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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-258

NELSON SERRANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

AMENDED SUPPLEMENTAL INITIAL BRIEF OF APPELLANT IN LIGHT OF *HURST V. FLORIDA*

APPEAL FROM CIRCUIT COURT
TENTH JUDICIAL CIRCUIT, POLK COUNTY

MARCIA J. SILVERS, ESQ.
Florida Bar No. 342459
Marcia J. Silvers, P.A.
Attorney for Nelson Serrano
770 South Dixie Highway
Suite 113
Coral Gables, Florida 33146
Telephone: 305/774-1544
Facsimile: 844/270-5670
marcia@marciasilvers.com

PRELIMINARY STATEMENT

This Amended Supplemental Brief is being filed to address the application of *Hurst v. Florida*, 136 S.Ct. 616 (2016), to Mr. Serrano's case. Oral argument is presently set in this appeal for June 8, 2016. The following symbols will be used to designate references to the record in this appeal:

"R." – volume and page number of record on direct appeal to this Court;

All other references will be self-explanatory.

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INTRODUCTION

On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida,* 136 S.Ct. 616 (2016). The *Hurst* Court held that Florida's capital sentencing scheme violated the Sixth Amendment to the United States Constitution. On May 19, 2016, Mr. Serrano filed a motion to file the instant amended supplemental brief addressing the application of *Hurst* to Mr. Serrano's case. Mr. Serrano's counsel has endeavored to provide the Court with the best brief possible in light of the far-reaching implications of *Hurst* which is a profound decision with a myriad of implications on Florida's capital sentencing process and on Mr. Serrano's case.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Mr. Serrano filed a series of pretrial motions objecting under *Ring v. Arizona*, 536 U.S. 584 (2002) to the jury not making the necessary findings of facts to determine Mr. Serrano's death eligibility. The motions were denied. (R249-259, 310-312, 334-357; transcript of 10/18/06 at 14-16). Mr. Serrano's trial occurred in 2006, four years after the United States Supreme Court, in *Ring*, applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to Arizona's capital sentencing scheme and held it violated the Sixth Amendment.

The jury recommended and advised, by a 9-3 vote, that the court impose the death penalty on Mr. Serrano. (R1500-03). No findings were made by the jury about any death eligibility factors set forth

in Florida’s statute because they were not instructed to make any such findings. The trial court told the jurors that their recommendation was merely advisory and that the final decision as to what punishment would be imposed was the sole responsibility of the judge. (Penalty phase transcript of 10/23/16 at 60.)

On direct appeal, Mr. Serrano again argued that Florida’s sentencing scheme is unconstitutional because the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. See Corrected Amended Initial Brief of Appellant, *Serrano v. State*, SC07-1434 at 97-100. This Court addressed and rejected the merits of this argument. *See Serrano v. State*, 64 So.3d 93, 114-15 (Fla. 2001).

SUMMARY OF THE ARGUMENT

Like *Furman v. Georgia,* 408 U.S. 238 (1972), the recent decision in *Hurst* represents a tectonic shift in capital jurisprudence and can only be described as a development of fundamental significance and jurisprudential upheaval. *Hurst* held that Florida’s capital sentencing scheme violated the Sixth Amendment because it permitted a judge, not a jury, to find each fact necessary to impose a sentence of death; and, *Hurst* held that a jury’s mere recommendation is not enough. The *Hurst* Court explained that the eligibility facts that must be found under Florida’s capital sentencing scheme are (1) that sufficient aggravating circumstances exist, and (2) that there are

insufficient mitigating circumstances to outweigh the aggravating circumstances. *See* §921.141(3), Fla. Stat. Neither of these facts were found by Mr. Serrano's jury (and have not been found by any jury in any capital case under the now-unconstitutional sentencing scheme in Florida).

Hurst applies to Mr. Serrano especially in light of the fact that, at trial and on direct appeal, he preserved his Sixth and Eighth Amendment challenges to Florida's capital sentencing statute. *Hurst* error is structural and not amenable to harmless error analysis and Mr. Serrano must be resentenced to life imprisonment pursuant to the mandatory language of §775.082(2), Fla. Stat. (2015). If this Court is not inclined automatically to order that Mr. Serrano be sentenced to life imprisonment, Mr. Serrano should be granted leave to file a Rule 3.851 Motion to raise a *Hurst* claim or be granted any other relief as deemed just and proper by this Court.

