IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-876

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Phillips filed his Initial Brief in this, his direct appeal, on July 12, 2015. In Argument V of his brief, Phillips argued that his death sentences violated the Sixth Amendment principles set forth in Ring v. Arizona, 536 U.S. 584 (2002). Phillips noted in his argument that the United States Supreme Court had granted certiorari review in Hurst v. Florida, 135 S.Ct. 1531 (2015), in order to address: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L. Ed. 2d 556 (2002)." (IB at 82). In its Answer Brief, the State argued that "[t]his Court has repeatedly rejected a claim that Ring invalidated Florida's capital sentencing scheme." (AB at 63). As for the grant of certiorari review in Hurst, the State relied on statements that this Court had made when holding that Ring was inapplicable to Florida's capital sentencing scheme: "Unlike the instant case, Hurst, did not involve the contemporaneous felony aggravator, which this Court's precedent clearly establishes does not implicate Ring." (AB at 63).

In Argument VI of his Initial Brief, Phillips argued that under Hall v. Florida, 134 S.Ct. 1986 (2014), he had not been afforded "a fair opportunity to show that the Constitution prohibits [his] execution." (IB at 87). Phillips noted that in a mental health evaluation conducted the day before his trial

started, he had scored a 76 on an IQ test. (IB at 31-33). Based upon this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), Phillips' trial counsel did not raise a claim that Phillips was intellectually disabled and that the Eighth Amendment precluded the imposition of a death sentence. Phillips argued that a remand for "a jury determination of whether he is eligible for a sentence of death" (IB at 90) was required because the United States Supreme Court in Hall had held that the Cherry rule "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." Hall v. Florida, 134 S.Ct. at 2001. In its Answer Brief, the State maintained that the mental health expert's evaluation on the eve of Phillips' trial in which the expert relied upon this Court's decision in Cherry as to a strict IQ score of 70 cutoff was definitive. According to the State, a pre-Hall mental health evaluation of Phillips' intellectual disability could not be revisited in light of Hall v. Florida.

After the submission of Phillips' Reply Brief on November 2, 2015, this Court's decision in Oats v. State, 2015 WL 9169766 (Fla. Dec. 17, 2015), issued. There, this Court wrote: "However, because the circuit court did not analyze the remaining prongs, and because neither the circuit court nor the parties and their experts had the benefit of Hall, we remand for further proceedings consistent with this opinion, including providing the

parties with an opportunity to present additional evidence at an evidentiary hearing to **enable a full reevaluation** of whether Oats is intellectually disabled." Oats v. State, 2015 WL 9169766 at *14 (emphasis added).

Then on January 12, 2016, the United States Supreme Court issued Hurst v. Florida, 136 S.Ct. 616, 619 (2016), and while addressing Florida's capital sentencing statutes wrote: "We hold this sentencing scheme unconstitutional."

Because the decisions in Hurst v. Florida and Oats v. State bear directly on the arguments Phillips made in his Initial Brief and the arguments the State made in its Answer Brief, he filed a motion with this Court requesting the opportunity to present supplemental briefing as to the impact of these two decisions on the arguments that the parties have set forth in their briefing. Thereafter, this Court granted the motion and ordered the submission of supplemental briefs.

BRIEF RECITATION OF THE RELEVANT FACTS AS TO ARGUMENT V AND ARGUMENT VI OF THE INITIAL BRIEF

A. FACTS RELEVANT TO HURST V. FLORIDA ISSUE

On April 22, 2010, Terrance Phillips was charged by indictment with two counts of first degree murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery (1 R 27-28).

On January 17, 2012, Phillips' trial commenced. The jury found Phillips guilty as charged on all counts in the verdict it

returned on January 20, 2012. As to the first degree murder charges, the jury found both premeditation and felony murder (3 R 556-62).

In the course of Phillips' trial, the jury was repeatedly told that their role at the sentencing phase of the trial was to merely "recommend" a sentence to the judge and that their recommendation was only advisory (6 R 39, 40, 177; 10 R 934-25; 11 R 1118, 1119, 1122, 1128-29, 1130). The jury was also instructed in conformity with Florida statutory law that the first fact question to be considered during the penalty phase deliberations was whether sufficient aggravating circumstances existed to justify the imposition of the death penalty:

> It is now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of two counts of first degree murder. You must follow the law that will now be given to you and **render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.** The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you've been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an **advisory** step sentence as to which punishment should be imposed - life imprisonment without the possibility of parole or the death penalty.

(11 R 1119) (emphasis added). Phillips' jury was then told that its advisory verdict did not need to be unanimous (11 R 1129).

