IN THE SUPREME COURT
STATE OF FLORIDA

TIMOTHY LEE HURST, CASE NO. SC12-1947

Appellant,

v.

STATE OF FLORIDA,

Appellee.

KENNETH RAY JACKSON, CASE NO. SC13-1232

Appellant,

v.

STATE OF FLORIDA,

Appellee.

BRIEF OF AMICUS CURIAE FLORIDA CENTER FOR CAPITAL REPRESENTATION AT FIU COLLEGE OF LAW ON BEHALF OF APPELLANT

SUPPLEMENTAL AMICUS BRIEF ON REMEDY

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STATEMENT OF INTEREST OF AMICUS CURIAE

Florida Center for Capital Representation at FIU College of Law was founded in 2014 to support defense attorneys representing defendants facing the death penalty in Florida. The FIU Center provides free case consultation and litigation-support services, as well as capital-litigation training programs, to defense attorneys and mitigation specialists across the state, and, as such, has a keen interest in the remedy afforded death-row inmates following the invalidation of Florida's death penalty.

SUMMARY OF ARGUMENT

The majority of states have determined that, upon holding their death-penalty statutes unconstitutional, the appropriate remedy is a sentence of life imprisonment. Their analysis comports with Florida jurisprudence.

Where, as here, the severance of the death-penalty provision preserves a valid sentencing alternative of lifetime incarceration, and where a new amendatory statute does not express legislative intent for retrospective effect and its application is forbidden by Ex post facto precepts, a sentence of life imprisonment is proper.

The unconstitutional statute denounced in *Hurst v. Florida*, cannot be fixed though judicial editing or creative jury instructions that are inconsistent with the statute. And it is impossible to separate neatly the constitutional from the unconstitutional provisions, and once attempted, no coherent statute remains.

The remedy that preserves the Legislature's statutory role and that is sustained by both proper severance and the Savings Clause is a sentence of life imprisonment without the possibility of parole.

ARGUMENT

THE VAST MAJORITY OF STATES HAVE CHOSEN LIFE IMPRISONMENT AS THE PROPER REMEDY WHEN THEIR DEATH-PENALTY STATUTE IS HELD UNCONSTITUTIONAL.

Since the early 1970s, state death-penalty schemes have been repeatedly held unconstitutional for a plethora of reasons: they were arbitrary and capricious, were impermissibly mandatory, limited mitigation, punished defendants lacking sufficient moral culpability, or denied essential jury fact-finding. For four decades, state courts have wrestled with the question of the proper remedy when their statute was declared unconstitutional. The majority of the states have concluded that the soundest resolution is re-sentencing to life imprisonment.

A. State courts hold that re-sentencing to life imprisonment is the appropriate remedy because it is consistent with legislative intent, and does not violate proscriptions on retroactive and ex post facto laws.

1. Severance of the unconstitutional alternative penalty.

In the aftermath of *Furman v. Georgia*, 408 U.S. 238 (1972), this Court ordered the reduction of all death sentences to life imprisonment, essentially severing the statutory provision authorizing the alternative sentence of death. *See Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *In re Baker*, 267 So. 2d 331 (Fla.

1972). Likewise, the Court declared that defendants still awaiting trial faced a maximum sentence of life imprisonment. *Donaldson v. Sack*, 265 So. 2d 499, 502-03 (Fla. 1972).[1] Other states followed suit, declaring that, because the death penalty as imposed was unconstitutional, that penalty would be severed from the sentencing statute and the alternative sentence of life imprisonment imposed. *E.g.*, *Bartholomey v. State*, 267 Md. 175, 185-86, 297 A.2d 696, 701-02 (1972); *Capler v. State*, 268 So. 2d 338, 339-40 (Miss. 1972); *State v. Funicello*, 60 N.J. 60, 67, 286 A.2d 55, 59 (1972).

Since then, severance of the unconstitutional penalty from that which remains valid has remained a prevalent remedy choice. *See*, *e.g.*, *French v. State*, 266 Ind. 276, 282-83, 362 N.E.2d 834, 838 (1977) (life sentence required where defendant sentenced under mandatory statute and death-penalty provision severable); *Rockwell v. Superior Court*, 18 Cal.3d 420, 444-45, 134 Cal.Rptr. 650, 665, 556 P.2d 1101, 1116 (1976) (unconstitutional mandatory death-penalty; court severs death-penalty provision, leaving life imprisonment, consistent with expressed legislative intent that invalidity of any section shall not affect remaining statutory provisions); *see also State v. Jenkins*, 340 So. 2d 157, 179 (La. 1976) (death sentence reduced to life, court noting that this was not the first time its

[1]In *Donaldson*, the Court noted that its resolution was consistent with the recently enacted, but not-yet effective, section 775.082(2), Florida Statutes (1972), which provided for a life sentence if the death sentence was held unconstitutional. *Ibid.*

death-penalty statute was unconstitutional but in "each case we instructed the trial courts to substitute life imprisonment for the death sentence.").

In Florida, only the death-penalty scheme has been declared unconstitutional by *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). The penalty of life imprisonment without the possibility of parole, as set forth in Sections 775.082(1)(a) and 921.141, Florida Statutes (1998), remains a viable sentence. The death-penalty provision, therefore, can be severed from the statute without running afoul of legislative intent.

2. An amendatory statute that resolves the constitutional infirmity should not be retroactively applied to permit a death sentence.

State courts favor resentencing to life imprisonment, not only to comply with legislative intent, but also to avoid impermissible retroactive application of prospective statutes:

> The most complex and widely litigated aspect of resentencing following the invalidation of a death penalty statute involves the question of whether the defendant can be resentenced to death pursuant to a subsequently enacted valid capital punishment statute. The majority of courts that have addressed this issue have concluded that a death penalty statute cannot be applied retroactively in such circumstances and that the maximum permissible penalty on resentencing is life imprisonment.

Hertz & Weisberg, "In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 CALIF.L.REV. 317, 362 (1981) (footnote omitted).[2]

a. The statute is not expressly made retroactive.

Most state courts have chosen life imprisonment as the proper recourse, after analyzing the suggestion that a new statute should be retroactively applied. The courts have rejected resentencing pursuant to the new law because the statute did not specify that it was to be retroactively applied. *See Hudson v. Commonwealth*, 597 S.W. 2d 610, 611-12 (Ky. 1980) (resentencing to life required as new statute not expressly retroactive); *People v. Hill*, 78 Ill.2d 465, 476, 401 N.E.2d 517, 522 (1980) (life sentence required where no legislative intent that amended statute should apply retroactively); *People v. Teron*, 23 Cal.3d 103, 115-19, 151 Cal. Rptr. 633, 588 P.2d 773 (1979) (new statute could not be applied retrospectively absent explicit language by the Legislature); *State v. Lindquist*, 99 Idaho 766, 768-72, 589 P.2d 101, 103-07 (1979) (requiring a life sentence where statute enacted after

[2]The authors were addressing cases in which the state statute was held unconstitutional because it limited mitigation, but their conclusion holds true for other death-penalty invalidations, as will be shown. Amicus notes that this Court did not declare Florida's statute unconstitutional post-*Lockett v. Ohio*, 438 U.S. 586 (1978), because the Court reinterpreted our statute as providing for unlimited mitigation and thus not unconstitutional. *See Meeks v. Dugger*, 576 So. 2d 713, 717-718 (1991) (Kogan, J., specially concurring). But the Supreme Court has now specifically held Florida's statute unconstitutional in *Hurst*, 136 S.Ct. at 619.

mandatory death-penalty statute did not expressly provide for retroactivity; rejecting state's arguments to construe former statute to make it constitutional); *State v. Collins*, 370 So. 2d 533, 534-35 (La. 1979) (requiring resentencing to life imprisonment where new statute not expressly made retroactive).

Chapter 2016-13, Laws of Florida, specifies that it "shall take effect upon becoming a law." Florida precedent, like that of other jurisdictions, requires "clear evidence of legislative intent to apply the statute retrospectively." *See*, *e.g.*, *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 194 (Fla. 2011) (citation omitted). Only if the legislation reflects a clear intent for retrospective application, does the Court consider whether retrospective application is constitutionally permissible. *Id.* (citations omitted). Therefore, the new death-penalty statute, lacking any indication that it is to apply to offenses committed before its effective date, cannot be retrospectively applied.

b. The Ex Post Facto Clause precludes retrospective application.

