IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1628

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Arbelaez's successive motion for postconviction relief which was summarily denied by the trial court. The motion was brought pursuant to Florida Rule of Criminal Procedure 3.851.

The following symbols will be used to designate references to the record in this appeal:

"R#" – page number on direct appeal to this Court;

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SUMMARY OF THE ARGUMENT

On January 12, 2016, the United States Supreme Court rendered its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Court held that Florida's death penalty scheme was unconstitutional because it allowed a judge, not a jury, to find each fact necessary to impose a death sentence, and that a jury's mere recommendation is not enough. *Id*. at 619. After *Hurst*, a Florida death sentence unsupported by jury findings of sufficient aggravating circumstances not outweighed by mitigating circumstances has no basis in law, is invalid, void, and unconstitutional.

Hurst 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. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance and jurisprudential upheaval. Thus, *Hurst* is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and must be given retroactive effect.

Hurst error is structural and not amenable to harmless error analysis. Because Arbelaez was sentenced to death under an unconstitutional statute, he must be resentenced to life imprisonment in accordance with Fla. Stat. § 775.082.

STATEMENT OF THE CASE AND FACTS

During voir dire, the State told the jury that their role was merely advisory, that they would only be giving the court a "recommendation" as to the sentence, and that the judge would make the final sentencing decision. (R. 131) . The court also repeatedly told the jurors that the court had the "final decision" for deciding whether Arbelaez would be sentenced to death.

Before the penalty phase began, the court reminded the jury that "[f]inal decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you the jury render to the court an advisory sentence as to what punishment should be imposed" (R. 976). During the defense closing, the defense told the jury "Your verdict is written in stone. You are to decide if he lives or dies" The State objected to this remark as a misstatement of the law and the objection was sustanied. (R. 1042-43) At the close of penalty phase evidence, before the jury began deliberations, the judge instructed them that the "final decision as to Mr. Arbelaez's sentence would be with the courtand that the jury was to render an "advisory sentence" t othe court. (R. 1049).

The forms gave no indication of any findings 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 jury was instructed on the "During the course of a felony" aggravator, HAC and CCP. The jury returned with a verdict of 11-1 in favor

of the death penalty. However there is no indication anywhere in the record as to which jurors found which aggravating factors.

The judge then conducted an independent sentencing proceeding and imposed sentences of death. The court found all three aggravators that the jury had been instructed on.

What the jury found as a matter of fact is unknown. All that is known is that the jury's death "recommendation" were made by a vote of 11 to 1.

ARGUMENT

A jury did not make the findings of fact necessary to render Arbelaez eligible for a death sentence.

Hurst 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." *Hurst*, 136 S. Ct. at 619. There is no conviction of capital murder in Florida without the jury findings required by *Hurst*. *Hurst* identified what those critical factfindings 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).

Hurst pointed out that "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id*. at 619 (citing Florida Statutes § 775.082(1)). Under Florida law, death eligibility depends on the presence

of certain statutorily defined facts, in addition to the verdict unanimously finding the defendant guilty of first degree murder: (1) that sufficient aggravating circumstances exist; and (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *See* § 921.141(3); *Hurst*, 136 S. Ct. at 622. Under *Hurst*, these findings of fact must be made by a jury. Neither of these factual determinations was made by Arbelaez's jury, and because they were not, Arbelaez was not death-eligible and must be sentenced to life imprisonment. The *Hurst* Court squarely held: "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." *Hurst*, 136 S. Ct. at 622. The same is true here.

The findings of fact statutorily required to render a defendant death-eligible are elements of the offense which separate first degree murder from capital murder under Florida law, and form part of the definition of the crime of capital murder. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" to state sentencing schemes under the Fourteenth Amendment).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the U.S. Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found that it violated the Sixth Amendment.[1] The U.S. Supreme Court in *Hurst* found that this Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) had wrongly failed to recognize that *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida*, 490 U.S. 638 (1989), which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*.

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury. *Hildwin*, 490 U.S., at 640-41. Their conclusion was wrong, and irreconcilable with *Apprendi*.

Hurst, 136 S. Ct. at 623 (citations omitted).

[1] In Arizona, the factual determination required by Arizona law before a death sentence was authorized was 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 the findings of sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravators. Fla. Stat. § 921.141(3).

The fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death-eligible is unlike the Arizona law that was at issue in *Ring*, and has at least two important consequences in assessing *Hurst's* scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error, and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed, there must be a finding that those circumstances—if present—are **sufficient** in a given case to justify a death sentence. Not all prior violent felonies are equal. The sufficiency finding required by the statute means that there must first be a case-specific assessment of the facts of the prior crime and a determination by the jury as to whether those facts—in conjunction with the factual basis for any other aggravators—are sufficient to justify the imposition of a death sentence. Then the jury must likewise evaluate the mitigating factors and make a finding that they are not sufficient to outweigh the aggravators.

Arbelaez's jury did not make any such findings. In fact, they made no findings at all. The jury was repeatedly told that its role in determining punishment was merely advisory, and that it was only required to provide the court with an advisory opinion or recommendation. The form signed and returned to the court merely stated that "a majority of the jury . . . **advise and recommend to the Court** that it impose the death penalty" on Arbelaez. The jury made no findings as to the facts necessary

to make Arbelaez 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; *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Although the U.S. Supreme Court did not specifically address whether Petitioner Hurst was entitled to a jury determination of his intellectual disability, the logic of *Hurst* suggests that the Sixth Amendment right must also attach to an ID claim. The *Hurst* 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." Florida Statute § 921.137(2) provides that "[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled." The determination of whether someone is ID is made by a judge, not a jury. Fla. Stat. § 921.137(4).

The logic of *Hurst* means that the Sixth Amendment right to a jury attaches to the ID determination. Arbelaez is categorically ineligible for death if he is ID. Once there is evidence raising a question of fact as to a defendant's ID, there must be a factual finding that the defendant is **not** ID before he can be subjected to a death sentence. Under *Hurst*, such a factual finding must be made by a jury, not a judge.

The elements a jury must find in order to subject a defendant to death must be found unanimously.

Apprendi, Ring, and *Hurst* hold that the facts necessary to render a capital

defendant death-eligible are elements which must be found by a jury. "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." *Hurst*, 136 S. Ct. at 602.

The requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Bottoson v. Moore*, 833 So. 2d 693, 714 (Fla. 2002) (Shaw, J., concurring). This Court has held true to that requirement over the years, stating in *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881) that "[t]he record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact," and later in *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) that "[i]n this state, the verdict of the jury must be unanimous."

This Court memorialized the unanimity requirement in Florida Rule of Criminal Procedure 3.440, which provides that "[n]o verdict may be rendered unless all of the trial jurors concur in it," that a court may not even correct matters of form in a verdict without "the unanimous consent of the jurors," and that a verdict cannot be entered of record if "disagreement is expressed by one or more" jurors. Fla. R. Crim. P. 3.440 (Rendition of Verdict; Reception and Recording). The requirement also appears in Florida Court's Standard Jury Instruction 3.10, which admonishes juries that "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." The right to a unanimous jury finding on elements

of crime is foundational in Florida law.

This means that *Hurst's* application of *Apprendi* to the § 921.141(3) findings comes with a concomitant requirement of unanimity. At issue in *Apprendi* was a sentencing statute in which the New Jersey Legislature "decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense," so that it would be found by a judge, rather than a jury. *Apprendi*, 530 U.S. at 471. This violated the Sixth Amendment and the right to a jury trial embodied therein, as the United States Supreme Court explained in *Apprendi*:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."

Apprendi, 530 U.S. at 477 (alterations and emphasis in original) (citations omitted). Observing that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding," *id*. at 478 (footnote omitted), the *Apprendi* Court ruled that any finding of fact which "expose[s a defendant] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," **is an element,** and thus must be found by a jury. *Ring*, 536 U.S. at 586 (citing

Apprendi) (emphasis added) .

Because in Florida "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment," *Hurst*, 136 S. Ct. at 620, the § 921.141(3) findings are an element of the offense of capital murder. This conclusion necessarily follows from *Hurst*, because the only way the Sixth Amendment would have applied to those findings was if they were elements. There is no *Hurst* without § 921.141(3) delineating elements of the crime of capital murder.

Now that *Hurst* has held that *Bottoson* erred in failing to find Florida's capital sentencing scheme unconstitutional under *Apprendi* and *Ring*, the factual determinations set forth as prerequisites for the imposition of a death sentence in § 921.141(3) are now, in fact, *Apprendi* elements which must be found unanimously by a jury.

Arbelaez's jury never made any findings. No sufficiency determination was made, and no elements were found, unanimously or otherwise. The jury's previous recommendation is meaningless, unconstitutional, and void.

