IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC12-1947

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The State of Florida files this Supplemental Answer Brief in response to this Court's orders of March 3 and March 11, 2016.

ARGUMENTS

ISSUE I

FLORIDA STATUTE § 775.082(2) DOES NOT REQUIRE A REMAND FOR IMPOSITION OF A LIFE SENTENCE (RESTATED)

Petitioner asserts that his death sentence should be stricken and that he should automatically be sentenced to life in prison, as a result of the *Hurst v. Florida*, 136 S.Ct. 616 (2016) opinion. The statute on which he relies, however, does not apply. Because *Hurst* did not find that the death penalty was constitutionally prohibited, § 775.082(2) does not mandate a blanket commutation of death sentences as Petitioner requests. Should this Court determine that any error was not harmless, the appropriate remedy would be a remand for a new penalty phase, not the automatic imposition of a life sentence.

Florida Statute § 775.082(2)

In *Hurst*, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. Petitioner asserts that because *Hurst* concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with § 775.082(2), Fla. Stat.

Clearly, *Hurst* did not determine capital sentencing to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation of a death sentence, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, § 775.082(2) does not apply by its own terms. That section provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972). In the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as what occurred thereafter in *Coker v. Georgia*, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman, life is warranted.

Although Petitioner suggests that this Court used similar language to require the commutation of all death sentences to life following *Furman* in *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), Petitioner is misreading and oversimplifying the *Donaldson* decision. *Donaldson* is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, *Donaldson* held that circuit courts no longer maintained

jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. *Donaldson* observes the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." *Donaldson*, 265 So.2d at 505. The focus and primary impact of the *Donaldson* decision was on those cases, which were pending for prosecution at the time *Furman* was released. *Donaldson* does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time *Furman* was decided.

This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of *Furman* is discussed in *Anderson v. State*, 267 So.2d 8 (Fla. 1972), a case which explains that, following *Furman*, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that

this occurred before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as *Witt v. State*, 387 So. 2d 922 (1980) and *Teague v. Lane*, 489 U.S. 288 (1989), were both decided later.

There are several logical reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as those which followed the *Furman* decision. *Furman* was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." *Donaldson*, 265 So.2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

By equating *Hurst* with *Furman*, Petitioner reads *Hurst* far too broadly. Hurst did not invalidate all Florida death sentences. After *Furman*, there were no existing capital cases left intact.

In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the

statute could be severed to preserve pending death cases. *State v. Pandeli*, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. *Donaldson*, 265 So.2d at 501, 502-03; *Driver v. Van Cott,* 257 So.2d 541 (Fla. 1972); *Davis v. State*, 146 So.2d 892 (Fla. 1962).

In *Cramp v. Board of Public Instruction*, 137 So.2d 828, 830 (Fla. 1962), this Court set forth a test for severability, to determine the extent to which a statute which has been deemed unconstitutional may still be operable. While a court certainly cannot re-write a substantive statute in order to render it constitutional, there is no impediment to a court salvaging a condemned statute through the adoption of procedural rules that satisfy any constitutional deficits that have been found. Because *Hurst* did not find that the death penalty was constitutionally prohibited, § 775.082(2) does not mandate a blanket commutation of death sentences as Petitioner requests.

Furthermore, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under *Hurst*. Petitioner's reliance on the Colorado Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences without parole under a similar

Colorado statute is misplaced. The Colorado statute is not identical to the Florida statute, as it is not triggered by a finding that "the death penalty" is unconstitutional, but specifies that, in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. *Woldt v. People*, 64 P.3d 256, 259 (Colo. 2003).

There is no reading of *Hurst* which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing proceeding may be required by *Hurst* in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; that is, whether a jury factfinding as to an aggravating circumstance, such as a contemporaneous felony, is apparent on the record. If there was a Sixth Amendment violation, the question shifts to the harmful impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of defendants.

Since it is clear that § 775.082(2) only applies when the entire death penalty is stricken and not just when the procedures for implementation of the death penalty are stricken,

it has no applicability here. Consequently, any argument that Petitioner's case should be remanded for imposition of a life sentence is erroneous. This Court should proceed to a harmlessness determination.