ARGUMENTS AND AUTHORITIES

ARGUMENT I

IN LIGHT OF *HURST V. FLORIDA,* MR. SERRANO'S DEATH SENTENCES MUST BE VACATED AND HE MUST BE SENTENCED TO LIFE IMPRISONMENT.

I. Introduction.

The decision in *Hurst v. Florida,* 136 S.Ct. 616 (2016), is a tectonic shift in Florida capital law and requires a global paradigm shift in our understanding of the Sixth Amendment aspects

of Florida's death penalty scheme. *Hurst* establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong and can only be described as a development of fundamental significance and jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment."). *Hurst* also establishes that Mr. Serrano's trial and appellate counsel were correct in their arguments to the lower court (at trial) and to this Court (on direct appeal) that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment and that he should be sentenced to life imprisonment. Mr. Serrano submits that he must be given the benefit of *Hurst* and be resentenced to life imprisonment under the mandatory language of §775.082(2), Fla. Stat. (2015).[1] However, as explained in more detail below, if this Court is not inclined automatically to order that Mr. Serrano be sentenced to life

[1]This statutory provision provides:
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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

imprisonment, he should be granted leave to file a Rule 3.851 Motion to raise a *Hurst* claim or be granted any other relief as deemed just and proper by the Court.

II. The *Hurst* Decision.

In *Hurst,* the United States Supreme Court held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 136 S.Ct. at 619. Specifically, the Court held 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." *Id.* The *Hurst* Court identified what those critical fact-findings are, leaving no doubt as to how Florida's capital sentencing statute must be read:

> 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. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3), Fla. Stat.; *Hurst*, 136 S.Ct. at 622. *Hurst* identified these findings as the operable findings that must be made by a jury. Neither of these factual determinations was made by Mr. Serrano's jury despite repeated requests to the trial court that the jury be required to make these requisite findings. Because they were not, Mr. Serrano argued and argues here, that he was not death eligible and must be sentenced to life imprisonment.

Hurst's holding is girded on the principle that findings of fact statutorily required to render a Florida defendant death eligible are elements of the offense, separating first-degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi,* 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227 (1999). In *Ring,* the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth

Amendment.[2] The Supreme Court in *Hurst* found that this Court's consideration, in *Bottoson v. Moore,* 833 So.2d 693, 695 (2002) (per curriam),of the potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional.

As previously explained, Mr. Serrano's jury was repeatedly told that its role in determining the sentence to be imposed was merely advisory and that it was only required to provide the court with an "advisory opinion" or "recommendation." Mr. Serrano's jury made no findings as to the eligibility facts necessary to make Mr. Serrano death eligible and the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S.Ct. at 622. Mr. Serrano's death sentences unquestionably violate the Sixth Amendment.

Notably, in Mr. Hurst's case:

> he had no prior convictions;
>
> he was not convicted of anything other than murder at his guilt-innocence proceedings;

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[2]In Arizona, the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination *by the court* that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

the jury that recommended death did so by a non-unanimous 7-5 vote;

his jurors were told that their decision was only a recommendation;

and a judge alone made all the findings upon which his death sentence was based.

In Mr. Serrano's case:

he had no prior convictions;

he was not convicted of anything other than murder at his guilt-innocence proceedings;

the jury that recommended death did so by a non-unanimous 9-3 vote;

his jurors were told that their decision was only a recommendation;

and a judge alone made all the findings upon which his death sentence was based.

There is no difference between Mr. Hurst's and Mr. Serrano's cases and sentences. Like Mr. Hurst, Mr. Serrano is entitled to relief and this Court should order resentencing per *Hurst*.

The Sixth Amendment violation in this case is structural error requiring resentencing. This Court imposed life sentences in all the cases in which death sentences had been imposed under the capital sentencing scheme determined to be unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972). The same result is proper here.

Mr. Serrano also agrees with amicus in *Lambrix v. State*/*Lambrix v. Jones*, Case Nos. SC16-8 & SC16-56, that the plain language of § 775.082(2), Fla. Stat., dictates that this Court

vacate his death sentence, remand his case, and order that he be resentenced to life without parole. *See* Amicus Brief of the Florida Association of Criminal Defense Lawyers (FACDL) in *Lambrix v. State/Lambrix v. Jones*, Case Nos. SC16-8 & SC16-56).