Hurst is a development of fundamental significance under _Witt v. State_ and must be given retroactive effect.

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.

Before *Hurst*, *Furman v. Georgia*, 408 U.S. 238 (1972) was the paradigmatic example.[2] In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. *Furman* was a difficult decision for the Supreme Court, which "had not been so visibly fragmented since its earliest days," agreeing only on a "terse per curiam statement announcing the result reached," and issuing nine separate opinions, four in dissent. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1758 (1987).

On the basis of *Furman*, this Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267

[2] When *Hurst's* predecessor *Ring* issued and it appeared that *Ring's* holding would do essentially what *Hurst's* has now done, Justice Anstead commented that "*Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*," that "we cannot simply stand mute in the face of such a momentous decision," and that "[t]he question is where do we go from here." *Bottoson v. Moore*, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, J., concurring).

So. 2d 8, 9-10 (Fla. 1972).[3] There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with undeniably unconstitutional executions.

As noted *supra*, the Florida Legislature, in anticipation of the holding in *Furman,* enacted Florida Statutes § 775.082(2), which 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).

This Court read this statute to leave absolutely no discretion for Florida courts when, as in *Hurst*, the death penalty was found unconstitutional in *Furman*. This Court found that the statute requires "an automatic sentence and a reduction from the sentence previously imposed," because "**[t]he Court has no discretion**." *Anderson v. State*, 267 So. 2d 8, 9 (Fla. 1972). The Court found simply that "[u]nder the circumstances of these particular cases, it is our opinion that we should correct the

[3] In *Anderson*, this Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the death sentence imposed in these cases is illegal.").

illegal sentences previously imposed without returning the prisoners to the trial court," and vacated the sentences. *Id*. at 10. Everyone who had received a sentence of death under the capital sentencing scheme declared unconstitutional in *Furman* received the benefit of the decision.

The imposition of life sentences on defendants sentenced under the death penalty scheme found unconstitutional in *Furman* was a ministerial, administrative matter. There was no inquiry into retroactivity. There was no argument that harmless error analysis was available when a capital sentencing scheme was declared unconstitutional. There was no parsing of the language of *Furman* to attempt to minimize its impact. There was no discretion to exercise. Life sentences were mandated for everyone sentenced to death under the unconstitutional sentencing scheme.

Because Arbelaez was sentenced under an unconstitutional scheme, he should be resentenced to life imprisonment according to §775.082. However, if a retroactivity analysis is deemed necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst*, unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman*, did not fragment the Court at all. On the contrary, *Hurst* was an 8-1, resoundingly unified pronouncement from the Supreme Court that Florida's sentencing of capital defendants has long been unconstitutional. In Florida, *Hurst* is just as much a sweeping jurisprudential

upheaval of fundamental significance as was *Furman*.

The retroactive treatment of *Gideon v. Wainwright*, 372 U.S. 335 (1963) is instructive here. This Court took up the matter of how to provide a means for convicted defendants to vindicate their Sixth Amendment rights identified in *Gideon*. *Roy v. Wainwright*, 151 So. 2d 825, 826 (Fla. 1963) ("As we read *Gideon*, the rule now simply is that the Sixth Amendment's guarantee of counsel is one of the fundamental rights essential to a fair trial."). In *Roy*, this Court expressed "concern[] over the procedural facilities available to state prisoners who might have belatedly acquired rights which were not recognized at the time of their conviction." *Id*. The Department of Corrections reported that of the 8,000 state prisoners incarcerated in 1962, **over 4,000 of those state prisoners had entered guilty pleas without the benefit of counsel**, and **over another 475 state prisoners had entered pleas of not guilty and were convicted without the benefit of counsel**. Thus, well over half of those incarcerated in Florida prisons in 1962 were likely eligible to obtain relief on the basis of the *Gideon* violation in their cases.

To preserve the effectiveness of judicial administration but still give retroactive effect to *Gideon*, this Court adopted and made effective Criminal Procedural Rule 1 on April 1, 1963 (two weeks after the March 18, 1963 issuance of the opinion in *Gideon*). This rule provided a postconviction vehicle for seeking relief on the basis of *Gideon*, and was the forerunner of the current Rule 3.850 and Rule

3.851. *Id*. It is clear from *Roy* that this Court accepted that the burden on the court system was an unavoidable fact in light of the ruling in *Gideon* and Florida's history of not guaranteeing counsel to all criminal defendants.