ISSUE II

ANY ERROR IN HURST'S SENTENCE IS HARMLESS (RESTATED)

Petitioner claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural," and not amenable to a harmless error analysis. This argument must be rejected. The United States Supreme Court remanded *Hurst* itself to this Court for determination of harmlessness, noting that "[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." *Hurst*, 136 S. Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be, and often is, harmless beyond any reasonable doubt. *Galindez v. State*, 955 So.2d 517, 521-23 (Fla. 2007); *Johnson v. State,* 994 So.2d 960, 964-65 (Fla. 2008). *See also Pena v. State*, 901 So.2d 781, 783 (Fla. 2005)(failure to instruct jury on age requirement was not fundamental error).

Petitioner's claim of structural error is refuted by *Neder v. United States*, 527 U.S. 1 (1999), where the Court found no structural error although the jury convicted the defendant after

one element of the offense was mistakenly not submitted for the jury's consideration. *Neder* explains why Petitioner's reliance on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), is misplaced. Although *Sullivan* found that constitutional error which prevented a jury from returning a "complete verdict" could not be harmless, the Court reviewed the relevant decisions in *Neder* and determined that reversal was not required where the evidence of the omitted element was overwhelming and uncontested. *Neder*, 527 U.S. at 19.

The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by *Washington v. Recuenco*, 548 U.S. 212 (2006), where the United States Supreme Court reversed a Washington state court holding that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was structural in nature and could never be harmless. *Blakely* is an *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000)*/Ring v. Arizona*, 536 U.S. 584 (2002) decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm. *See also Galindez v. State*, 955 So.2d 517, 524 (Fla. 2007) (holding harmless error analysis applies to *Apprendi* and *Blakely* error).[1]

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[1] The concurrence in *Galindez* also observed that this Court has the inherent authority to fashion remedies for constitutional problems such as *Hurst. Galindez v. State*, 955 So.2d 517, 527 (Fla. 2007) (Cantero, J., concurring) (stating

This case is no different than the many cases in which this Court has applied the harmless error analysis in determining whether the finding of an aggravator by the trial court was supported by evidence. *See Smith v. State*, 28 So.2d 838 (Fla. 2009) (applying the harmless error analysis in determining whether competent, substantial evidence supported trial court's finding of the avoid arrest and CCP aggravators). Likewise, this case is no different from cases in which this Court applied the harmless error analysis in determining whether the trial court's doubling of an aggravating circumstance warranted reversal. *See Kalisz v. State*, 124 So.3d 185 (Fla. 2013) (holding that any error in finding the avoid arrest aggravator was harmless in light of the four other aggravating circumstances found); *Bright v. Florida*, 90 So.3d 249, 261 (Fla. 2012) (holding that the improper double finding of the prior violent felony aggravating circumstance constituted harmless error); *Armstrong v. State*, 642 So.2d 730, 738-39 (Fla. 1994) (finding that the trial judge's improper doubling of two of the aggravating circumstances and failure to give the limiting instruction were

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the when "confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies" citing *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1133 (Fla. 1990)).

harmless error beyond a reasonable doubt in light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case). Hurst has failed to distinguish, much less, address these situations in arguing that this case is not amenable to a harmless error analysis.

Furthermore, opposing counsel's logic applies to every other type of error and would be the end of the harmless error doctrine. *Goodwin v. State*, 751 So.2d 537, 539-41 (Fla. 1999) (detailing the history of the harmless error doctrine and explaining that before the doctrine, appellate courts routinely reversed convictions for almost every error committed during trial resulting in appellate courts being described as "impregnable citadels of technicality" and resulting in harmless error statutes being enacted). The harmless error doctrine, by its very nature, requires an appellate court to "guess" what the jury would have done. Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970). Florida has a harmless error statute that requires appellate courts to affirm, if possible. § 924.33, Fla. Stat. (2015) (providing that no judgment shall be reversed unless the appellate court is of the opinion, "that error was committed that injuriously affected the substantial rights of the Petitioner" and that it "shall not be presumed that error injuriously affected the substantial rights of the Petitioner"). This Court can, and should, conduct a harmless error analysis in

this case, as it has done for numerous other errors in the penalty phase in hundreds of capital cases, including for the improper finding of an aggravator.

Hurst argues that 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. This is incorrect. The State presented evidence supporting the following two aggravators at the penalty phase: HAC and during-the-commission-of-a-robbery. *Hurst v. State*, 147 So.3d 435, 437-39 (Fla. 2014).