The jury was not required to identify any of its factual conclusions. After deliberations were completed, the jury foreman announced the jury's verdict was death recommendations by a vote of 8-4 (11 R 1134).

Thereafter, the trial judge conducted an independent sentencing proceeding as required by the Florida statute and imposed sentences of death. In doing so, the judge — and the judge alone — made the findings of fact required under Florida law to make Phillips eligible for a sentence of death, i.e. that sufficient aggravating circumstances existed to justify a sentence of death and that sufficient mitigating circumstances did not exist to outweigh the aggravating circumstances.[1]

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[1]As to the later fact, the judge deviated from the statutorily defined fact and instead found that the aggravating circumstances outweighed the mitigating circumstances (R 4 663). The judge identified three aggravating circumstances that he concluded were present: 1) previous conviction of a capital felony; 2) previous conviction of a felony for which Phillips was placed on probation; and 3) the homicide occurred in the course of an armed robbery. The judge identified one statutory mitigating circumstance as present: Phillips was several months past his 18th birthday. The judge identified eleven non-statutory mitigators: 1) Phillips had a borderline IQ of 76; 2) Phillips has a learning disability; 3) Phillips has a severe speech impediment; 4) Phillips is easily influenced by others; 5) Phillips was impacted by the death of his father; 6) Phillips is a loving and caring family member, steadfast friend, and a good neighbor; 7) Phillips is good at sports; 8) Phillips grew in a high crime neighborhood; 9) Phillips was abused and neglected as a child and did not receive professional mental health; 10) Phillips is reverent and God-fearing; and 11) Phillips was respectful during court proceedings.

Of course, what the jury found as a matter of fact is unknown. All that is known is that the jury's death

B. FACTS RELEVANT TO OATS V. STATE ISSUE

Dr. Michael D'Errico, a clinical and forensic psychologist, testified that he performed an evaluation of Phillips on January 16, 2012 (11 R 1053, 1055).[2] Dr. D'Errico testified that he reviewed a stack of school records, which described Phillips' history in special education classes for specific learning disabilities (11 R 1055-56).[3] It was also reported in the records that Phillips had been involved in speech therapy between the first and fourth grades for a speech impediment or phonological disorder (11 R 1056). In addition, Dr. D'Errico reviewed an incident report from the Department of Children and Families in 2002, in which Phillips showed up at school with his face burned (11 R 1060). The burn was caused by a hot clothes iron (11 R 1060). Phillips said he did it to himself; he wanted to see if the iron was hot (11 R 1060).

Dr. D'Errico testified at the penalty phase that Phillips scored a 76 on an unidentified IQ test that he had administered. This placed Phillips in the fifth percentile ("In other words he - - 95 percent of all of the entire population of the United

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recommendations were by a vote of 8-4.

[2]Phillips' trial began on January 17, 2012. The record does not explain why Phillips' counsel waited until the day before the trial started to have a mental evaluation of Phillips conducted when the matter had been pending for two years.

[3]Phillips was involved in special education classes from the first grade until he quit school in the ninth grade (11 R 1060).

States if given the same test would score higher than Phillips did on this test." (11 R 1057). Dr. D'Errico concluded that Phillips has significantly subaverage intelligence and that he falls in the borderline range of intellectual functioning (11 R 1056). According to Dr. D'Errico's testimony, however, Phillips was not mentally retarded (11 R 1056). Dr. D'Errico apparently relied upon this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), for this conclusion because he explained that an individual can only be classified as mentally retarded if he scores 70 or below on an IQ test, which of course was the holding of Cherry and not the standard in the profession as explained by the United States Supreme Court in Hall v. Florida.[4] Because of the Cherry cutoff, Dr. D'Errico did not evaluate Phillips for deficits in adaptive functioning.[5]

Nevertheless, Dr. D'Errico did explain that Phillips' **historical** intellectual functioning coupled with his current intellectual functioning warranted a diagnosis of borderline

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[4]Dr. D'Errico specifically explained that an individual can only be classified as mentally retarded if he receive a score of 70 or below on a qualifying IQ test (11 R 1056-57).

[5]However in the course of his testimony, Dr. D'Errico noted facts in Phillips' history that show deficits in adaptive functioning. These include: records that Phillips had been involved in speech therapy between the first and fourth grades for a speech impediment or phonological disorder (11 R 1056), and an incident report from the Department of Children and Families in 2002 which indicated that Phillips burned his face with a hot clothes iron in order to see if the iron was hot (11 R 1060).

intellectual functioning according to the diagnostic manual (11 R 1059). He further reiterated that Phillips was not merely slightly below the normal range of intelligence; he was significantly below the normal range of intelligence (11 R 1064-65).

