IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Petitioner,

v. **CASE NO. SC12-1947**

STATE OF FLORIDA,

Respondent.
_____/

SUPPLEMENTAL INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Appellant, Timothy Lee Hurst, files this Supplemental Initial Brief in response to this Court's orders of March 3 and 11, 2016. Appellant raises five issues presented by the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016).

ARGUMENT

In Hurst, 136 S. Ct. at 619, the Supreme Court held Florida's sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." In so holding, the Court focused on the "critical [factual] findings necessary to impose the death penalty" id. at 622, in Florida:

> 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. s. 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." s. 921.141(3).

Id.; see also Bottoson v. Moore, 833 So. 2d 693, 719-23, 725 (Fla. 2002)(Pariente, J., concurring in result only)("[T]he maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors").

ISSUE I

THIS COURT SHOULD REMAND HURST'S CASE FOR IMPOSITION OF A LIFE SENTENCE PURSUANT TO SECTION 775.082(2), FLORIDA STATUTES.

Section 775.082(2) 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).

The Supreme Court's decision in Hurst holding Florida's capital sentencing scheme unconstitutional triggered the provisions of section 775.082(2). After the United States Supreme Court ruled that Florida's capital sentencing scheme was unconstitutional in Furman v. Georgia, 408 U.S. 308 (1972), but while a petition for rehearing was pending, this Court addressed section 775.082(2) and said:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972). Subsequently, this Court, citing Donaldson, reduced to life all the death sentences imposed under the sentencing scheme determined to be unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972); Walker v. State, 296 So. 2d 27, 30 (Fla. 1974); Craig v. State, 290 So. 2d 502, 502-03 (Fla. 4th DCA 1974).

Thus, this Court considered Florida's death penalty scheme, as declared unconstitutional in 1972, as part of the "death penalty"

for purposes of interpreting and applying section 775.082(2). Arguments that it does not apply to Florida's unconstitutional death penalty scheme fail under the rules of statutory construction. Specifically, the polestar of interpreting legislative enactments is legislative intent. See Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla.2006). As this Court said in White v. Pepsico, Inc., 568 So. 2d 886, 889 (Fla. 1990).

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 460 (6th Cir.2013) (quoting Caminetti v. United States, 242 U.S. 470, 490 (1917)).

Thus, when the text "conveys a clear and definite meaning, that meaning controls." J.M v. Gargett, 101 So. 3d 352, 356 (Fla. 2012); see also Hill v. Davis, 70 So. 3d 572, 575 (Fla. 2011)(a statute's text is the "most reliable and authoritative expression" of the legislature's intent); Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000). "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005). Such an approach also recognizes this Court's limits. When the text speaks clearly and without ambiguity, the judiciary simply applies it. See Gomez v. Vill. of Pinecrest, 41

So. 3d 180, 185 (Fla. 2010) (quoting Velez v. Miami-Dade County Police Dep't, 934 So. 2d 1162, 1164-65(Fla.2006))("We are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.").

Further, this Court gives effect to the entire statue whenever possible, and every word in it. Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003). It is also for the legislature, not this Court, to enact laws because this Court has no legislative rights. State v. Egan, 287 So. 2d 1, 6-7 (Fla. 1973).[1]

With those rules in mind, the plain language contained in the first sentence of section 775.082(2) could not offer a clearer command: If the death penalty is held unconstitutional by this Court or the United States Supreme Court, the court having original jurisdiction over the case "shall" resentence the defendant to life imprisonment.

The lack of any qualifying or limiting language in the statute also dictates this remedy. Had the Legislature intended to restrict the automatic and obligatory reduction of death sentences

[1]"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist, No. 47 (J. Madison).

to life imprisonment upon the death penalty being held unconstitutional, it could have done so; but it did not. In 1998 the legislature *did* preclude the replacement of a death sentence with a life sentence based solely on a higher court's holding that the *method of execution* was found unconstitutional, as opposed to the death penalty. See § 775.082(2) (1998). If the Legislature had intended to somehow invalidate the remedy conferred by the first sentence of subsection (2) in 1972, it could have simply eliminated the entire subsection. Instead, it chose to add the second sentence in the provision to narrow the application of the first sentence. See § 775.082(2) (1998). Hence, reading those sentences in *pari materia,* the first sentence establishes the general rule, with the second creating the one exception. See Fla. Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 768 (Fla. 2005).

Thus, the section's first sentence plainly commands this Court to reduce to a life sentence any death sentence imposed under the statute held unconstitutional in Hurst v. Florida. For this Court to say that section has no application to Hurst's case, and is limited only to those cases pending at the time of Furman effectively nullifies the law and runs counter to the rule that the entire section is to be given effect, including the individual words used in it. For this Court to say that the legislature intended section 775.082(2) to apply only to Furman era cases when

the plain language of the statute does not so limit it would be assuming a legislative right to write or amend Florida law. Hence, section 775.082(2) is not a dinosaur designed to fix a particular problem that occurred at a particular time. It is alive and well, and by its clear, unambiguous language has life today. Seagrave v. State, 802 So. 2d 281, 290 (Fla. 2001) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute."); Knowles v. Beverly Enterprises-Fla., Inc., 898 So. 2d 1, 9 (Fla. 2004)("[T]he legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so.").

Based on a plain language reading of this statute, persons previously sentenced to death for a capital felony are entitled to have their now-unconstitutional death sentences replaced by sentences of life without parole.

If the text plainly dictates that result, the only way this Court could consider its legislative history is if the statute's plain terms would produce an absurd result. See State v. Burris, 875 So. 2d 408, 410 (Fla. 2004) (citing Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 303 (Fla. 2002)). But, the remedy drawn by the Legislature, as limited in 1998 to *sentences* rather than methods of execution, was and is reasonable. Similarly, a

conclusion that the death sentencing procedure used to impose that death sentence is unconstitutional is also reasonable. Cf. Austin v. State ex rel. Christian, 310 So. 2d 289, 292 (Fla. 1975) (any doubts about the scope of a statute may be resolved by consideration of such factors as convenience, sound public policy, or the "due administration of justice").[2]

Because the Supreme Court's decision in Hurst puts this Court in the same position as it was at the time of Furman, it must now impose life sentences on all of Florida death row inmates pursuant to section 775.082(2). As this Court has previously determined, such result is nothing if not reasonable and practical, in addition to being consistent with the plain language of the statute.

Perhaps most compelling, after the Furman dust had settled, and the Court had sentenced to life in prison those individuals serving death sentences that were final or pending on direct appeal, the Legislature revoked subsection (2) of section 775.082 and renamed subsection (3) subsection (2). Chapt. 74-383, s. 5, Laws of Fla. (1974). Thus, in 1974, the Legislature indicated its intent to leave what is now the language in subsection (2) in place. If any doubt could remain about the intended application of

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[2]Moreover, the legislative history of section 775.082, when examined, supports Hurst's interpretation of that law. See Brief of Amici Curiae Florida Association of Criminal Defense Lawyers, Florida Capital Resource Center, and Florida Center for Capital Representation on Behalf of Appellants, Hurst v. State, Case No. SC12-1947.

section 775.082(2), the "Rule of Lenity" dictates that the statute be construed in the manner most favorable to the capital defendant. See Reino v. State, 352 So. 2d 853, 860 (Fla. 1977). This statutory construction tool has long been codified in section 775.021(1), Florida Statutes, which provides: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." This statutory directive requires that any ambiguity, or situations in which statutory language is susceptible to differing constructions, must be resolved in favor of the criminal defendant. State v. Byars, 823 So. 2d 740, 742 (Fla. 2002); Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008); Lamont v. State, 610 So. 2d 435, 437-38 (Fla. 1992).

Section 775.082(2) is neither vague nor ambiguous. The first sentence of the statute is clear in its mandate. But if there could be any ambiguity, it must be resolved in favor of the capital defendant.

Hurst would also point out that of the five western states whose death penalty schemes were expressly declared unconstitutional in Ring. Arizona, 536 U.S. 584 (2002) in 2002, two of them, Colorado and Arizona, had "savings clauses" substantially similar to Florida's section 775.082(2). The Supreme Court of Colorado held that it applied to individuals previously sentenced

to death under the unconstitutional statute, and that they must be resentenced to life imprisonment rather than be exposed to new death penalty resentencing trials under the newly enacted statute. Woldt v. People, 64 P.3d 256, 258-59, 262-72 (Colo. 2003).[3]

The Colorado Supreme Court's decision in Woldt was complicated by the fact that the Colorado legislature had enacted two conflicting statutes: one statute required the imposition of a life sentence in the event the death penalty statute was found unconstitutional (the mandatory provision), while the other granted the court discretion to affirm the death sentences or order new penalty phase trials (the discretionary provision). 64 P.3d at 267. Using principles of statutory construction, the court in Woldt held the mandatory provision must prevail.[4] Id. at 269.