HAC Aggravator

The uncontested evidence supporting the HAC aggravator included the fact that the victim, Petitioner's supervisor, weighing only 86 pounds and 4 foot 8 1/2 inches tall, had been bound, gagged with electrical tape, and suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms at the Petitioner's hands; and that some of those wounds cut through the tissue into the underlying bone. *Hurst v. State*, 147 So.3d at 437-38. Specifically, one cut to Harrison's eyelid region penetrated to the underlying bone, as did a cut to the top of her lip. (R/VII 449) One of the cuts to her neck nearly severed her trachea. (R/VII 437) Another cut to her left wrist nearly completely severed her radial artery. (R/VII 447) Harrison suffered several

"poking" wounds, which were not fatal, but certainly contributed to the painful manner in which she died. *Hurst*, 147 So.3d at 437-38. One of the stab wounds penetrated her lung, collapsing it and causing a lot of respiratory difficulty. (R/VII 438, 450-51) The Medical Examiner testified to arterial spurting, that her body was projecting blood out with force, which was reflected in the crime scene photographs. (*Id.*; R/VII 455-56) She also had blood stains on the knees of her pants, reflecting that she had been kneeling in her own blood. (R/VII 455) Testimony presented from the Medical Examiner indicated that it could have taken as long as fifteen minutes for her to die and that Harrison's injuries occurred before death. *Hurst*, 147 So.3d at 437-38 (Fla. 2014) As the trial court noted in finding and assigning great weight to the HAC aggravator, "[t]he utter terror and pain Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs introduced in evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured." (R/III 561) Any rational jury would have found the HAC aggravator in a case where the victim was stabbed at least sixty times with some of those cuts going through the tissue and into her bone.[2]

[2] The rational jury test is the harmless error test the Court

During the-commission-of-a-robbery aggravator

The evidence supporting the during-the-commission-of-a-robbery aggravator included testimony from two of Hurst's friends, with whom he shared his plan to rob Popeye's (his place of employment), as well as testimony from one of those friends, Lee Smith, reflecting that Hurst came to his house with a plastic container full of money from the Popeye's safe on the morning of the murder. Smith also testified that Hurst had blood on his pants and told him that he had robbed Popeye's and "had cut her." A Popeye's manager also testified that she came into the restaurant after the murder and discovered that the safe was unlocked and open, and the previous day's receipts, as well as $1751 from the previous day and $375 in small bills and change, were missing. Hurst, who was scheduled to work that morning was not present and Harrison's lifeless body was discovered in the freezer. Her change purse and driver's license were recovered

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utilized in *Neder* which dealt with this exact type of error. The Court stated that the harmless-error inquiry is whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18, 119 S.Ct. at 1838. The *Neder* Court explained to "set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Id.* quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970).

from a trash can in Smith's backyard. *Hurst v.* State, 147 So.3d at 437-39.

The jury was instructed that,

> [a]n aggravating circumstance must be proven **beyond a reasonable doubt** before it may be considered by you in arriving at your recommendation. **In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.**
>
> …
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.[3]

(R/III 456, 458) (emphasis provided)

The jury recommended death by a vote of 7-5. Thereafter, the trial court found the exact same two aggravators: (1) HAC and (2) during-the-commission-of-a-robbery, and assigned them both great weight before sentencing Hurst to death.[4]

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[3] The State also educated the jury, during its closing argument, that it was required "to prove an aggravating factor beyond a reasonable doubt." (R/IX 786) The State later informed the jury that anything could be mitigating; that mitigators only have to be proven by the greater weight of the evidence; and that they would have to weigh the aggravating and mitigating circumstances to reach a proper sentencing recommendation. (R/IX 793, 798)

[4] It should be noted that Hurst's initial death sentence was vacated after a postconviction appeal. The jury at his first 2002 penalty phase was presented with the same evidence supporting HAC and committed during the course of a robbery. That jury recommended death by a vote of 11-1. *Hurst v. State*, 819 So.2d 689,692-93 (Fla. 2002). The second penalty phase,

In short, the evidence supporting the aggravators is overwhelming. *Neder* provides that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 527 U.S. at 17. Applying the harmless error test addressed above, it is apparent that, based on the evidence presented to support the aggravation, a rational jury would have reached the same sentencing recommendation. As Justice Alito stated in his dissenting opinion, "[i]n light of this evidence, it defies belief to suggest that the jury would not have found the existence of either aggravating factor if its finding was binding." *Hurst*, 136 S.Ct. at 626-27.

Petitioner argues that this Court cannot give any weight to the jury's advisory recommendation because the jury had been instructed that its recommendation was merely advisory. He fails to mention that the jury was also instructed that although their recommendation was advisory, it "must be given great weight and

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which occurred in 2012, and is at issue now, also resulted in a recommendation of death but with a lower vote, likely the result of significant mental health mitigation having been presented. Simply stated, the evidence supporting the aggravators was overwhelming and should this case be remanded a third time, Hurst would again be sentenced to death.

deference by the Court in determining which punishment to impose." (R/III 453) Additionally, the State, in its closing argument, also informed the jury that its advisory recommendation "carries great weight, and that [the judge] has to give great weight to, and so your learned advisory sentence is very important." (R/IX 785) Clearly, the jury was made aware of the impact of its recommendation.

Petitioner, in making this argument, cites to *Caldwell v. Mississippi*, 473 U.S. 320 (1985), for the proposition that it is impermissible to rest a death sentence on the determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the sentence rests elsewhere. This Court addressed *Caldwell* in deciding *Foster v. State*, 518 So.2d 901 (1987) and found it inapplicable to Foster's claim that the jury was told its role was only advisory in nature, thereby diminishing its sense of responsibility because "unlike *Caldwell*, in Florida the judge rather than the jury is the ultimate sentencing authority." *Id.* at 901-02. In short, Petitioner's reliance on *Caldwell* is erroneous.[5]

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[5] Petitioner also quotes portions of this Court's opinion in *Combs v. State*, 525 So.2d 853 (1998). The pertinent part of that opinion, however, rejected Combs' argument and held that *Caldwell* was inapplicable to his case.

This Court should conduct a harmless error analysis and, based on the evidence presented at the penalty phase, determine that any error was harmless.

ISSUES III AND IV

IF THIS COURT REMANDS THIS MATTER FOR RESENTENCING PURSUANT TO *HURST V. FLORIDA*, 136 S. CT. 616 (JAN. 12, 2016), THE PROVISIONS SET FORTH IN CHAPTER 2016-13, LAWS OF FLORIDA SHOULD GOVERN (RESTATED)

The State does not concede that Petitioner is entitled to relief pursuant to *Hurst*. Nevertheless, in compliance with this Court's March 11, 2016, Order, the State offers the following analysis on the applicability of Chapter 2016-13, Laws of Florida in the event this Court remands this matter for resentencing pursuant to *Hurst*. The State further addresses various constitutional issues, including *ex post facto* concerns that may arise in this context.

If this Court were to order that Petitioner be resentenced, Chapter 2016-13, Laws of Florida would govern. If this Court orders resentencing based on *Hurst*, such a proceeding would be *de novo*. *See, e.g., State v. Fleming*, 61 So. 3d 399, 406 (Fla. 2011)("[T]his Court has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings, including death penalty cases, are *de novo* in nature."). Because resentencing is *de novo*, "both parties may present new evidence bearing on the sentence." *Id*.

There should be no impediment to the imposition of a sentence in accordance with the new legislation that amended §921.141, Florida Statutes. In relevant parts, the amendments now require: (1) that the jury find each aggravating factor unanimously beyond a reasonable doubt; (2) that a jury must recommend a death sentence with at least ten jurors; (3) that the judge may not find an aggravating factor not found by the jury; and (4) that the judge may not override a jury recommendation of life, but may override a jury recommendation of death. All of these changes inure to the benefit of a defendant.

The Prohibition on *Ex Post Facto* Laws

The application of Chapter 2016-13, Laws of Florida would not violate the prohibition against *ex post facto* laws. U.S. Const. art. I, § 10. The United States Supreme Court has summarized the characteristics of an *ex post facto* law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). Furthermore, "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

The United States Supreme Court addressed a similar issue in *Dobbert*. Dobbert had committed the first-degree murders of two of his children in 1971 and 1972. The procedures utilized in Florida's then-existing capital sentencing statute were held unconstitutional under the Eighth Amendment in *Furman* in June 1972, and a revised capital sentencing statute was enacted in late 1972, after Dobbert committed the murders of his children.

