated in *Witt*, “[c]onsiderations of fairness and uniformity make it very ‘difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.’” Here, if *Miller* is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with “indistinguishable cases” will serve lesser sentences merely because their convictions and sentences were not final when the *Miller* decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court’s decision in *Miller* retroactively.

Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015) (citations omitted) (emphasis added). If unfairness implicating a liberty interest demands retroactive application, then so too does unfairness implicating one’s interest in life.

¹⁰ “Indeed, I continue to believe that, in light of *Ring*, Florida’s death penalty statute, as applied in circumstances like those presented in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional.” *Hurst v. Florida*, 147 So.3d 435, 449-50 (Fla. 2014), see *Peterson v. State*, 94 So.3d 514, 538 (Fla. 2012) (Pariente, J., concurring as to conviction and dissenting as to sentence).

Further, if the unfairness of juveniles in indistinguishable cases receiving different non-capital sentences is too great, then so too is the unfairness of executing Mr. Abdool in the future while defendants with indistinguishable cases will receive the benefit of *Hurst* and not be put to death due to the timing of their cases. Certainly, there will be capital defendants with “indistinguishable cases” whose death sentences will be vacated and will thus receive lesser sentences simply because their convictions and sentences were not final when the *Hurst* decision issued. Such arbitrariness implicates not just the general due process notion of fairness, but also the Eighth Amendment principles enunciated in *Furman v. Georgia*¹¹ that preclude the arbitrary imposition of the death penalty. Such patent unfairness requires that *Hurst* be applied retroactively.

II. Hurst’s Rejection of Reasoning Based on Stare Decisis Strongly Favors its Retroactive Application:

The U.S. Supreme Court found that this Court “considered *Ring* inapplicable in light of [the U.S. Supreme] Court’s repeated support of Florida’s capital sentencing scheme in pre-*Ring* cases,” specifically citing to *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed. 2d 728 (1989) and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed. 340 (1984). *Hurst* at 620-1. This Court reasoned that since the U.S. Supreme Court “never expressly” overruled *Hildwin* in *Ring* or

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

otherwise, *Ring* was inapplicable to Florida. *Id.*, quoting *Hurst v. State*, 147 So. 3d 435, 446-47 (Fla. 2014).

The U.S. Supreme Court has now expressly overruled *Hildwin* and *Spaziano* “to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury’s fact finding that is necessary for imposition of the death penalty.” *Id.* at 7-9. In doing so, it specifically rejected any argument pursuant to the doctrine of *stare decisis*, stating:

Although “the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]” . . . [o]ur precedents are not sacrosanct.’ . . . ‘[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.’ . . . And in the *Apprendi* context, we have found that “*stare decisis* does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.

Id. at 9 (internal citations omitted). In expressly overruling *Hildwin* and *Spaziano* and rejecting the doctrine of *stare decisis*, the U.S. Supreme Court indicated that retroactive application of *Hurst* is favored. The Court held that the logic of those decisions had been “washed away” by the subsequent developments of constitutional law in *Apprendi* and *Ring*. *Id.* at 8. Although not expressly overruled until *Hurst*, the U.S. Supreme Court held that those precedents contained no substantive reasoning supporting the unconstitutional sentencing scheme in light of *Apprendi* and *Ring* and indicated that this Court was not required to wait for a U.S. Supreme

Court decision expressly overruling them. *Id.* at 7-9. Retroactive application is necessary to correct the injustices perpetuated by this faulty reliance.

III. Hurst Applies to Mr. Abdool's case:

The United States Supreme Court held in *Hurst* that Florida's sentencing scheme violates the Sixth Amendment. Specifically, the Court ruled that "[t]he 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.*" *Hurst* at 619 (emphasis added). The U.S. Supreme Court identified in *Hurst* what those critical fact findings are, leaving no doubt as to how the statute must be read under the Sixth Amendment:

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."** Fla. Stat. § 775.082(1) (emphasis added). 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."** § 921.141(3). "[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.

Id. at 622 (emphasis added) (citations omitted).

Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily defined facts in addition to the verdict unanimously finding the

defendant guilty of first degree murder. The additional statutorily defined facts required to render the defendant death eligible are 1) that “sufficient aggravating circumstances exist” and 2) that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” See § 921.141(3); *Hurst* at 622. Pursuant to Florida’s statute, the judge has to make the specific findings. However, *Hurst* identified these findings as the operable findings that must be made by a jury. So did *Ring*: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” *Ring v. Arizona*, 536 U.S 584, 602 (2002).

In Mr. Abdool’s case, the jury was advised repeatedly that the sentence they were to render was “advisory” and that the jury would “recommend the appropriate sentence”. TR13:853, 858. The instructions given to the jury also emphasized the advisory nature of the jury’s decision. The jury was specifically told that “the final decision as to what punishment shall be imposed is the responsibility *of the judge*”. TR6:729-734; TR16:1286 (emphasis added). The jury was consistently told that they will render an “advisory sentence” and make a “recommendation”. TR16:1286-7,1290, 1293-5.