Another barrier to applying the new death-penalty statute is the Ex Post Facto Clause of the state and federal Constitutions. A number of state courts have noted this barrier in rejecting the suggestion that they apply a new death-penalty statute to previously committed crimes. *See*, *e.g.*, *Miller v. State*, 584 S.W. 2d 758, 759-62 (Tenn. 1979) (where mandatory statute unconstitutional, new death-penalty statute could not be retroactively applied without violating state ex post facto

clause); *Akins v. State*, 231 Ga. 411, 412, 202 S.E. 2d 62, 63 (1972) (subsequent death-penalty statute could not be retroactively imposed without violating state ex post facto clause). Courts have distinguished *Dobbert v. Florida*, 432 U.S. 282, 294, 301 (1977) in which the Supreme Court rejected an ex post facto challenge to death sentencing under a statute that was enacted years after the offense date.

Dobbert involved a defendant who had not yet been tried for capital murder at the time that the statute was passed. Courts have distinguished the case, reasoning that while Dobbert was never tried under the unconstitutional process, defendants in the cases before them had already been subjected to the unconstitutional death-penalty scheme. *Commonwealth v. Story*, 497 Pa. 273, 279-92, 440 A.2d 488, 491-92 (1981) (defendant sentenced under unconstitutional mandatory death-penalty statute must be resentenced to life where new statute not expressly made retroactive; *Dobbert* not inconsistent since there defendant not brought to trial until new statute enacted); *State v. Rodgers*, 270 S.C. 285, 291-93, 242 S.E. 2d 215, 217-19 (1978) (defendants sentenced under mandatory death-penalty scheme resentenced to life imprisonment; *Dobbert* distinguishable since defendants had already been tried under unconstitutional statute; rejecting state's argument that new statute was procedural and remedial and could be retroactively applied); *Meller v. State*, 94 Nev. 408, 410, 581 P.2d 3, 4 (1978) (life imprisonment required for defendant sentenced to death under a mandatory

scheme, citing *Rodgers*, *supra*, as factually similar and distinguishing *Dobbert*); *see also State v. Lindquist*, 99 Ida. 766, 768-69, 589 P.2d 101, 103-04 (1979) (noting in dicta the ex post facto obstacle in applying the new statute); *but see State v. Coleman*, 185 Mont. 299, 318-23, 605 P.2d 1000, 1012-15 (1979) (new procedural statute applicable when mandatory statute held unconstitutional).

But there is an additional reason why *Dobbert* is inapposite. While the Supreme Court noted that the statute at issue in *Dobbert* was procedural and ameliorative, the same is not true here. For the Legislature has made significant substantive changes to Section 921.141, Florida Statutes (2016). Perhaps the most significant is that the Legislature purports to change an element of capital murder.

The new statute only requires that the jury must "unanimously find[ ] at least one aggravating factor, [to make] the defendant [ ] eligible for a sentence of death," *id.* at 921.141(2) (2016), whereas the previous unconstitutional statute that the Legislature is amending required two separate findings to establish death eligibility: "'the facts … [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'[former] § 921.141(3)." *Hurst*, 136 S. Ct. at 622 (ellipsis and brackets in original). The new statute thus changes the statute to the defendant's detriment by reducing that which the state must prove to render a defendant eligible for a death sentence. *Cf. State v. Lovelace*, 140 Ida. 73, 78, 90 P.3d 298,

303 (2004) (procedural statute retrospectively applied post-*Ring* where elements unchanged; no ex post facto violation); *State v. Gales*, 265 Neb. 598, 627-29, 658 N.W.2d 604, 630-33 (2003) (same). Such an alteration of the "definition of crimes," is the prototypical category of new law that cannot be retroactively applied. *See Collins v. Youngblood*, 497 U.S. 37, 51 (1990).

In *Collins*, the Supreme Court plainly stated its "original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes." *Id.* at 43. The Court later expounded upon this foundational principle in *Carmell v. Texas*, 529 U.S. 513, 531 (2000), by recognizing that a law that changes "the quantum of evidence necessary to sustain a conviction" cannot be retrospectively applied. There, it was taken as a given that laws that change the elements of an offense would violate the Ex Post Facto Clause if applied to offenses committed prior to the law's enactment. *Id.* at 520, 531. It is evident, then, that the new statute cannot be retrospectively applied to offenses committed prior to its effective date.