The Colorado Supreme Court also concluded that returning the cases to the trial court for new jury penalty trials would raise serious ex post facto questions since, inter alia, "the mandatory provision ... dictates life imprisonment as the remedy for this

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[3]While the Supreme Court of Arizona reached a contrary conclusion in State v. Pandell, 161 P.3d 557, 573-74 (Ariz. 2007), the Arizona court's conclusion was based on a theory of severability, which this Court, under well-established Florida law, cannot adopt. See Issue III, infra.

[4]In addition, the court concluded that affirming the death sentences on a quasi-"harmless error" theory, based on whether the juries implicitly found the aggravators that had been found by the three-judge panels, would place the appellate court in an impermissible factfinding role. Id. at 269-70.

constitutional violation." Id. at 270-72. The Colorado Supreme Court recognized that Dobbert v. Florida, 432 U.S. 282 (1977), does not control the remedy for defendants who have been sentenced under an unconstitutional statute. 64 P.3d at 271-72 & n.21. Dobbert's situation was different from Woldt's because Dobbert was neither tried nor sentenced under an unconstitutional statute and would not have been eligible for relief under Colorado's savings clause, which dictated life imprisonment as the remedy in the event the death penalty was held unconstitutional. Application of the discretionary option thus "would extinguish the benefits to Woldt ... of this statutory right to life imprisonment." Id.

The same analysis applies here. Hurst, unlike Dobbert, was sentenced under an unconstitutional statute, and under the plain language of section 775.082(2) has a right to be sentenced to life imprisonment, which raises a different ex post facto problem from that addressed in Dobbert. Resentencing Hurst under the newly-enacted statute would extinguish the benefit to him of his statutory right to life imprisonment.

ISSUE II

HURST'S SENTENCE MUST BE VACATED BECAUSE THE SIXTH AMENDMENT VIOLATION CANNOT BE DEEMED HARMLESS.

The constitutional defect in Hurst's death sentence is that the judge, rather than a jury, determined "each fact necessary to impose a sentence of death." Hurst, 136 S. Ct. at 619. Those

critical findings are "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. at 622.

This defect is structural, and not subject to harmless error review. The absence of a jury determination of elements of an offense is a "defect affecting the framework within which the trial proceeds," see Arizona v. Fulminante, 499 U.S. 279, 310, 310 (1986), rather than an error that occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed." See id. at 307-08. The Hurst defect goes to the heart of capital sentencing because it deprives defendants of a "basic protectio[n] without which a [capital] trial cannot reliably serve its function." 508 U.S. at 281. The structural nature of a Hurst defect is further underscored by what Justice Scalia called the "illogic of harmless-error review." See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993). Because Florida's statute is defective in that it does not allow for a jury verdict on the necessary elements for a death sentence to be imposed, "the entire premise of [harmless error] review is simply absent." See id. at 280. Harmless error analysis requires the reviewing court to determine "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would have been rendered, but whether the [death sentence] actually rendered in trial was surely unattributable to the error." Id. Because

there are no jury findings on the requisite aggravating circumstances, 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. This 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. It requires an actual jury finding of guilty [of the aggravators].

Sullivan, 508 U.S. at 280. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never rendered--no matter how inescapable the findings to support the verdict might be--would violate the jury-trial guarantee." See id. at 279.

Justice Anstead summed up the harmless-error barrier best in his concurrence in Bottoson v. Moore, 833 So. 2d 693, 708 (Fla. 2002)(Anstead, J., concurring), abrogated by Hurst:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would

> be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

See also Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., specially concurring)("the sentencing judge can only speculate as to what factors the jury found in making its recommendation"); Johnson v. State, 53 So. 3d 1003, 1007-08 (Fla. 2011)(dispensing with harmless error analysis based on "sheer speculation").

Hurst error simply cannot be quantified or assessed because the record is silent as to what any particular juror, much less a unanimous jury, actually found. In this case, for example, the jury was instructed on two aggravating circumstances, neither of which this Court can conclude the jury unanimously found. Especially in light of the considerable mental mitigation presented at the resentencing hearing, this Court cannot conclude whether any particular juror, much less a unanimous jury, found the especially heinous, atrocious, or cruel aggravator. Likewise, the 7-5 advisory recommendation indicates that five of the jurors found that whatever aggravation was found was insufficient to outweigh the mitigation. Making matters worse, we do not know if the remaining seven jurors found one or both aggravators or by what vote they did so. Therefore, this Court has no way of knowing which combination of aggravating factors any particular juror found sufficient to impose death, much less whether those seven jurors

found the same combination of aggravating factors sufficient to impose death. It is possible that not even six jurors relied on the same combination of aggravating circumstances, a particularly likely scenario given that only seven of them recommended a death sentence. This picture, as well as many others, would not satisfy the Sixth Amendment because as Hurst has now made clear, the Sixth Amendment requires a jury to find beyond a reasonable doubt "each fact necessary to impose the sentence of death." Here, this Court cannot say beyond a reasonable doubt that Hurst's jury did that.