If this Court is not inclined automatically to order that Mr. Serrano be sentenced to life imprisonment, Mr. Serrano should be granted leave to file a Rule 3.851 Motion to raise a *Hurst* claim or be granted any other relief as deemed just and proper by this Court. When the United States Supreme Court held in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), that instructing sentencers that there were only a limited number of statutory mitigating circumstances they could consider violated the Eighth Amendment, this Court ruled that *Hitchcock* constituted a change in law of fundamental significance. *Riley v. Wainwright*, 517 So.2d 656, 660 (Fla. 1987). At first this Court determined that *Hitchcock* claims could be addressed in state habeas petitions. *Hall v. State*, 541 So. 2d 1125, 1128 n.4 (Fla. 1989). But it quickly became apparent that the statute limiting mitigation to a finite statutory list had operated on defense attorneys in a way that shaped their investigation, strategy, and presentation of evidence and argument. In order to assess the constraints on counsel inflicted by the unconstitutional restriction on mitigation, this Court remanded cases to the trial courts to take evidence. *Hall*, 541 So. 2d at 1126 (Florida's pre-*Hitchcock* law "precluded Hall's counsel from

investigating, developing, and presenting possible nonstatutory mitigating circumstance”); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) (“according to the affidavits filed with this motion, Meeks’ counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction.”).

ARGUMENT II

HOUSE BILL 7101 ESTABLISHES A CONSENSUS FOR EIGHTH AMENDMENT PURPOSES THAT A DEATH SENTENCE MAY NOT BE IMPOSED WHEN THREE JURORS DURING THE PENALTY PHASE PROCEEDING VOTED IN FAVOR OF A LIFE SENTENCE.

At Mr. Serrano’s penalty phase proceeding, three jurors voted in favor of a life sentence. On March 7, 2016, House Bill 7101 became effective when it was signed by the Governor of Florida. It substantially revised Florida’s capital scheme and provides that, when three jurors vote in favor of a life sentence, a death sentence may not be imposed. This represents a consensus for Eighth Amendment purposes that a death sentence may not be imposed on a capital defendant when three or more jurors in a penalty phase proceeding voted in favor of a life sentence.

This claim could not have been presented before the enactment of House Bill 7101 on March 7, 2016. Thus, it is timely presented herein.

The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with “the evolving standards of decency that mark the progress of a maturing society.” Roper v. Simmons, 543 U.S. 551, 561

(2005)(quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v.Dulles, 356 U.S. at 100. "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation." Id. at 103. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. at 382 (Burger, C.J., dissenting)). "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy, 554 U.S. at 420. "Though the death penalty is not invariably unconstitutional [citation], the Court insists upon confining the instances in which the punishment can be imposed." Id. For example, the Eighth Amendment requires that: "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005). Further, "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Hall v.Florida, 134 S.Ct. 1986, 2001 (2014).

There is now a consensus that, when three or more jurors vote for the imposition of a life sentence in a particular case, neither

the crime nor the defendant have been shown to be among the worst of the worst as the Eighth Amendment requires before a death sentence can be imposed. See Atkins v. Virginia, 536 U.S. 304, 319 (2002) (the death penalty must be reserved for those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."). When three or more jurors vote for a life sentence, there is not a strong enough basis for the imposition of a death sentence under the Eighth Amendment. Three or more jurors voting for a life sentence clearly is objective indicia of societal standards.

Under House Bill 7101, the 9-3 death recommendation means that Mr. Serrano's death sentence stands in violation of the Eighth Amendment. Accordingly, Mr. Serrano's death sentence must be vacated and his case remanded for the imposition of a life sentence.

CONCLUSION.

Based on the foregoing arguments and in light of *Hurst v. Florida*, House Bill 7101, the Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 16, 17 and 22, Fla. Const., Mr. Serrano submits that the Court should vacate his unconstitutional sentence of death and remand to the circuit court to resentence Mr. Serrano to life imprisonment; and/or permit him to file a Rule 3.851 Motion to raise the claims raised herein; and/or grant any other relief as deemed just and proper by the Court.

Respectfully submitted,

/s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQUIRE
Counsel for Appellant
Florida Bar No. 342459
Marcia J. Silvers, P.A.
770 South Dixie Highway, Suite 113
Coral Gables, Florida 33146
Telephone: 305/774-1544
marcia@marciasilvers.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 19th day of May 2016 to: capapp@myfloridalegal.com and stephen.ake@myfloridalegal.com.

BY: /s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) for computer-generated briefs.

/s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQ.