IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-547

LARRY DARNELL PERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE BY JOINING IN THE BRIEF OF AMICI CAPITAL LAW OFFICES FILED APRIL 29, 2016 AND ACCEPTED BY THIS COURT ON MAY 4, 2016

On April 29, 2016, a group of law offices that specialize in representing capital defendants, primarily in postconviction proceedings, filed a motion in this case to appear as amici curiae, and an accompanying amici brief, pursuant to Florida Rule of Appellate Procedure 9.370. On May 4, 2016, this Court issued an order granting the motion and accepting the brief of "Capital Law Offices Specializing in Capital Appeals" (May 4, 2016, Order at 1). The Capital Collateral Regional Counsel-South ("CCRC-South") fits within that description and, with the consent of the existing amici law offices, seeks to join in that previously filed and accepted brief.

Pursuant to Rule 9.370(a), CCRC-South states below its interests in joining the amici curiae in this matter and explains its agreement with the arguments

presented in the amici brief. The other requirements of Rule 9.370(a) through (d), regarding the brief's content, timing, service, and consent of the parties, have already been addressed and satisfied in the filing of the brief.

The Fifth District Court of Appeal certified two questions in this case: (1) Did *Hurst* declare "Florida's death penalty" unconstitutional, and (2) "if not," does the new death penalty statute found in Chapter 2016-13 apply to "prosecutions for capital offenses that occurred prior to its effective date"? *State v. Perry*, 2016 WL 1061859, *4 (5th DCA March 16, 2016). CCRC-South believes the brief of amici law offices aids this Court in the disposition of these questions. The brief focuses on Question 2.

CCRC-South agrees with amici law offices that Chapter 2016-13 is retroactive and applicable to resentencings ordered to cure the *Hurst* error. As described by amici law offices, the Florida Legislature might have set out to pass a substantive change in law that would have cured the *Hurst* problem, but it managed only to make procedural changes in how the same statutory elements are found. CCRC-South agrees that "[t]he revised statute contains the same substantive elements required to authorize a death sentence under the old statute identified in *Hurst*" (April 29, 2016, Brief at 6).

CCRC-South would highlight Justice Scalia's concurrence in *Ring v. Arizona*,

stating that "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane," all facts "essential to the imposition of the level of punishment that a defendant receives" must be found by a jury under the Sixth Amendment. 536 U.S. 584, 610 (2002) (Scalia, J., concurring). In other words, no matter what the Legislature labels the eligibility facts, it is how a statutory scheme actually operates that matters for purposes of identifying the Sixth Amendment eligibility findings.[1] A unanimous finding of one aggravator under the new statute might be said to somehow create death eligibility under the statute, but it does not. Death is not on the table—death does not actually enter the picture—until the jury has found sufficient aggravators outweighing mitigators, because prior to those findings, there can be no death recommendation under any circumstances.

[1] Note that the term *eligibility* has two different meanings, or usages, relevant to post-*Hurst* issues in Florida, and it is important to avoid equivocation between them. In the Sixth Amendment context, making a defendant "eligible for the death penalty" refers to the notion that all factfindings made necessary by a state statute for the imposition of death have properly been found by a jury. *See Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). Sixth Amendment eligibility is statutory eligibility. As an Eighth Amendment concept, *eligibility* refers to the notion that "society will inflict death upon only a small sample of the eligible criminals," *Furman v. Georgia*, 408 U.S. 238, 300 (1972) (Brennan, J., concurring), who have committed the "worst of the worst" murders. *See Coddington v. State*, 254 P.3d 684, 709 (Okla. 2011). Eighth Amendment eligibility is *Furman* eligibility, honoring "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

Thus, CCRC-South also agrees with amici law offices that, while procedural in nature and retroactive, the new statute can only be properly applied if accompanied by an interpretive opinion from this Court curing the statute's failure to expressly require unanimity on the critical factfindings of sufficient aggravators outweighing mitigators. It is well-settled Florida law that elements must be found unanimously. Indeed, "the requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). The new statute fails to expressly require unanimity as to the sufficiency finding and the weighing finding. This is evidenced particularly well by the proposed jury instructions effectuating the statute, which direct that "different factors may be given different weight or values by different jurors" in finding sufficiency and weighing. *Proposed jury instructions for capital cases*, The Florida Bar News, p. 11 (April 15, 2016). This flies in the face of Florida law.

In light of this Court's request for supplemental briefing on the question of whether the new statute's 10-2 death recommendation violates the currently prevailing Eighth Amendment standard of decency,[2] CCRC-South would highlight

[2] Because there is already an amici class including CCRC-South, CCRC-South seeks to join the previously filed brief rather than filing an amicus brief attendant to the new briefing requested by this Court, pursuant to a new 10-day timeframe under Rule 9.370.

that amici law offices correctly view the sufficiency finding and weighing finding as separate from the death recommendation. Whether those factfindings create death eligibility under the Sixth Amendment and *Hurst*, making them elements which must be found unanimously under Florida law, is a separate issue from whether a 10-2 death recommendation satisfies the death-eligibility requirements of the Eighth Amendment's prohibition on cruel and unusual punishments by comporting with this Nation's "evolving standards of decency." *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Again, the proposed jury instructions offer support for this view. They instruct jurors that "[r]egardless of the results of your individual weighing process, the law neither compels nor requires you to determine that the defendant should be sentenced to death." *Proposed jury instructions for capital cases*, The Florida Bar News, p. 15 (April 15, 2016). Thus, the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, which this Court relies on to "eliminate—or minimize—juror confusion concerning the applicable law in criminal cases" (in this instance, Chapter 2016-13), interprets Chapter 2016-13 as making the sufficiency and weighing findings different from the death recommendation. And this Court can interpret Chapter 2016-13 to require unanimous findings as to sufficiency and weighing

regardless of its conclusion as to the constitutionality of the 10-2 recommendation.[3]

Any interpretation of the new statute that would permit the finding of a single aggravator to create death-eligibility would present a patent Eighth Amendment violation. July 2 of this year will be the fortieth anniversary of the U.S. Supreme Court's decision in *Proffitt v. Florida* that "[o]n its face the Florida system [] satisfies the constitutional deficiencies identified in *Furman*." 428 U.S. 242, 253 (1976). That holding was based in part on the fact that "[t]he sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors . . . to determine whether the death penalty shall be imposed." *Id*. at 251. Since that holding, the list of aggravating circumstances has doubled. Florida Statutes § 921.141(6) enumerates sixteen aggravating circumstances, including that (f) the murder was committed to make money, (h) the murder was heinous, (h) the murder was atrocious, (h) the murder was cruel, (m) the victim was elderly, (n) the defendant was a "criminal gang member," (o) the defendant had previously been, but no longer was, designated as a sex offender, and (a) the defendant was simply on probation. The list is extensive.

[3] With this being said, CCRC-South certainly believes that taking the life of a defendant based on the sentencing finding of a divided jury, where any number of jurors believe that the defendant's life should be spared, violates the prevailing standard of decency in this Nation. It is ludicrous to suggest otherwise after *Hurst* and given the overwhelming adherence nationwide to unanimity in capital jury sentencing.

The Legislature did nothing to reduce the list when it passed Chapter 2016-13.

It is difficult to think of a first degree murder that would not involve at least one of the listed aggravators. It is easy to think of an aggravating circumstance that could not, in and of itself, be sufficient to justify imposition of the death penalty and thus could not create death-eligibility. For this reason, Florida's death penalty scheme has been found to satisfy the Eighth Amendment only because a finding of *sufficient* aggravators is required before a defendant is death-eligible. That finding is still required, but it must be made unanimously if it is to serve as part of the critical factfindings that will create death-eligibility under the Sixth Amendment.

With regard to Question 1, CCRC-South agrees with amici law offices and Perry that *Hurst* declared "Florida's death penalty" unconstitutional. The Fifth DCA agreed with the State's argument below that "*Hurst* struck down only Florida's procedure for imposing the death penalty, not the death penalty itself." *Id*. at *5. Stating this another (perhaps contradictory) way, the Fifth DCA found "*Hurst* determined that Florida's 'scheme' to impose the death penalty was unconstitutional, not the penalty itself." *Id*. at *6. The court reasoned that "*Hurst's* holding is narrow and based solely on the Court's determination that the 'Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.'" *Id*. Amici law offices generally agreed with Perry's argument on Question 1 (April 29,

2016, Brief at 2). Perry generally argues that *Hurst* must be read to have invalidated Florida's death penalty (April 21, 2016, Brief at 3).

The significance of this question to CCRC-South's clients is that its answer determines whether this Court must apply Florida Statutes § 775.082(2) in cases with *Hurst* errors. Section 775.082(2) requires life sentences to be imposed on death-sentenced inmates "[i]n 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 Fifth DCA ruled that § 775.082(2) does not apply because "the United States Supreme Court in *Hurst* did not hold that the death penalty was unconstitutional." *Perry*, 2016 WL 1061859 at *2. Amici law offices, while arguing that the new statute applies retroactively to defendants sentenced prior to the statute's March 7, 2016, effective date, maintained also that "amici do not abandon arguments made in other cases that the proper relief for *Hurst* error is the imposition of a life sentence," referring to the applicability of Subsection (2) (April 29, 2016, Brief at 2). Thus, the certified question of whether *Hurst* found "Florida's death penalty" unconstitutional primarily asks what § 775.082(2) means by "the death penalty." CCRC-South would highlight that the amici law offices and Perry, while departing on the retroactivity of the new statute, agree in the first instance that Subsection (2) should apply.