The Court rejected *ex post facto* challenges to the application of the revised statute, and also emphasized that the "operative fact" of the existence of the prior death penalty statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. *Dobbert*, 432 U.S. at 298. Furthermore, like the amendments to the statutes in House Bill 7101, as set forth above, the Court found the 1972 amendments to be ameliorative, and less onerous to the defendant. *Id*. at 294. Looking at legislative intent, the Court further found that the passing of the amended statutes "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose on murderers." *Id.* at 297. Thus, the existence of a statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent, *i.e.*, that the legislature would want the sentencing court to be able to entertain a revised statutory scheme in order to implement its obvious

intent that the sentence of death should be considered as a viable option. Likewise, in this instance, the passage of the present amended statute is clearly indicative of legislative intent regarding the "severity of murder and of the degree of punishment which the legislature wished to impose on murderers." *Id*.

The foregoing point is further consistent with the United States Supreme Court's analysis in *United States v. Booker*, 543 U.S. 220 (2005). After declaring the United States Sentencing Guidelines unconstitutional, the Court addressed the remedy to impose. Under such circumstances, the Court emphasized that the remedial issue was one of legislative intent: "We answer the remedial question by looking to legislative intent. . . . We determine what 'Congress would have intended in light of the Court's constitutional holding.'" *Id*. at 246 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996)(plurality opinion)).

Accordingly, under the circumstances, the *ex post facto* clause of the United States Constitution would be no impediment to the application of Chapter 2016-13, Laws of Florida in the event this Court remands this matter for resentencing.

The "Savings Clause"

The "Savings Clause" of the Florida Constitution prevents retroactive application of criminal statutes:

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

Art. X, § 9, Fla. Const. The Savings Clause does not prevent the application of a new or amended statute when the purpose of the statute is to remedy a violation of the federal constitution. This is precisely what this Court concluded when it was confronted with a similar issue in *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). As this Court stated, even if the Savings Clause were to apply, "the requirements of the federal constitution must trump those of our state constitution." *Horsley*, 160 So. 3d at 406 (citing U.S. Const. art. VI, cl. 2). Fashioning a remedy that complies with the Sixth Amendment "must take precedence over a state constitutional provision that would prevent this Court from effectuating that remedy." *Id*.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court invalidated mandatory life without parole sentences for juveniles convicted of first-degree murder reasoning that such sentences violated the Eighth Amendment. In response, the Florida Legislature enacted Chapter 2014-220, Laws of Florida, as a remedy. In *Horsley*, this Court found that application of Chapter 2014-220 to juvenile offenders whose sentences were unconstitutional under *Miller* was the appropriate remedy. "First and foremost, this is the remedy that is most consistent with the legislative intent regarding how to comply

with *Miller*, as it is the remedy the Legislature itself has specifically adopted." *Horsley*, 160 So. 3d at 405. Further, the Savings Clause was no impediment because the new statute was enacted to remedy a violation of the federal constitution. *Id.* at 406.

Then, in *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015), *Gridine v. State*, 175 So.3d 673, 675 (Fla. 2015), and *Lawton v. State*, 181 So.3d 452, 453 (Fla. 2015), this Court held that the new statute would also be applied to juvenile defendants whose non-homicide sentences violated the Eighth Amendment under *Graham v. Florida*, 560 U.S. 75 (2011). Again, the new statutes were enacted to remedy a violation of the federal constitution. The *Graham* cases are of significance because, unlike the situation in *Horsley*, where there was no other viable sentence available to those first-degree murder defendants, in the *Graham* line of cases, there was always a viable non-life sentence available for a juvenile defendant whose initial sentence violated *Graham*. Similarly, there has always existed the alternative sentence of life in prison for those convicted of first-degree murder. As *Henry*, *Gridine*, and *Lawton* illustrate, the existence of an alternative to the death penalty in this instance does not preclude courts from applying Chapter 2016-13, Laws of Florida to remedy the Sixth Amendment violation condemned in *Hurst*.

In enacting Chapter 2016-13, Laws of Florida, the Legislature's intent was to keep open the option of the imposition of the death penalty in pending cases rather than having courts automatically impose a sentence of life in prison without further consideration. As such, it is clear that the Legislature intended that the newly amended statute be applied to pending cases. Chapter 2016-13, Laws of Florida took effect upon becoming law, as opposed to taking effect at a later date such as July 1, 2016, or October 1, 2016. Ch. 2016-13, § 7, Laws of Fla.

In fact, a February 25, 2016 Senate amendment to the proposed legislation deleted the following: "Section 7. The amendments made by this act to ss. 775.082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts that occur on or after the effective date of this act," thereby refuting Petitioner's argument that nothing in the new statute indicates legislative intent for it to apply to pending cases. Petitioner's citation to *Bates v. State*, 750 So.2d 6, 10 (Fla. 1999) is instructive. Bates held that "any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent." The fact that our legislature removed proposed language applying the new law prospectively only makes clear that their intent was to apply it both prospectively and

retroactively. As stated above, the amendments are procedural changes in the law.

Thus, the provisions of Chapter 2016-13, Laws of Florida should apply in this case in the event Petitioner is resentenced. Under these circumstances, applying the provision is "the remedy most faithful to the [Sixth] Amendment principles established by the United States Supreme Court, to the intent of the Florida Legislature, and to the doctrine of separation of powers." *Horsley*, 160 So.3d at 406.

Petitioner argues that *Dobbert* is factually distinguishable because Dobbert was never sentenced under an unconstitutional statute and cites various out-of-state cases in support of his argument. But that distinction does not matter to an *ex post facto* analysis. In *Knapp v. Cardwell*, 513 F.Supp. 4 (D. Ariz. 1980) *aff'd,* 667 F.2d 1253 (9th Cir. 1982), the federal district court found:

> [w]hile petitioners cite several state court decisions which have distinguished Dobbert on the basis that their defendants had been tried and sentenced under unconstitutional death penalty statutes, including Meller v. State, 94 Nev. 408, 581 P.2d 3 (1978)[6]; State

[6] Petitioner also cites *Meller v. State*, 581 P.2d 3 (Nev. 1978), however it is distinguishable in that it did not deal with a *Dobbert* issue. In fact, the court included a footnote stating, "[w]e are cognizant of the sentencing procedures recently approved by the U.S. Supreme Court in Dobbert v. Florida, 432 U.S. 282. . . . However, because the present case is factually distinguishable from Dobbert, we find those

> v. Rogers, 270 S.C. 285, 242 S.E.2d 215 (1978), these cases do not state rationale which this Court finds persuasive in dealing with the facts before it. Dobbert, and other Supreme Court decisions discussing the ex post facto clause, see e. g., Beazell v. Ohio, supra, suggest that the two key areas for inquiry in the present case are the law at the time of the criminal act and the law at the time of final sentencing. The ex post facto clause only prohibits detrimental substantive alterations of the applicable law "at the time the act was committed." 269 U.S. at 169, 46 S.Ct. at 68. This Court holds that, for ex post facto purposes, the status of the death penalty between the dates of petitioners' crimes and their final sentencing was irrelevant. What is important is that petitioners were forewarned of the existence of the death penalty at the time they committed their crimes and that the procedure by which they were ultimately sentenced was constitutional.

Id. at 17.

Petitioner's reliance on *State v. Rodgers*, 242 S.E.2d 215 (S.C. 1978) is misplaced; Rodgers had already been resentenced to life imprisonment after the effective date of the new death penalty statute. Further, Petitioner's citation to *State v. Lindquist*, 589 P.2d 101 (Idaho 1979) is likewise erroneous. In *Lindquist*, the Idaho Legislature declared that its acts were not to be applied retroactively unless expressly stated. *Id.* at 103. The Act complained of, the 1977 Act, contained no express language indicating that it was to be applied retroactively. In refusing to apply the new law retroactively to Lindquist, the Supreme Court of Idaho stated, "[w]e need not decide whether

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procedures inapposite." *Meller*, 581 P.2d at 4 n.3.

Dobbert is applicable to the circumstances of this case or whether the ex post facto clause of the Idaho Constitution requires a different interpretation . . . Here, our statutes themselves clearly prohibit the retroactive application of the 1977 statute to this defendant." *Id.* at 104.[7] Thus, contrary to Petitioner's position, *Dobbert* is controlling authority and should govern this Court's retroactivity analysis.