Prior to trial, trial counsel filed two motions: “Motion for Findings of Fact by the Jury” and “Motion for Interrogatory Penalty Phase Verdict”, attempting to secure

verdict forms that would reveal the jury's fact-findings. The trial court denied these motions. TR2:113; TR4:394-6. This resulted in a verdict form labeled "Advisory Sentence" that was used by the jury to render its advisory sentence. The form is attached as Appendix A. This form simply contained two spaces to check off. One was for the imposition of a life sentence without parole. The other one, the first on the form and the one the jury checked, had a sentence that read "A majority of the jury, by a vote of 10 to 2 *advise and recommend* to the court that it impose the death penalty upon Dane Abdool." TR6:736 (emphasis added). The 10 to 2 vote was handwritten onto the form by the foreperson.

When the jury came to its decision, again the judge stated, "I understand that you have reached an *advisory sentence*." TR16:1301 (emphasis added). No findings as to any facts can be gleaned from either the advisory sentence form or from the record at trial¹². Furthermore, the jury was led to believe continuously throughout the trial that the judge would make the ultimate sentencing decision.

It is abundantly clear from the face of the record that in Mr. Abdool's case, a judge, and not a jury, found the facts necessary to impose a sentence of death. This is a direct violation of the Sixth Amendment as interpreted not just by *Hurst*, but also by *Ring*, which was the law at the time Mr. Abdool was sentenced. As noted

¹² The jury in this matter was polled, but only to ascertain whether "the advisory sentence was correctly stated". TR16:1301-1303.

above, the jury made *no* findings at all, other than a non-unanimous recommendation of death. As *Hurst* explicitly states, “The State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires.” *Hurst v. Florida*, 136 S.Ct. 616, 622 (2016).

Mr. Abdool’s trial counsel and appellate counsel preserved these errors and appropriately raised the issues. Like Timothy Hurst, Mr. Abdool argued on direct appeal that his sentence violated the Sixth Amendment in light of *Ring*. Appellate counsel further argued that Mr. Abdool’s death sentence was infirm as a result of the jury’s role being repeatedly diminished by arguments made at trial, the trial court and instructions given during trial in contravention of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)¹³.

The circumstances of Mr. Abdool’s sentence presents, even in the narrowest reading of *Ring/Hurst*, Sixth Amendment concerns, since he had a non-unanimous vote and he does not have a prior or contemporaneous felony conviction. Only two aggravators were presented to the jury: HAC and CCP, neither of which involved any fact finding during the guilt phase.

This can no longer stand after *Hurst*, and Mr. Abdool is entitled to relief. This Court should apply Fla. Stat. §775.082(2) and sentence Mr. Abdool to life. Fla. Stat.

¹³ This Court rejected those claims. *Abdool v. State*, 53 So.3d 208, 228 (Fla. 2010).

§ 775.082(2), first enacted in 1972 as Fla. Stat. § 775.082(2) and (3), provides in relevant part:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See Ch. 72-118, Laws of Fla. (1972).

Under this statutory provision, Mr. Abdool is entitled to an automatic life sentence. With no constitutional statute, Fla. Stat. §775.082(2) leaves no discretion to the courts as to the remedy. In this case, the court has jurisdiction over Mr. Abdool as “a person previously sentenced to death for a capital felony”. Therefore it is this Court’s statutory duty to sentence Mr. Abdool to life imprisonment as provided in subsection (1) of the same statute. The portion of Fla. Stat. § 775.082(1) providing for judge-made findings justifying the death penalty has been nullified pursuant to the *Hurst* decision. However, the remaining portion of that subsection provides that, if the death penalty is not imposed, a person who stands convicted of a capital felony “shall be punished by life imprisonment and shall be ineligible for parole.” This Court need look no further than Fla. Stat. § 775.082(2) for the remedy correcting the constitutional injury occasioned by Florida’s capital sentencing

scheme prior to the *Hurst* decision. It mandates a life sentence for each person sentenced under it, including Mr. Abdool.

Alternatively, if this Court does not find Fla. Stat. §775.082(2) applicable, then *Hurst* mandates that at the very least, Mr. Abdool receive a constitutionally compliant resentencing.

IV. The Error Is Not Harmless:

The Court in *Hurst* declined to address the State's argument that the error in that case was harmless because "This Court normally leaves it to state courts to consider whether an error is harmless..." *Hurst* at 624. It is Mr. Abdool's position that 1) *Hurst* does not mandate a harmless error analysis and 2) that the error in Mr. Abdool's case is not subject to harmless error.

The mention of harmless error in *Hurst* arose as a response to the State's suggestion that the error would be harmless. *Hurst* at 624. The U.S. Supreme Court merely mentioned it and stated it would not address the issue because it was the Court's normal practice to leave such considerations to state courts. *Id.* This in no way mandates or orders that this Court or any other court in Florida has to engage in a harmless error analysis.

Furthermore, the error resulting from a *Hurst* violation can never be harmless. The statute under which Mr. Abdool was sentenced to death has been held to be unconstitutional in violation of the Sixth Amendment. The Sixth Amendment

provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” The right to a jury trial in serious criminal cases is “fundamental to the American scheme of justice”. See *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993), citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). “The right to a trial by jury reflects... ‘a profound judgment about the way in which law should be enforced and justice administered’.” *Id.* at 281, citing *Duncan v. Louisiana*, 391 U.S. at 155. “The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error’.” *Id.* at 281-2. A harmless error review in this context would be illogical, and would require the courts to hypothesize how a jury might have decided the sentence in a hypothetical proceeding consistent with *Hurst*, *Ring*, *Apprendi* and the Sixth Amendment.

According to Florida law, the element distinguishing death-eligible first-degree murder from first-degree murder, the maximum punishment for which is life imprisonment without the possibility of parole, is the existence of “sufficient aggravating circumstances” not outweighed by mitigating circumstances. See Fl. Stat. §775.082; §941.121. In Florida, “[n]otwithstanding 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.” Fl. Stat. §921.141(3) (emphasis added). However, every fact necessary to raise the penalty

beyond the maximum must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J. concurring)¹⁴. Because Mr. Abdool’s jury was never required to find beyond a reasonable doubt sufficient aggravating circumstances not outweighed by the mitigating circumstances, there is no way to determine whether the error was harmless. “The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action... it requires *an actual jury finding....*” *Sullivan* at 280; see also *Bollenbach v. U.S.*, 326 U.S. 607 (1946). Pursuant to *Hurst*, “[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.” *Hurst* at 622, citing *Walton v. Arizona*, 497 U.S. 639, 648 (1990)¹⁵. In other words, the jury recommendation does not carry any true findings of fact and is virtually meaningless. Furthermore, we know from the advisory sentence form in Mr.

¹⁴ “Accordingly, whether or not the States have been erroneously coerced into the adoption of “aggravating factors,” wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: *they must be found by the jury beyond a reasonable doubt.*” *Ring v. Arizona*, 536 U.S. 584, 612, 122 S. Ct. 2428, 2445, 153 L. Ed. 2d 556 (2002) (Scalia, J. concurring) (emphasis added).

¹⁵ See also *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.*” (emphasis added) It is explicit within Florida’s jurisprudence interpreting the now unconstitutional sentencing scheme that the jury’s verdict cannot be relied upon to provide factual findings, as none were made pursuant to the unconstitutional law.

Abdool's case that the jury's decision was not unanimous and that there were no guilt phase findings for either of the two aggravators, HAC or CCP. Based upon the fact-finding that the Sixth Amendment, as interpreted by *Hurst*, *Ring* and *Apprendi*, requires, an advisory recommendation is constitutionally insufficient. See *Hurst* at 622.

Hurst changes the dynamics of jury selection and death qualification, and its proper application will impact an attorney's strategy and decision-making throughout the trial. No longer will the jury's role in determining death-eligibility be advisory; it will make the ultimate sentencing decision. Although the Florida Legislature has not yet enacted a statute to replace the one that was found unconstitutional in *Hurst*, thus leading to even more speculation regarding a harmlessness analysis, the landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth, Eighth and Fourteenth Amendments. Based upon the factual record before this Court, in particular the jury's advisory sentence of death where there was no unanimous jury finding as to any of the aggravating circumstances and the lack of constitutionally required jury-fact finding, the error is clearly not harmless.

CONCLUSION

It is apparent that *Hurst* reaches to the heart of an adversarial process where a capital defendant's life hangs in the balance, and expressly clarifies the role of the impartial jury in capital cases. Based upon *Hurst*, *Ring* and *Apprendi*, it is clear that Mr. Abdool's sentence was rendered under an unconstitutional sentencing scheme and is inherently flawed. Mr. Abdool's jury made no discernable factual findings, and rendered a non-unanimous advisory sentence. A mere recommendation from the jury is no substitute for the factual finding that is required by *Apprendi*, *Ring* and now *Hurst*. Mr. Abdool is entitled to retroactive application of *Hurst* and to have his death sentence vacated and life sentence imposed. Or, in the alternative, Mr. Abdool is entitled to a new penalty phase proceeding consistent with *Hurst* in order to preserve the guarantees of the Sixth Amendment.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Scott A. Browne, Assistant Attorney General @ scott.browne@myfloridalegal.com and CapApp@myfloridalegal.com, on this 23rd day of February, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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