At most, *Hurst* would affect roughly 400 death-sentenced prisoners, compared to *Gideon's* unimaginable 4,500. The most that a death-sentenced prisoner could obtain under *Hurst* is a life sentence without parole. Section 775.082(2) can be used to permit death row inmates to automatically receive life sentences with minimal expenditure of resources.

This Court explained in *Falcon v. State,* 162 So. 3d 954, 962 (Fla. 2015), that the principles of fairness underlying *Witt* "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.'" In *Falcon*, this Court found that applying a constitutional rule to some but not other similarly situated juvenile offenders meant that some would "serve lesser sentences merely because their convictions and sentences were not final" when the rule was announced. *Id*. The Court stated that "[t]he 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 [retroactivity]." *Id*.

If the unfairness resulting from loss of liberty demands retroactive application, then so too does loss of life. If the unfairness to juveniles in indistinguishable cases

receiving different non-capital sentences is too great, then so too is the unfairness of executing Arbelaez while other defendants with indistinguishable cases will receive the benefit of *Hurst* (and not be put to death under an unconstitutional death penalty scheme). Such patent unfairness and arbitrariness, certainly great enough to implicate the Eighth Amendment principles enunciated in *Furman v. Georgia*, requires that *Hurst* be applied retroactively.

This Court's prior discussions regarding the retroactivity of *Apprendi* and *Ring* do not resolve or affect in any way *Hurst's* retroactivity.

This Court engaged in a retroactive analysis of *Apprendi* in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), and of *Ring* in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). However, the *Witt* analyses in both *Hughes* and *Johnson* were infused with this Court's failure to recognize that *Apprendi* and *Ring* do in fact apply in Florida, and that as a result, Florida's capital sentencing scheme was unconstitutional. In neither *Hughes* nor *Johnson* did this Court resolve the retroactivity of *Hurst*.

Hughes and *Johnson*, decided on the same day, both presumed the inapplicability of *Ring* in Florida in assessing the impact of *Apprendi* and *Ring* under *Witt*. Because the *Witt* analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the *Witt* analysis. Now that we know from *Hurst* that *Apprendi* renders Florida's capital sentencing scheme unconstitutional and caused *Hildwin* and *Spaziano* to be overruled, we must

do a new assessment under *Witt*. *Hurst's* retroactivity in Florida must be assessed, not *Apprendi's* (which was not a capital case), and certainly not *Ring's* (which contemplated Arizona's sentencing scheme).

When this Court adopted the *Witt* retroactivity standard, the Court specifically ruled that it was not bound by the federal standard. *Witt v. State*, 387 So. 2d at 926. This Court found federal retroactivity law too restrictive, and crafted *Witt* specifically to provide greater, more expansive, more inclusive protection. *See Johnson*, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague*"); *see also Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting) (observing that the federal standard is "considerably more restrictive" than *Witt*).

The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems." *Id*. at 861 (Anstead, J., dissenting). The federal standard in *Teague v. Lane,* 489 U.S. 288 (1989) is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case.'" *State v. Whitfield*, 107 S.W. 3d 253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." *Hughes*, 901 So. 2d at 862. Indeed,

federal habeas courts, in capital cases, are directed to uphold state court decisions **that they find to be incorrect**, as long as there is some reasoning to support the incorrect ruling. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000).

It would thus seem that some reasoning would be required on the part of state courts, but it is not. Federal habeas courts must supply their own reasoning—asking "what arguments or theories supported or . . . could have supported[] the state court's decision," *Harrington v. Richter*, 562 U.S. 86, 102 (2011)—support, and ultimately uphold **incorrect state court rulings supported by no reasoning at all**. The reason for this is that "requiring a statement of reasons [from state courts] could undercut state practices designed to preserve the integrity of the case-law tradition." *Id*. The goal is "deference and latitude" for state courts. *Id*. It is not to do justice on the facts. *Teague* arises from these same considerations and has been "universally criticized by legal commentators 'as being fundamentally unfair, internally inconsistent, and unreasonably harsh.'" *Hughes*, 901 So. 2d at 862 (Anstead, J., dissenting).

Thus, "[i]t would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague's* rationale is deference to a state's substantive law and review." *Hughes*, 901 So. 2d at 863 (Anstead, J., dissenting). On the contrary, "[i]f anything, the more restrictive standards of federal review place **increased and heightened importance upon the quality and reliability of the state proceedings**." *Id*. at 863 (Anstead, J., dissenting). This nation's judicial system

presumes that Florida courts will do justice, will get it right, will be hypersensitive to constitutional violations in the first instance, and require federal habeas review only in the rarest of cases. The reliability and confidence in Florida's judicial system depends on Florida courts being more protective of constitutional rights. Florida is the bulwark.

Thus, it is hugely problematic that the *Hughes* Court "rel[ied] almost exclusively on federal decisions that evaluate retroactivity under the irrelevant and considerably more restrictive federal standard announced in the plurality opinion in *Teague* . . . ." *Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting). It is hugely problematic that the *Johnson* Court "[d]eferr[ed] to the United States Supreme Court's assessment of its own decision in *Ring*," *Johnson*, 904 So. 2d at 410, where "in *Schriro v. Summerlin*, 542 U.S. 348 (2004), [it found] that *Ring* does not apply retroactively for purposes of federal law. *Id*. at 408 (citation partially omitted).

In *Hughes* and *Johnson*, Justice Anstead warned that the Court, in its retroactivity analyses, "simply turned a blind eye to the most important and unique feature of the American justice system upon which we have relied for centuries to ensure fairness and justice for our citizens: the right to trial by jury." *Hughes*, 901 So. 2d at 858 (Anstead, J., dissenting), lamenting that "[n]o other right in our system has been so jealously guarded, until today." *Id*. (Anstead, J., dissenting). *Hughes* and *Johnson* should have no bearing on this Court's assessment of *Hurst's* retroactivity.

***Hurst* error is structural and can never be harmless.**

After declaring Florida's capital sentencing scheme unconstitutional, *Hurst* reversed the judgment of this Court and remanded for further proceedings not inconsistent with the *Hurst* opinion. The U.S. Supreme Court specifically, and as a matter of course, left it for this Court to consider on remand "the State's assertion that any error was harmless." *Hurst*, 136 S. Ct. at 624. The U.S. Supreme Court stated, "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." *Id*. It is important to note that the Court's only purpose in addressing the State's assertion of harmless error was to decline to address it in any way. Nothing in *Hurst* requires or endorses a harmless error analysis. And indeed, such an analysis would be inappropriate, because *Hurst* found a structural error that can never be harmless.[4] Florida cannot correct its error in allowing trial judges to do the work of juries by substituting postconviction or appellate judges to do the work of juries.

The U.S. Supreme Court recognized a limited class of fundamental

[4] When *Furman* issued, harmless error was not an unfamiliar concept. The United States Supreme Court had explained five years earlier when constitutional error could be found to be harmless. *Chapman v. California*, 386 U.S. 18, 21-22 (1967) ("We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule."). Yet, no argument was ever advanced that *Furman* error was harmless.

constitutional errors that defy harmless error analysis in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. The *Hurst* error in Arbelaez's sentencing—stripping the capital jury of its constitutional fact-finding role at the penalty phase—was a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *See id*. at 310. Indeed, the *Hurst* error "infected the entire trial process" in Arbelaez's case (*see Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)) and deprived Arbelaez of "basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8 (1999).

Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence] actually rendered in [original] trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Since there are no jury findings, it is not possible to review whether such findings would have occurred absent the *Hurst* error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty [of the aggravating circumstances] beyond a

> reasonable doubt—not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt would surely not have been different absent the constitutional error. **That is not enough**. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . .

Id. (emphasis added).

It is impossible to guess how the makeup of the jury would have been different if the prospective jurors had known it would be their sole responsibility to decide whether Arbelaez would live or die. It cannot be known how counsel's trial preparation and penalty phase strategies were impacted by the now-unconstitutional capital sentencing scheme. If a harmless error analysis is undertaken, it would require a trial court to conduct fact-finding as to the impact of the *Hurst* error.

CONCLUSION AND RELIEF SOUGHT

Arbelaez asks that this Court vacate his unconstitutional death sentences and impose life sentences; permit him to amend his pending state habeas petition to raise a *Hurst* claim; and/or relinquish jurisdiction to allow him to file a Rule 3.851 motion raising a *Hurst* claim in circuit court; and/or grant any other relief that this Court deems just and proper.

Respectfully submitted,
/s/ Rachel Day

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CERTIFICATE OF COMPLIANCE

I further certify that the foregoing Initial Brief has been produced in a 14 point Times New Roman type, a font that is not proportionately spaced and in compliance with Fla. R. App. Pro. 9.220 and 9.100(l).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided to the opposing counsel by electronic mail this 3rd day of March, 2015.

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