B. The unconstitutional statute cannot be fixed by editing and pairing the unconstitutional statute with new jury instructions.

In *Rockwell v. Superior Court*, 18 Cal. 3d 420, 134 Cal.Rptr. 650, 665, 556 P.2d 1101, 1116 (1976), the California Supreme Court rejected the notion that it could rewrite the death-penalty statute to comply with constitutional requisites:

> The People argue finally that the defects in the California statutory scheme for imposition of capital punishment can be overcome by judicially mandated procedures, which this court should pronounce because the Legislature intended to write a constitutional death penalty . . . . We decline the People's invitation. They ask us not to interpret, but to rewrite the law. . . Decisions as to which criminal defendants shall suffer the death penalty, whether these decisions shall be made by judge or jury, . . . are matters of legislative concern. 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.

(citations omitted). The Idaho Supreme Court similarly rejected the state's invitation to rework its statute, explaining that "what the state asks this court to do is not interpret but, under the ruse of judicial construction, to rewrite the 1973 statute to read like the 1977 statute. We simply do not have the power to rewrite substantive statutory law." *Lindquist*, 99 Ida. at 770, 589 P. 2d at 105. (citations omitted); *accord Bond v. State*, 273 Ind. 233, 236, 403 N.E.2d 812, 816 (1980) (death sentence reduced to life; court could not fix statute since "judiciary cannot usurp a legislative function by creating standards for imposing the death penalty).

The same holds true here. The Court's rulemaking authority cannot be invoked to rewrite the unconstitutional portions of the death-penalty statute through supplemental jury instructions that necessarily lead to "results unanticipated by the legislature." *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984). To be consistent, Sections of 921.141 (2) and (3), which establish the roles of the trial court and jury, would have to be

excised, recrafted, and reinserted -- not merely severed[3] -- as evinced by the Legislature's own extensive statutory revisions. *See* § 921.141 (2016). This remedy by judicial legislation is, as recognized in *Horsley v. State*, 160 So. 3d 393, 405 (Fla. 2015), "inconsistent with our respect for the separation of powers."

C. Re-sentencing Mr. Hurst to life imprisonment is the proper remedy.

Last year, following the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 22455 (2012) , this Court wrestled with a similar remedy question. After *Miller* invalidated the Florida first-degree murder statute, as applied to juveniles, the Court was "presented with this unique situation in which a federal constitutional infirmity in a sentencing statute has now been specifically remedied by our Legislature." *Horsley v. State*, 160 So. 3d at 395; *see also Falcon v. State*, 162 So. 3d 954 (Fla. 2015). But the Court's analysis in the juvenile context, although instructive, compels a different conclusion here.

The statute in effect at the time that the juveniles were sentenced provided for two possibilities: death or life imprisonment, and death and a mandatory

[3]Unlike the severance of the entire death-penalty provision, which leaves the life-imprisonment provision intact, once the unconstitutional components of the law are removed, an incomplete statute remains, because "the valid and the void parts of [the] statute are mutually connected with and dependent upon each other as conditions, considerations, or compensations for each other, [so that] a severance of the good from the bad would effect a result not contemplated by the Legislature." *Small v. Sun Oil Co.*, 222 So. 2d 196, 199-200 (Fla. 1969).

lifetime sentence were both unconstitutional as applied to juveniles. Accordingly, the Court was called upon to fill the gap created by the invalidation of the only statutory penalty for juvenile's convicted of first-degree murder.

Rejecting the suggestion that the Court create its own remedy or revive one long disfavored, the Court chose to apply the newly enacted statute that represented a "recent, unequivocal expression of legislative intent." *Horsely*, 160 So. 3d at 395. The Court held that all juveniles whose sentences were invalidated by *Miller*, even those whose crimes preceded the effective date of the statute, were entitled to resentencing under the Legislature's new sentencing law. *Id.* This remedy was most consistent with "the fundamental principle of respecting the separation of powers regarding criminal sentencing, including the Legislature's important role in establishing the appropriate sentence for a criminal offense." *Id.*