Because the determination of what constitutes "sufficient aggravating circumstances" to impose a sentence of death is highly subjective, vastly different from the objective, discrete elements at issue in Ring, and because the jury renders only a general advisory verdict, it is impossible to deduce what the advisory jury might have found. As Judge O.H. Eaton elaborated:

> The role of the jury during the penalty phase under the Florida penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various

> aggravating and mitigating circumstances; and, of course, no one will even know if one, more than one, any, or all the jurors agreed on any of the aggravating and mitigating circumstances.

Aguirre-Jarquin v. State, 9 So. 3d 593, 611 (Fla. 2009)(Pariente, J., specially concurring)(quoting Judge Eaton's sentencing order).

Accordingly, because the jury's advisory 7-5 death verdict in this case is devoid of evidence of the jury's fact-finding, the constitutional error identified in Hurst is structural, precluding harmless-error review and requiring that Hurst's death sentence be vacated, and a life sentence imposed.

Even if a harmless-error analysis could be applied to a Hurst defect, the Court can place little or no weight on the jury's advisory recommendation because Hurst's jury was instructed many times that its recommendation was advisory only, thus diminishing its responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In Caldwell, the United States Supreme Court held "it is constitutionally impermissible [under the Eighth Amendment] to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

Following Ring, a majority of this Court acknowledged that if the jury's verdict were not merely advisory, the Court "would necessarily have to find that [Florida's] standard jury

instructions, as they have existed since 1976, violate the dictates of Caldwell," thereby requiring "resentencing proceedings for virtually every individual sentenced to death in this state since 1976." Combs, 525 So. 2d at 858 (internal quotations omitted).

In the present case, the jurors were told, by both the judge and the prosecutor, that their role was only advisory--a recommendation. The effect of this instruction, though accurate, undermined the reliability of the jury's deliberative process. The straightforward reasoning of Caldwell applies with equal force to the defect identified in Hurst. As the Supreme Court observed, where the jury is improperly told that it may shift responsibility to another entity--here, the trial judge[5]--there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences," see id. at 330, which in light of the jury's 7-5 death recommendation in the present case makes that shifting responsibility more distinctly possible than had it unanimously voted for death.

ISSUE III

THIS COURT CANNOT REMAND FOR A RESENTENING PHASE USING THE REMAINS OF THE UNCONSTITUTIONAL SENTENCING LAW BECAUSE THE UNCONSTITUTIONAL PORTIONS ARE NOT SEVERABLE.

The unconstitutional parts of section 921.141 cannot be

[5] See Fla. Std. Jury Inst. 7.11(2)("As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the trial judge...as the trial judge, that responsibility will fall on me.")

severed from the rest. They are integral to the sentencing scheme, and in fact without them, there is no procedure for determining who is sentenced to death and who is sentenced to life imprisonment. Moreover, any attempt by this Court to rewrite the statute would be an unconstitutional encroachment into the legislative realm.

Under Florida law, "if the valid portion of the law would be rendered incomplete, of if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional." Eastern Air Lines Inc. v. Department of Revenue, 455 So. 2d 311,317 (Fla. 1984)(emphasis supplied). A court cannot "exercise the legislative function of rewriting the statute . . ." Florida Horsemen Benevolent and Protective Association v. Rudder, 738 So. 2d 449, 452(Fla. 1st DCA 1999); see Ex Parte Levinson, 274 S.W.2d 76, 78 (Tex. Crim. 1955)(severance can only be accomplished when--after the unconstitutional part is stricken--the remainder is complete in itself; "the courts must not enter the field of legislation and write, rewrite, change, or add to a law.") Moreover, when the constitutional and unconstitutional provisions of a statute are inextricably intertwined, the invalid portions cannot be severed. Allen v. Butterworth, 756 So. 2d 52, 64 (Fla. 2000). Said a bit differently, the portion of a statute that is declared unconstitutional will be severed if:

> "(1) the unconstitutional provisions can be separated from the remaining valid provisions,

> (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken."

Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 518 (Fla. 2008) (quoting Cramp v. Bd. of Pub. Instruction, 137 So. 2d 828, 830 (Fla. 1962)).

Section 921.141(2) provides for an advisory sentence by the jury, and subsection (3) provides that "[n]otwithstanding the recommendation of a majority of the jury" the trial court shall enter a sentence of life imprisonment or death, and if a death sentence is imposed the trial judge shall make the written findings of fact as to the aggravating and mitigating circumstances "upon which the sentence of death is based." The jury's advisory role and the judge's factfinding role cannot be "severed" from the statute; their respective functions can only be addressed by rewriting the statute. Without subsection (2), there is no procedure in section 921.141 for determining who is sentenced to death and who is sentenced to life imprisonment; there is merely a seemingly random list of aggravating and mitigating factors with no direction as to how to apply them or who shall apply them. Without the unconstitutional provisions, the remainder of the statute is incomplete and incoherent. Hence, severing the unconstitutional

parts of section 921.141 from those for which there is no constitutional challenge fails at least three of the four prongs in the test articulated in this Court's opinion in Lawnwood Med. Ctr., Inc.

Two recent Pennsylvania decisions aptly illustrate how the jury's advisory role and the judge's factfinding role are interwoven into section 921.141. In Commonwealth v. Hopkins, 117 A.3d 247 (Pa. 2015), a statute requiring imposition of an increased mandatory minimum sentence if certain controlled substance crimes occurred within 1000 feet of a school was found unconstitutional under Alleyne v. United States, 133 S. Ct. 2151 (2013),' because the statute mandated that the enhanced sentencing factor be determined by the trial judge at sentencing rather than by a jury verdict. The commonwealth's "core position" was that only certain limited procedural provisions of the statute run afoul of Alleyne and that these were severable and the substantive provisions remained viable. Hopkins, 117 A.3d at 252. The commonwealth's "severability" argument was soundly rejected in Hopkins, 117 A.3d at 252-62, for the reasons explained in Commonwealth v. Newman, 99 A.3d 86, 101-02 (Pa. Super. 2014):

> We find that Subsections (a) and (c) of Section 9712.1 are essentially and inseparably connected. Following Alleyne, Subsection (a) must be regarded as the elements of the aggravated crime of possessing a firearm while trafficking drugs. If Subsection (a) is the predicate arm of Section 9712.1, then Subsection (c) is the "enforcement" arm.

> Without Subsection (c), there is no mechanism in place to determine whether the predicate of Subsection (a) has been met.
>
> The Commonwealth's suggestion that we remand for sentencing jury would require the court to manufacture[out of] whole cloth a replacement enforcement mechanism for section 9712.1. In other words, the Commonwealth is asking us to legislate.

Similarly, without its unconstitutional provisions, Florida's death penalty statute contains no mechanism for determining who lives and who dies. Those provisions are integral to the former statutory scheme and cannot be severed from it; the entire law is unconstitutional.

This Court also lacks the authority to craft a remedy. As the Supreme Court of Idaho said, when faced with a similar problem: "Were this court to attempt to devise the necessary procedures and criteria we would not only invade the legislative province, but would also be in the position of having to pass objectively on the constitutionality of procedures of our own design." State v. Lindquist, 589 P.2d 101, 105. The power to create such substantive law lies exclusively with the legislature, as this Court has recognized for at least 10 years. See State v. Raymond, 906 So. 2d 1045 (Fla. 2005); see also State v. Steele, 921 So. 2d 538 (Fla. 2006)(asking the Legislature to correct the problems with the death penalty scheme). This Court has no right to intrude into the law-making arena and craft a statute or other remedy to solve the problems the United States Supreme Court found in our death penalty

scheme.

ISSUE IV

HOUSE BILL 7101 CANNOT BE APPLIED RETROACTIVELY TO HURST'S CASE.

House Bill 7101 does not apply retroactively. Normally, the law applicable to a particular case or defendant is that which existed when the crime was committed. In this case, that would be 1998. Moreover, laws normally apply prospectively, and only if the legislature indicates a retrospective application can that option possibly open. Bates v. State, 750 So. 2d 6, 10 (Fla. 1999)("In Florida, without clear legislative intent to the contrary, a law is presumed to apply prospectively. . . . Retroactive application of the law is generally disfavored . . . and any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent.") Moreover, under rules of statutory construction, this Court cannot expand or limit the reach of a law, but must give it its plain meaning.

In this case, the enacting sentence at the end of HB 7101 provides, "this act shall take effect upon becoming a law." HB 7101, p.4101 2016 Legislature. Engrossed 1. Nothing in this new law indicates any legislative intent for it to apply to cases in existence before its enactment. Hence, the legislature provided only a prospective application for it, and this Court should give it that plain meaning.

Moreover, Article X, section 9, of the Florida Constitution

prohibits retroactive application of the amended section 921.141:

> Section 9. Repeal of criminal statutes.-Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

As discussed in Issue I, supra, Dobbert is factually distinguishable because Dobbert was never sentenced under an unconstitutional statute. In similar situations, various state supreme courts facing a similar problem regarding the retroactive application of a new death penalty statute have distinguished Dobbert and found that the new or amended death penalty law could not apply to defendants who were sentenced to death before the new law was enacted. See State v. Rodgers, 242 S.E.2d 285 (S.C. 1978); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Lindguist, 589 P.2d 101 (Idaho 1979); State v. Collins, 370 So. 2d 533 (La. 1979); Hudson v. Commonwealth, 597 S.W.2d 610 (Ky. 1980); Commonwealth v. Story, 440 A.2d 488 (Pa. 1981).

Dobbert, therefore has no controlling authority here.

ISSUE V

HB 7101 CONTAINS SIGNIFICANT CONSTITUTIONAL FLAWS IN ITS APPLICATION ON REMAND.

The following issues are potential problems with the new statute. They are not ripe for review, and there is neither adequate time nor briefing space to explicate them here. This Court should be aware, however, that the following issues probably will

arise.

A. House Bill 7101 provides for judge findings and sentencing, in violation of the Sixth Amendment. The Supreme Court in Hurst held that the jury, not the judge, must make the findings necessary for a death sentence to be imposed. Sections 921.141 (3) and (4) as provided in HB 7101, charge the judge, not the jury, with making the findings required. This new law suffers the same Sixth Amendment shortcomings as the previous law. Although the jury must make specific findings as to the aggravating circumstance, only the judge is required to make findings as to whether the aggravators are sufficient to impose death and are not outweighed by the mitigating circumstances.

B. HB 7101 does not require jury findings on the critical facts necessary for a death sentence to be imposed. As the Supreme Court in Hurst recognized, the facts necessary for death in Florida are "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 U.S. at 622. HB 7101 does not vary from the previous law on this point. Like the previous law, there is no requirement that a jury specifically find these facts. The Sixth Amendment violation identified by the Hurst Court in the previous law continues in HB 7101.

C. HB 7101 does not require a unanimous verdict as to all the factual determinations justifying a death sentence, specifically,

the findings as to the sufficiency of the aggravators and whether the aggravators outweigh the mitigators, nor does it assign a particular burden of proof to these determinations. The Sixth Amendment, however, requires a unanimous verdict in a capital case, and the Fifth and Sixth Amendments require that all the required findings be proved beyond a reasonable doubt. In addition, the Eighth Amendment requires death sentencing verdicts to be unanimous because, one, there is a nationwide consensus against non-unanimous jury verdicts in capital cases, and two, non-unanimous jury verdicts, which produce less reliable results, fail to comport with United State Supreme Court precedent and the evolving standards of decency.

D. Hurst's 7-5 jury recommendation for death constitutes a life sentence under the new law provided for by HB 7101. The new section 921.141(2) created in HB 7101 provides for a life recommendation on any vote less than 10 to 2 for death. Hurst a has vote of 7-5 and is entitled to the benefit of that vote. Hurst's recommendation constitutes a life sentence under the new law. Protections against double jeopardy and collateral estoppel apply to Hurst; he cannot be subjected to a resentencing proceeding that would deprive him of this jury's life recommendation. See Art. 1, s. 9, Fla. Const.; Wright v. State, 586 So. 2d 1024 (Fla. 1991); Brown v. State, 521 So. 2d 110 (Fla. 1988).

CONCLUSION

Based on the arguments presented here, Timothy Hurst respectfully asks this Honorable Court to remand his case to the trial court with instructions to sentence him to life in prison without the possibility of parole

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided via the Florida Courts eFiling portal to Carine Mitz, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com, and to appellant, Timothy Hurst, #124669, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026, on this 28th day of March, 2016.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was computer generated using Courier New 12 point font.

/s/ David A. Davis
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