On this point, CCRC-South has observed the view being expressed in oral

arguments and briefing that "the death penalty" under Subsection (2) means *death itself*—capital punishment itself—in the United States, in the abstract, under any procedure, in any instance. Under this view, the United States Supreme Court would have to strike down American capital punishment itself for Subsection (2) to apply. This interpretation cannot be correct.[4]

Subsection (2) specifies that this Court—which has no jurisdiction to rule on the death penalty beyond the State of Florida—not just the United States Supreme Court, could make a finding of unconstitutionality that would require life sentences under Subsection (2). In this regard, when Subsection (2) refers to "the death penalty," it has to mean *Florida's* death penalty, and thus also has to include cases where the U.S. Supreme Court strikes down only *Florida's* death penalty.

If Subsection (2) means *Florida's* death penalty, then there is no meaningful distinction between *Hurst* invalidating the procedure under which death sentencing occurs or the death penalty itself. The procedure *is* the death penalty. The death

[4] While CCRC-South's argument herein expounds somewhat on that provided by amici law offices and Perry, CCRC-South respectfully requests that this Court, in this uncommon instance where an amici brief has already been filed for a group of amici under which CCRC-South falls, permit this very limited supplementation of the arguments already submitted on this quickly evolving and multifarious issue. In the event that this Court finds CCRC-South's limited supplementation of the existing arguments improper under Rule 9.370 and declines to accept it, CCRC-South respectfully requests that the Court still grant the motion to join in the brief.

penalty *is* the procedure.

Florida's death penalty was comprised under the old statute of sentencing based on judge-found facts. Thus, *Hurst* found, and could only find, Florida's "**sentencing scheme**" unconstitutional, *see Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (emphasis added), rather than parsing out a single statutory provision or certain language for the purpose of expressing that holding. The factfindings necessary to impose death and the sentencing decision inextricably based on those findings is what Florida's death penalty scheme was under the old statute.

In an effort to aid in this Court's disposition of this issue, CCRC-South would add that efforts to identify which provisions or words or sentences or paragraphs in the statute were invalidated by *Hurst* may be proving difficult for this Court and others for a simple reason: there are none. *Hurst* held the *scheme* unconstitutional. The *scheme* is an abstraction of Florida death sentencing distilled from all the concrete statutory language underlying it. The Oxford Dictionary defines a *scheme* as a "large-scale systematic plan or arrangement for attaining some particular object or putting a particular idea into effect."[5] If that large-scale systematic plan is unconstitutional, it is unconstitutional, not just one of its underlying concrete

[5] http://www.oxforddictionaries.com/us/definition/american_english/scheme.

components.[6] This Court should proceed based not on what it thinks the Supreme Court must have meant, it should proceed on what the Supreme Court actually said: "We hold this sentencing scheme unconstitutional." *Id*.

Concluding that *Hurst* did not find Florida's death penalty unconstitutional—just the procedure—would be like concluding that a broken window is not broken—just the glass. This Court can sort through the shards in an attempt to find which ones constitute the break, but the window will still be shattered and gone.

Scheme and *statute* are different terms with different meanings. In *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012), this Court referred to Ellerbee's *Ring* claim as a challenge "to Florida's Capital Sentencing Scheme." How can *Hurst*, which expanded on *Ring* in applying the underlying Sixth Amendment rule in Florida, be about something less than *Ring* was before it?

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[6] If the holding of *Hurst* must be read to apply to only certain statutory language rather than—by its explicit terms—Florida's "scheme," then the reasoning of *Hurst* clearly points to the findings in former Florida Statutes § 921.141(3). *Hurst* cited that provision in finding that Florida's scheme was unconstitutional for "requir[ing] a judge to find these facts." *Hurst*, 136 S. Ct. at 622 (citing Fla. Stat. § 921.141(3)). Subsection (3) required judges to find that sufficient aggravating circumstances existed to justify a death sentence and that those aggravating circumstances were not outweighed by mitigating circumstances. *See id*. ("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.'" (emphasis and alterations in original).

Hurst held Florida's death penalty scheme unconstitutional, so Subsection (2), by its plain terms, applies. The retroactive new statute need only come into play if this Court concludes otherwise and orders resentencings to cure *Hurst* errors.

CCRC-South, like the amici law offices, represents numerous capital defendants with issues arising from *Hurst v. Florida*, 136 S. Ct. 616 (2016), who will be affected by this Court's interpretation of the new statute. That interpretation will shape the remedy for *Hurst* error.

WHEREFORE, CCRC-South respectfully requests this Court grant it leave to join the amici law offices in this case.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been provided to Vivian Singleton, Assistant Attorney General, Vivian.Singleton@myfloridalegal.com, J. Edwin Mills, jemillslaw@hotmail.com, Martin J. McClain, martymcclain@earthlink.net, Todd G. Scher, Tscher@msn.com, and John Abatecola, jabatecola@comcast.net, by electronic mail on this 11th day of May, 2016.

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