At the time of Dr. D'Errico's evaluation the decision in Hall v. Florida had not yet been issued. Obviously, his evaluation of Phillips was conducted without the benefit of that decision.

ARGUMENT V

THE CAPITAL SENTENCING STATUTE UNDER WHICH PHILLIPS WAS TRIED, CONVICTED AND SENTENCED TO DEATH IS UNCONSTITUTIONAL, AND AS A RESULT, HIS DEATH SENTENCES STAND IN VIOLATION OF THE SIXTH AMENDMENT.

A. HURST V. FLORIDA

On January 12, 2016, the United States Supreme Court rendered its 8-1 decision in Hurst v. Florida, 136 S.Ct. 616 (2016), and found that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." Id. at 619. The Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. The Hurst opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

The State fails to appreciate the central and singular

> role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death**." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**." § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted).

Under Florida's statute, a death sentence is not authorized unless two statutorily defined facts are found. A unanimous verdict finding the defendant guilty of first degree murder by itself does not authorize a death sentence. The two statutorily defined facts required to authorize the imposition of a death sentence on an individual convicted of first degree murder are 1) the existence of "sufficient aggravating circumstances" and 2) the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); Hurst, 136 S.Ct. at 622. As a result, these two statutorily defined facts constitute elements of capital first degree murder, i.e. first degree murder plus the statutorily defined elements that authorize the imposition of a greater punishment than that authorized solely on the basis of a first degree murder conviction.

Because Florida's statute does not require a jury to return a verdict finding that these two statutorily defined facts have been proven by the State beyond a reasonable doubt, Florida's capital sentencing statute violates the Sixth Amendment. Hurst v. Florida, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.").

B. IN OTHER CASES, THE STATE HAS CONCEDED THAT WITHOUT QUESTION PHILLIPS GETS THE BENEFIT OF HURST V. FLORIDA

This is Phillips' direct appeal from his conviction and the imposition of sentences of death. During the oral argument in Lambrix v. State, Case No. SC16-56, on February 2, 2016, the State of Florida conceded that any death sentenced individual whose sentence of death was not final before January 12, 2016, when Hurst v. Florida issued, gets the benefit of that decision. In other words, the State conceded that Hurst v. Florida unquestionably applied in Phillips' case because this Court had yet to complete its review of his sentences in his direct appeal.

This means that in Phillips' appeal there are no questions of retroactivity to address. Even though the crime for which he stands convicted of occurred on December 24, 2009, more than six years before the decision in Hurst issued, Hurst governs this appeal. Even though Phillips' trial began on January 17, 2012, almost exactly four years before the decision in Hurst issued, Hurst governs this appeal and hence Phillips' 2012 trial.

In its Answer Brief filed on September 18, 2015, the State summarized its argument as to Phillips' Argument V as follows:

> Phillips's sentences of death do not violate the Sixth Amendment to the United States Constitution as interpreted by Ring v. Arizona, 536 U.S. 584 (2002). **This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring**. Phillips urges this Court to revisit the issue but his arguments lack merit. Because Phillips has not presented any new issue this Court has previously declined such requests. Further, Ring does not apply to Phillips's case as the trial court found the aggravating circumstance of prior violent felony for the contemporaneous murders.

Answer Brief at 21 (emphasis added). The entirety of the State's argument was wiped out by Hurst v. Florida. The United States Supreme Court specifically found that Florida's capital sentencing scheme does violate the Sixth Amendment. The United States Supreme Court specifically found that this Court's rejection of Ring challenges to Florida's sentencing scheme was erroneous because this Court failed to appreciate the significance of Ring and its application to the Florida capital sentencing scheme.

As to the State's assertion that Ring does not apply because the judge found the prior violent felony aggravator, the argument is simply wrong under Hurst v. Florida.[6] Florida's capital

[6]Within the body of its argument, the basis for the State's contention appears to be prior decisions by this Court in which it indicated that it read Ring as not applying to the previously convicted of a crime of violence aggravator (AB at 63). However, just as this Court misread Ring as not applying in Florida, this Court misread Ring as to what was the decision's Sixth Amendment

sentencing statute was declared unconstitutional. The finding of a particular aggravating circumstance by a judge does not suddenly render the statute constitutional. The capital sentencing scheme that was the basis for sentencing Phillips to death has been found unconstitutional. The only arguments made by the State in its Answer Brief have been rejected by Hurst v. Florida, which is the controlling authority.

Under Hurst, Phillips' sentences of death that were imposed pursuant to an unconstitutional capital sentencing statute stand in violation of the Sixth Amendment.

C. SECTION 775.082(2), FLA. STAT.

Section § 921.141, Fla. Stat., sets forth Florida's death penalty scheme. In Hurst, the United States Supreme Court ruled the statutory scheme violated the Sixth Amendment and was unconstitutional. While the United States Supreme Court did not specifically address Florida's capital sentencing scheme in Furman v. Georgia, 408 U.S. 238 (1972), Florida's Attorney General conceded before this Court that the decision in Furman

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component and what was the Arizona law component. Under Arizona statutory law, the fact necessary to authorize the imposition of a death sentence was the finding of one aggravating circumstance. It was to that statutorily defined fact, one aggravating circumstances, that the Sixth Amendment applied. Under Florida law, the statutorily defined facts necessary to authorize a death sentence are: 1) the existence of sufficient aggravating circumstances, and 2) the absence of sufficient mitigating circumstances that outweigh the aggravating circumstances. It is to those statutorily defined facts that the Sixth Amendment attaches and requires to be found by a jury. Hurst v. Florida.

rendered Florida's death penalty scheme unconstitutional under the Eighth Amendment. Thus, the 2016 decision in Hurst parallels the effect of 1972 decision in Furman.

After Furman was recognized as rendering Florida's capital sentencing scheme unconstitutional, this Court had to consider the impact of Furman upon death sentences that had been imposed pursuant to an unconstitutional sentencing scheme. In Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972), this Court specifically held that in light of Furman, Florida's death penalty statute was unconstitutional and could not be upheld:

> We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's **holding against the death penalty as provided under present legislation.** Our decision is compelled by that Court's action.

(Emphasis added). This Court then addressed the applicability of section 775.082(2)[7] to those defendants who had been sentenced to

[7]Section 775.082(2), Florida Statutes, 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

death under an unconstitutional sentencing scheme:

> 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. This provision is not before us for review and we touch on it only because of its materiality in considering the entire matter.

Id. at 505 (footnote omitted). This Court specifically noted that § 775.082(2) was relevant because the United States Supreme Court had "invalidat[ed] the death penalty as now legislated." Id. In fact, Chapter 72-118, which added the pertinent language contained in section 775.082(2), was enacted in the 1972 Legislative session in anticipation of Furman. See Donaldson, 265 So. 2d at 503 ("At their 1972 Session, the Legislature foresaw the possibility of the current situation."). The statute actually was effective October 1, 1972; while Furman was decided on June 29, 1972, rehearing wasn't denied until October 10, 1972. Furman v. Georgia, 409 U.S. 902 (1972).

In Reino v. State, 352 So. 2d 853, 860-61 (Fla. 1977), this Court noted that the Legislature added 775.082(2) in March of 1972:

> As early as March, 1972, the legislature was cognizant of the possibility of the decision reached in Furman.

> State Constitution or the Constitution of the United States.

> Not only did the legislature revise the death penalty statute to be effective October 1, 1972 (Ch. 72-72, Laws of Florida), it enacted Ch. 72-118, Laws of Florida, filed in the office of the Secretary of State March 30, 1972, which amended Section 775.082, Florida Statutes, by adding a new subsection reading:
>
> > 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, a person who has been convicted of a capital felony shall be punished by life imprisonment.

Id. at 860-61.

In Anderson v. State, 267 So. 2d 8 (Fla. 1972), this Court determined, upon motion by the Attorney General, that trial courts could resentence all inmates under sentence of death in absentia. This Court and the Attorney General agreed that the newly enacted, but not yet effective, section 775.082(2) would apply. See also Reed v. State, 267 So. 2d 70 (Fla. 1972) (holding that in light of Donaldson, the defendant's sentences had to be changed from death to life imprisonment).

The State's position, which has been asserted in other cases, that § 775.082(2) does not apply after Hurst -- because the death penalty has not been declared unconstitutional *per se* -- fails to recognize that Furman had not declared the death penalty unconstitutional *per se*. When this Court applied § 775.082(2) in 1972, Furman had not declared any death penalty unconstitutional *per se*. The ruling was that the procedures then in place did not comport with the Eighth Amendment.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court

acknowledged as much. There it ruled that Furman did not abolish the death penalty. This Court in Dixon wrote: "[Furman] does not abolish capital punishment." "Capital punishment is not, per se, violative of the Constitution of the United States . . . or of Florida." Id. at 6-7. See also Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982) ("Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitution.").

It was the *procedure or scheme* for imposing the death penalty that rendered Florida's death penalty unconstitutional under the Eighth Amendment as explained in Furman. When this Court determined that section 775.082(2) applied, it was after the procedure that Florida employed to impose a death sentence had been found unconstitutional, not the sentence of death itself. Furthermore, there was no ambiguity about the application of §775.082(2) after Furman. Anderson, 267 So. 2d 8; Reed, 267 So. 2d 70.

Certainly, § 775.082(2) makes no distinction between a ruling invalidating Florida's death penalty scheme on Eighth Amendment grounds and a ruling invalidating the scheme on Sixth Amendment grounds. Therefore, this post-Hurst situation cannot be dismissed as different from the post-Furman situation in 1972. Under this Court's post-Furman jurisprudence, Phillips must be sentenced to life imprisonment in the wake of Hurst because no

individual case-by-case determination has been provided for by statute.

D. APPLICATION OF DOUBLE JEOPARDY PRINCIPLES

Upon the conviction of first degree murder alone, the only sentence permitted by virtue of the decision in Hurst v. Florida is life imprisonment. As it relates to his death sentences, all that Phillips stands convicted of now are two counts of first degree murder. He was not convicted of first degree murder along with a finding of the statutorily defined facts which must be found in order for a death sentence to be authorized, i.e. the element or elements necessary to authorize an increase in the punishment above that authorized just a conviction of first degree murder.

The double jeopardy implications of Phillips' circumstances can be illustrated with an analogy. Assume that he had been convicted of manslaughter because the jury had only been instructed on the crime of manslaughter; it had not been instructed as to the additional elements necessary for a first degree murder conviction. Could the sentencing judge then impose a valid and legal life sentence on Phillips because he found as a matter of fact that Phillips had a premeditated intent to kill when he killed? See State v. Montgomery, 39 So. 3d 252 (Fla. 2010). Under Hurst, it is clear that if the judge imposed a life sentence in those circumstance, such a sentence would violate the

Sixth Amendment. But if the judge nevertheless said that because he found as a matter of fact that premeditation was present and imposed a life sentence without the possibility of parole, what would happen if Phillips did not appeal. Then twenty years later, Phillips realized that his sentence was illegal and filed a Rule 3.800(a) motion which can be filed at any time to correct an illegal sentence. See Carter v. State, 786 So. 2d 1173, 1178 (Fla. 2001). Could the State argue that before the sentence was corrected, it was entitled to present evidence of premeditation to the jury in order to keep the sentence intact? According to Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998), the answer to the question would seem to be no as it would violate double jeopardy.[8] A defendant convicted of manslaughter cannot be

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[8]In Hopping, this Court adopted the reasoning of the dissenting judge from the First DCA decision under review:

> Thus, **as Judge Benton concisely reasoned**, the sentence should not be unreachable under a rule expressly intended to correct illegal sentences:
>
> > The court today decides that appellant's claim that his sentence was unconstitutionally lengthened, after he had begun serving it cannot be considered under a rule that provides: "A court may at any time correct an illegal sentence imposed by it...." The opinion in Davis v. State, 661 So.2d 1193 (Fla.1995), should not, in my opinion, be read so narrowly. **A sentence that has been unconstitutionally enhanced is "an illegal sentence ... [in] that [it] exceeds the maximum period set forth by law for a particular offense without regard to the guidelines**."
>
> Hopping v. State, 674 So.2d 905, 906 (Fla. 1st DCA

legally sentenced as though he had been convicted of first degree murder on the basis of a judge's finding of premeditation. And, the State would not be able to later seek to present evidence of premeditation to argue either that the illegal sentence was harmless or that the State was entitled to a new sentencing proceeding at which it could seek to get a new jury to return a first degree murder conviction when the previous jury had returned a manslaughter conviction.

In Phillips' case, the only possible punishment authorized by the convictions of first degree murder alone was life imprisonment without the possibility of parole.[9] There can be no doubt about this. The indictment charged first-degree murder. Phillips was convicted of only first-degree murder. At the time that the jury returned unanimous verdicts of guilt on two first-degree murder counts, there were no actual findings as to the presence of the statutorily defined facts, i.e. the elements, 1) whether sufficient aggravating

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> 1996)(Benton, J., dissenting) (citations omitted). **We agree with Judge Benton's reasoning** and conclude that our holding today does no violence to the rationale of Davis.

Hopping v. State, 708 So. 2d at 265 (emphasis added).

[9]As Hurst now makes clear that **any** fact, no matter how it is labeled, which increases the punishment authorized by a guilty verdict, constitutes an element of the death eligible offense, i.e. capital first degree murder, and must be found by a jury beyond a reasonable doubt.

circumstances existed to justify the imposition of a death sentence, and 2) whether sufficient mitigating to outweigh the aggravating circumstances did not exist. Pursuant to the statutory scheme in place at the time, the Sixth Amendment requires that Phillips be sentenced to life because his jury did not convicted him of first degree and the additional elements necessary to authorize a death sentence.