But here there is no void to fill. The alternative penalty of life imprisonment without the possibility of parole was legislatively prescribed, is harsh and fitting, and stands after the unconstitutional death penalty is severed. And its imposition is also in keeping with legislative intent, as evidenced by the separate statutory provision of Section 775.082(2), Florida Statutes (1998), which provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result

> of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

The Court recognized, in *Donaldson v. Sack*, 265 So. 2d 499, 505 (Fla. 1972), the "materiality" of this statute to the Court's ruling that life imprisonment was the maximum penalty after *Furman v. Georgia*, and explained that this remedy was "consistent with the Legislature's express intent in this area" as it "foresaw the possibility of the current situation," which "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." *Id.* at 503, 505 (Fla. 1972). And this Court's construction of the Savings Clause as applying to invalidations of Florida's death penalty "as now legislated" is consistent with the constructions afforded such clauses by the North Carolina, Missouri, and Colorado supreme courts.

In *State v. Warren*, 292 N.C. 235, 232 S.E.2d 419 (1977), the North Carolina Supreme Court interpreted its savings clause to require life sentences after its mandatory death-penalty statute was declared unconstitutional. The Legislature had passed a statute that provided for life imprisonment if "it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act." *Id.* at 243, at 424 (citation omitted).

There, it was the defendant who sought to *avoid* the savings clause, arguing that the General Assembly's language meant "that the alternative punishment --

life imprisonment -- applies only if the death penalty for first-degree murder is held to be [p]er se unconstitutional." *Id.* Since it was not a per se ruling, he contended that he could not be resentenced to life. The court, in holding that the invalidation of North Carolina's mandatory scheme "triggered the alternative provision for life imprisonment," *id.* (citation omitted), explained:

> This position is untenable. In enacting Section 7, obviously the legislature was concerned that an alternative punishment be provided if the North Carolina death penalty was ever again overturned, regardless of the state of the death penalty generally.[4]

Similarly, following *Ring v. Arizona*, 536 U.S. 584 (2002) the Supreme Court of Missouri had to determine the proper recourse where its death-penalty statute unconstitutionally precluded jury fact-findings. *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003). The court looked to its savings clause, in which the Legislature "anticipated" the required remedy:

> In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor. . . .

[4] The defendant was more successful in Mississippi in avoiding the savings clause, after the court had given it inconsistent constructions over the years. *See Bell v. State*, 160 So. 3d 188, 190-94 (Miss. 2015).

Id. at 271. The court then held that, because the imposition of the death sentence violated the Sixth and Fourteenth Amendment right to a jury, this provision applied, requiring the re-sentencing to life imprisonment. *Id.*

A similar "savings clause" was considered by the Supreme Court of Colorado after that state's death-penalty scheme was also held unconstitutional under *Ring*. *Woldt v. People*, 64 P. 3d 256 (Colo. 2003). The sentencing provision requiring life imprisonment provided:

> In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be punished by life imprisonment. In such circumstances, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

Id. at 259. A discretionary provision passed in 2002 authorized affirming the death sentences or requiring new capital-sentencing proceedings. But the court held that the mandatory savings clause governed, noting that to follow the discretionary procedure would implicate the Ex Post Facto Clauses of the state and federal Constitutions. *Id.* A sentence of life imprisonment was required.[5]

[5] The Supreme Court of Arizona declined to follow *Woldt*, noting that the Colorado court had failed to consider severing the judicial fact-finding provision. *State v. Pandell*, 215 Ariz. 514, 530-31, 161 P.3d 557, 573-74 (Ariz. 2007).

As previously addressed, the ex post facto proscription similarly precludes application of Florida's new capital-sentencing statute.[6] But most importantly, the penalty statute that remains once the unconstitutional death-penalty provision is removed, as reinforced by the mandatory Savings Clause that has been in effect for over 40 years, elucidate legislative intent and mandate lifetime imprisonment.

CONCLUSION

Amicus submits that re-sentencing to life imprisonment without the possibility of parole is the proper remedy.

Respectfully submitted,

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[6]Additionally, the new statute remains constitutionally suspect in its failure to require a unanimous verdict.

CERTIFICATE OF SERVICE

I certify that a copy of this brief of Amicus Curiae was sent on April 7, 2016 via the e-portal filing system which will send a notice of electronic filing to the following: Registered E-Mail on April 7, 2016 to:

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