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[7] *See State v. Collins*, 370 So.2d 533 (La. 1979) also cited by Petitioner. The *Collins* Court held similarly to the *Lindquist* Court, finding that the new death penalty statute could not be applied retroactively because Louisiana law expressly prohibited retroactive application of any new legislation: "No section of the Revised Statutes is retroactive unless it is expressly so stated" citing La. R.S. 1:2. Collins, 370 So.2d at 534 n.3. Likewise, *Hudson v. Commonwealth*, 597 S.W.2d 610 (Ky. 1980), also cited by Petitioner, reached the same conclusion. Because Kentucky had a statute which provided that "[n]o statute shall be construed to be retroactive, unless expressly so declared" and the new death penalty statute failed to expressly address retroactivity, the *Hudson* Court was without a proper vehicle to apply the new statute retroactively. *Id.* at 610-11. Finally, *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981) involved similar legislation which prohibited retroactive application of newly-enacted laws; specifically, Pennsylvania's statute provided that "(n)o statute shall be construed to be retroactive unless clearly and manifestly intended by the General Assembly" citing 1 Pa.C.S. s 1926. *Id.* at 489. These courts have all held that retroactive application of the new death penalty is impermissible under **state law.**

ISSUE V

CHAPTER 2016-13, LAWS OF FLORIDA DOES NOT CONTAIN CONSTITUTIONAL FLAWS (RESTATED)

The State respectfully disagrees with opposing counsel on his reading of Chapter 2016-13, Laws of Florida and the "potential problems" he avers may arise as a result.

A. Petitioner claims that Sections 921.141(3) and (4) as provided in Chapter 2016-13, Laws of Florida violate *Hurst* because they provide that the judge, not the jury, is to make the findings necessary for imposition of death. A proper reading of Chapter 2016-13, Laws of Florida makes it clear that the jury is tasked with making findings necessary for death to be imposed. Sections 921.141(3) and (4) repeatedly refer to the jury's role in making the necessary findings. Sections 921.141(3) and (4) do not charge the judge, rather than the jury, with this task. The judge is tasked with imposing sentence.

B. Petitioner submits that Chapter 2016-13, Laws of Florida will pose problems because it does not require jury findings on the critical facts necessary for imposition of the death penalty. Subsection (2)(a) provide that "the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set for in subsection (6)." Subsection (2)(b) provides

that the "jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous." Further, Subsection (2)(b)(2) provides that if the jury unanimously finds at least one aggravating factor, it "shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death." The recommendation shall be based on a weighing of whether sufficient aggravating factors exist; and whether aggravating factors outweigh the mitigating circumstances found to exist. This is exactly what *Hurst* requires.

C. Petitioner avers that Chapter 2016-13, Laws of Florida is deficient because it does not require a unanimous verdict as to all factual determinations justifying imposition of death, including the finding as to whether the aggravators outweigh the mitigators. *Hurst* does not require jury sentencing. Neither mitigators, nor weighing, are required by *Hurst*. *Hurst* does not require unanimity in the jury's final recommendation.

D. Petitioner submits that his 7:5 death recommendation constitutes a life sentence under Chapter 2016-13, Laws of Florida because it is less than the 10:2 vote required under the new statute. He argues that he cannot be subjected to a resentencing proceeding because of double jeopardy. As discussed *supra*, Hurst is not entitled to an automatic commutation of his

death sentence to one of life imprisonment. Any problem in the prior recommendation was caused by the subsequent change in law under *Hurst*, not from any insufficiency of aggravating circumstances. *United States v. Robison*, 505 F.3d 1208, 1225 (11th Cir. 2007) (explaining that a remand for a new trial is the appropriate remedy where any insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency" citing *United States v. Sanchez-Corcino*, 85 F.3d 549, 554 n. 4 (11th Cir.1996)); *United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995) (rejecting a double jeopardy challenge to a retrial after the law changed regarding an element of the crime because a retrial was "not oppressive" as it "merely permits the government to prove its case in accordance with the recent change in law" relying on *Lockhart v. Nelson*, 488 U.S. 33, 42, 109 S.Ct. 285, 291, 102 L.Ed.2d 265 (1988)); *United States v. Ford*, 703 F.3d 708, (4th Cir. 2013)(holding double jeopardy did not prohibit retrial following reversal based on a post-trial change in law because any insufficiency in the proof was caused by the subsequent change in law, not the government's failure to muster evidence citing *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003), as well as other circuit cases); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (double jeopardy did not

bar imposition of death penalty on retrial, because no fact-finder had acquitted defendant of death penalty for victim's murder); *Walls v. State*, 926 So.2d 1156, 1173 (Fla. 2006) (finding that double jeopardy did not bar imposition of the death penalty on retrial because no fact-finder had acquitted Walls of the death penalty for Peterson's murder).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Petitioner's death sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis via the eportal on the 7th day of April, 2016.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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