The question in Hurst was not whether the Sixth Amendment guarantees the right to a jury determination of the facts necessary to establish that the elements of a criminal offense have been proved beyond a reasonable doubt. That has been a given since the Bill of Rights was adopted. The important question resolved by Hurst was what facts are elements under Florida law that must be established to render a capital defendant eligible for a death sentence.

> As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death."** Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

Hurst v. Florida, 136 S.Ct. at 622 (emphasis added).[10]

[10]In Apprendi v. New Jersey, 530 U.S. 466 (2000), Justice Thomas wrote in his concurrence that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here,

Because Phillips has not been convicted by a jury of first degree murder and the additional facts or elements necessary to authorize a sentence of death, the only sentences that can be imposed for his two first degree murder convictions are life sentences.

E. AVAILABILITY OF HARMLESS ERROR ANALYSIS

The State did not raise a harmless error argument in its Answer Brief. However, Phillips recognizes that the issue of the availability of harmless error was mentioned in Hurst although the United States Supreme Court did not resolve its applicability:

> **Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18–19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless).** This 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. See Ring, 536 U.S., at 609, n.7, 122 S. Ct. 2428.

Hurst v. Florida, 136 S.Ct. 616, 624 (2016) (emphasis added). Obviously, the Supreme Court in Hurst left the State's assertion that any error was harmless for this Court to address in the first instance. In so doing though, the Supreme Court referred this Court to Neder v. United States, 527 U.S. 1 (1999), noting parenthetically that the failure to instruct on an **uncontested**

Winship and the right to trial by jury." Id. at 501.

element in that case had been found harmless. Looking to Neder, there the Supreme Court wrote:

> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "**defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself**." *Fulminante, supra,* at 310, 111 S.Ct. 1246. Such errors "infect the entire trial process," *Brecht v. Abrahamson,* 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose,* 478 U.S., at 577, 106 S.Ct. 3101. Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Id.,* at 577–578, 106 S.Ct. 3101.
>
> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Our decision in *Johnson v. United States, supra,* is instructive. *Johnson* was a perjury prosecution in which, as here, the element of materiality was decided by the judge rather than submitted to the jury. The defendant failed to object at trial, and we thus reviewed her claim for "plain error." Although reserving the question whether the omission of an element *ipso facto* " 'affect[s] substantial rights,' " 520 U.S., at 468–469, 117 S.Ct. 1544, we concluded that the error did not warrant correction in light of the " 'overwhelming' " and "uncontroverted" evidence supporting materiality, *id.,* at 470, 117 S.Ct. 1544.

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The conclusion that the omission of an element is subject to harmless-error analysis is consistent with the holding (if not the entire reasoning) of *Sullivan v. Louisiana,* the case upon which Neder principally relies. In *Sullivan,* the trial court gave the jury a defective "reasonable doubt" instruction in violation of the defendant's Fifth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt. See *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) *(per curiam).*Applying our traditional mode of analysis, the Court concluded that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," 508 U.S., at 281, 113 S.Ct. 2078, and produces "consequences that are necessarily unquantifiable and indeterminate," *id.,* at 282, 113 S.Ct. 2078. By contrast, the jury-instruction error here did not "vitiat[e] *all* the jury's findings." *Id.,*at 281, 113 S.Ct. 2078; see *id.,* at 284, 113 S.Ct. 2078 (REHNQUIST, C. J., concurring). It did, of course, prevent the jury from making a finding on the element of materiality.

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It would not be illogical to extend the reasoning of *Sullivan* from a defective "reasonable doubt" instruction to a failure to instruct on an element of the crime. But, as indicated in the foregoing discussion, the matter is not *res nova* under our case law. And if the life of the law has not been logic but experience, see O. Holmes, The Common Law 1 (1881), we are entitled to stand back and see what would be accomplished by such an extension in this case. The omitted element was materiality. Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. **Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so**

> **allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed.** We do not think the Sixth Amendment requires us to veer away from settled precedent to reach such a result.

Neder, 527 U.S. at 8-9, 10-11, 15 (emphasis added).

To determine under Neder whether Hurst error is subject to harmless error analysis requires consideration of what exactly is Hurst error. Unlike the circumstances in Neder, the element at issue under Hurst is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in Neder where the presence of the element was not contested, Phillips did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover a reversal in Phillips' case on the basis of Hurst would not result in a retrial of his guilt of first degree murder. It would either require the imposition of a life sentence on the basis of double jeopardy or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Phillips would contest the existence of those facts. This distinguishes Neder and demonstrate that the error should be found structural and not subject to harmless error.

Even if harmless error may be theoretically possible, it would also make no sense for the Florida judiciary to seek to cure its prior denial of jury participation through another denial of jury participation. In Hurst at a minimum, the problem was **that judges rather than juries were finding facts necessary to authorize a death sentence.** Seeking to remedy that error by having appellate judges, rather than trial judges, once again supplant the judgement of the jury would be repeating the same error. The only reason the Supreme Court in Clemons v. Mississippi, 494 U.S. 738 (1990), permitted appellate courts to reweigh aggravators and mitigators after striking an aggravator was its conclusion that the Sixth Amendment was not at issue: "In a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury." Clemons, 494 U.S. at 744-45. The Clemons Court then expressly relied on Hildwin v. Florida, 490 U.S. 638 (1989): "Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)." Clemons, 494 U.S. at 746. See Hurst, 136 S.Ct. at 624 ("Time and subsequent cases have washed away the logic of Spaziano and

Hildwin. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."). With the underlying reasoning of Clemons wiped away in Hurst, this Court cannot rely on Clemons to justify a harmless error analysis that is little more than an appellate court reweighing of whatever aggravators the court might imagine a jury to have found. Guessing at what might have happened had the jury made the necessary factual determination is just the sort of "frail conjecture" that Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), forbids.

The fact that Phillips did contest whether a death sentence should be returned in his case[11] and would specifically contest whether the statutorily defined facts, i.e. elements, are present at a resentencing, distinguishes Phillips circumstances from those in Neder where the error was possibly harmless. Moreover, Hurst would change how the trial was conducted. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions as to the importance of

[11]Of course at his 2012 trial, Phillips did not have notice that the statutorily defined facts were elements that under the Sixth Amendment a jury was required to find proven beyond a reasonable doubt. Due process demands reasonable notice which was not given here. This Court cannot rely on counsel's actions or inactions to find errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine.

its role as to the sentence that would be imposed would have to comply with Caldwell v. Mississippi, 472 U.S. 320 (1985). The full ramifications of Hurst on Florida capital trials at the moment can only be guessed. This fact alone should demonstrate that Hurst error cannot be found harmless beyond a reasonable doubt, certainly not in Phillips' case where four jurors were in favor of life sentences, presumably because those jurors did not find the statutorily defined facts present.

Florida law requires elements to be found unanimously by the jury. Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." Bottoson v. Moore, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." Id. at 714. The Florida Legislature adopted the English common law rule on November 6, 1829 with enactment of Section 775.01 of the Florida Statutes. See id. Florida's first Constitutional Convention adopted the right to a jury trial when it proclaimed in Article I of our Declaration of Rights that "the right of trial by jury, shall for ever remain inviolate." Fla. Const. art. I, § 6.

Given that four jurors voted in favor of life sentences for

Phillips, even if harmless error is an option for Hurst error, it would be impossible to say beyond a reasonable doubt in Phillips' case that a jury instructed that its verdict was binding and had to be returned unanimously would have returned a determination of the statutorily defined facts and rendered Phillips eligible for death sentences.

F. CONCLUSION

Under Hurst, Phillips' death sentences cannot stand. He was not convicted by a jury of first degree murder plus the statutorily defined facts that constitute elements of capital first degree murder and authorize the imposition of a death sentence.

ARGUMENT VI

UNDER HALL V. FLORIDA, PHILLIPS WAS DEPRIVED OF "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBIT[ED] [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY, AND BECAUSE HE IS INTELLECTUALLY DISABLED PHILLIPS IS NOT ELIGIBLE TO RECEIVE A DEATH SENTENCE.

A. INTRODUCTION

Argument VI of Phillips' Initial Brief was written in reliance upon the United States Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014). There, the Supreme Court determined that this Court's adoption of a strict cutoff requiring an IQ score of 70 or below for an intellectual disability claim in Cherry v. State violated the Eighth Amendment ban on the execution of defendants who are intellectually

disabled. But, Hall went even further and held that capital defendants must be given "a fair opportunity to show that the Constitution prohibits their execution." Hall, 134 S. Ct. at 2001.

In Phillips' case, a mental health expert who evaluated him at the last minute (the day before his trial began) obtained an IQ score of 76 on an undisclosed IQ test. Solely on the basis of this Court's decision in Cherry strictly requiring IQ scores of 70 or below, Dr. D'Errico without further testing concluded that Phillips was not intellectually disabled under Cherry. In Argument VI, Phillips argued that the Cherry standard operated in his case to deprive him of the fair opportunity that Hall v. Florida guaranteed. Phillips also argued that because a defendant must not be intellectually disabled to be eligible for a sentencing of death, he was entitled under the Sixth Amendment to a jury verdict on his intellectual disability (IB at 90).

The State responded in its Answer Brief that Phillips' argument was meritless because "Phillips's own mental health expert said he is not intellectually disabled." (AB at 67). The State did not address Phillips' assertion that because intellectual disability went to death eligibility, the Sixth Amendment entitled Phillips to have a jury determine whether his intellectual disability rendered him ineligible for a death sentence.

Since briefing was completed, this Court rendered its decision in Oats v. State, 2015 WL 9169766, and addressed the import of Hall v. Florida on mental health evaluations as to a capital defendant's intellectual disability. Since briefing was completed, the United States Supreme Court rendered its decision in Hurst v. Florida.

B. OATS V. STATE

At issue in Oats was the intellectual disability of Sonny boy Oats who is under a death sentence for a 1979 homicide. Oats' death sentence became final in 1985 when this Court affirmed the death sentence on direct appeal. Oats v. State, 472 So. 2d 1143 (Fla. 1985). Following the issuance of Atkins v. Virginia, 536 U.S. 304 (2002), Oats argued that due to his intellectual disability his death sentence should be vacated. An evidentiary hearing was conducted on his claim commenced in 2010 and was concluded in 2011, well after this Court's opinion in Cherry v. State. The circuit court denied relief. On December 17, 2015, this Court reversed and remanded.

In Oats v. State, this Court discussed Hall v. Florida and Brumfield v. Cain, 135 S.Ct. 2269 (2015), at length.[12] Both cases

[12]Phillips also relied on Brumfield in his Initial and Reply Briefs. The IQ score at issue in Brumfield was 75, and the United States Supreme Court found the 75 IQ "was squarely in the range of potential intellectual disability." Brumfield v. Cain, 135 S.Ct. at 2278. The Supreme Court noted that an IQ score of 76 even warranted an evidentiary hearing. Id. at 2279 ("See State v. Dunn, 2001-1635 (La.11/1/02), 831 So.2d 862, 886, n. 9 (ordering

were found to govern even though they issued long after Oats' death sentence was final in 1985. Further, this Court found that the circuit court had committed error in its order denying Oats' intellectual disability claim. Accordingly, a reversal was required. But in remanding, this Court determined that another evidentiary hearing was warranted because the circuit court, the parties and the experts in evaluating Oats had not had the benefit of the decision in Hall v. Florida. This Court wrote:

> The evidence presented to the circuit court in fact strongly leads to the conclusion that Oats established both his low IQ and onset of an intellectual disability prior to the age of 18. However, **because the circuit court did not analyze the remaining prongs**, and because **neither the circuit court nor the parties and their experts had the benefit of Hall**, we remand for further proceedings consistent with this opinion, including providing the parties with an opportunity to present additional evidence at an evidentiary hearing **to enable a full reevaluation of whether Oats is intellectually disabled.**

Oats v. State, 2015 WL 9169766 at *14 (emphasis added).

Of course, this is precisely the situation in Phillips' case. When Phillips was evaluated on January 16, 2012, the day before his trial started, neither the mental health expert, Dr. D'Errico nor defense counsel "had the benefit of Hall." Accordingly just as in Oats v. State, "a full reevaluation of whether [Phillips] is intellectually disabled" should be ordered.

Atkins evidentiary hearing even though 'prison records indicate[d]' the defendant had an '"estimated IQ of 76,"' emphasizing testimony that prison officials 'did not do the formal IQ testing').").

Phillips was and is entitled to a Hall compliant evaluation of his intellectual disability.

C. HURST V. FLORIDA

While the United States Supreme Court did not specifically address Hurst's intellectual disability claim and whether he was entitled to a jury's determination of his intellectual disability, the logic of the Hurst decision would suggest the Sixth Amendment right must attach to an intellectual disability claim.

The Court in Hurst ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. Section 921.137(2), Fla. Stat., provides: "A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled." Thus under Florida statutory law, a defendant convicted of first degree murder who is intellectually disabled is not eligible to receive a death sentence.

The logic of Hurst means that the Sixth Amendment right to a jury attaches to the intellectual disability determination. Phillips is not eligible for a death sentence if he is intellectually disabled under § 921.137(2). Thus once there is evidence raising a question of fact as to a defendant's

intellectual disability, there must be a factual finding that the defendant is not intellectually disabled. Such a fact finding under the Sixth Amendment is for a jury to make. Hurst v. Florida.

D. CONCLUSION

Phillips is entitled to have his intellectual disability claim evaluated in conformity with Hall v. Florida. Further, under Hurst, the Sixth Amendment right to trial by jury attached to the ultimate factual determination of Phillips' intellectual disability. This is because a defendant's intellectual disability renders the defendant ineligible to be sentenced to death under Florida statutory law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Initial Brief has been furnished by electronic service to Berdene Beckles, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 17th day of February, 2016.

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CERTIFICATE OF FONT

This is to certify that this Supplemental Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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