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 RE: STATE'S SUPPLEMENTAL AUTHORITY

MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law

141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344
FAX: (954)564-5412

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

INTRODUCTION

On June 27, 2016, this Court granted Phillips' "Motion Seeking an Opportunity to Brief the Supplemental Authority Submitted by the State on June 14, 2016 ..." and gave Phillips until July 12, 2016, to file his initial brief on the matter. This is Phillips' supplemental initial brief authorized by this Court's June 27th order.

THE CONTEXT OF THE STATE'S SUBMISSION OF THE SUPPLEMENTAL AUTHORITY AT ISSUE IN THIS BRIEF

On June 14, 2016, the State filed its "Second Notice of Supplemental Authority" in which it gave this Court notice of United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013). The notice indicated that Gabrion was submitted in support of the State's position as to Argument V of Phillips' initial brief.

In Argument V of Phillips' initial 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).

After the Supreme Court issued its decision in Hurst v. Florida, 136 S.Ct. 616 (2016), in January of this year, Phillips asked for the opportunity to file supplemental briefing regarding the import of Hurst as to Argument V of his initial brief. On February 8, this Court granted the motion and directed the parties to submit supplemental briefs. Pursuant to that order,

the parties briefed the impact of Hurst on Argument V of Phillips' initial brief. Shortly after the supplemental briefing was completed, this Court heard oral arguments from the parties on March 9, 2016.

Meanwhile on March 7, 2016, two days before those oral arguments, the Governor signed new legislation into law that rewrote Florida's capital sentencing statute in the wake of Hurst v. Florida.

On June 14, 2016, three months after the oral argument in Phillips' appeal and after the revised capital sentencing statute had been enacted, the State filed the "Second Notice of Supplemental Authority" which is the subject of this brief.

This Court's examination of Hurst and its import has certainly not been limited to Phillips' appeal. Indeed since Hurst issued, this Court has evinced its desire to closely scrutinize Hurst in order to understand how it is to be applied. Following the issuance of Hurst, supplemental briefing was ordered by this Court in many, many pending capital appeals. Discussions of Hurst and its import were a staple of the oral arguments in capital appeals that this Court heard in February, March, April, May, and June of this year. In addition, oral argument was heard in June in a case in which the constitutionality and construction of the newly enacted capital sentencing statute was at issue. As that oral argument showed,

the new statute's constitutionality, and even its construction, turns on how Hurst is read and applied.

It was after all of the supplemental Hurst briefing and the numerous oral arguments that the State submitted Gabrion, a 2013 decision regarding a federal death sentence, as supplemental authority, not just in Phillips' pending appeal, but in numerous others. Throughout all of the supplemental Hurst briefing and numerous oral arguments that followed the issuance of Hurst through the beginning of June, the State's position had been consistent, i.e. Hurst was a narrow decision only requiring a jury to have found a fact that established the existence of one single aggravating circumstance.[1] But then in the middle of June, the State for the first time relied upon and submitted Gabrion as supplemental authority to be considered as to Hurst. In the parenthetical set forth in its notice, the State described Gabrion as "holding that the jury's determination that a factor sufficiently outweighs another is not a finding of fact, but a moral judgment." This parenthetical clearly was meant to reflect the argument that the State now seeks to present to this Court on the basis of Gabrion, an argument that not only did it not make before, but that is actually at odds with the arguments that the

[1]The State's argument that Hurst was a narrow ruling with very limited impact was part of its strategy to maintain that Hurst was not a "jurisprudential upheaval[]" within the meaning of Witt v. State, 387 So. 2d 922, 929 (Fla. 1980). Deviating from arguing Hurst was narrow has implications for its Witt argument.

State did make.

It is within that context that Phillips saw the State's sudden reliance upon Gabrion as a recognition by the State that its arguments that Hurst was a very narrow ruling had not gained traction with this Court. Because he viewed the filing of Gabrion as supplemental authority to be an effort by the State to substitute in a new and different argument regarding Hurst without giving him a chance to address it, Phillips asked this Court for the opportunity to brief "the supplemental authority and the import of the State's reliance on it." Motion (6/15/16) at 5. Given that this Court granted his motion, herein Phillips addresses how Hurst and Gabrion intersect and what the State's reliance on Gabrion demonstrates.

FACTS RELEVANT TO ARGUMENT V OF PHILLIPS' INITIAL BRIEF

In the Supplemental Initial Brief that Phillips filed on February 17, 2016, he set forth the facts of his case relevant to his arguments premised upon Hurst v. Florida. Phillips relies upon his statement of relevant set forth there.

ARGUMENT RE *HURST* AND *GABRION*

Argument V of Phillips' initial brief filed on July 12, 2015, asserted that his death sentences violated the Sixth Amendment principles set forth in Ring v. Arizona, 536 U.S. 584 (2002). Following the issuance of Hurst, the parties have used the "Argument V" label to reference Phillips' arguments that his

death sentences now stand in violation of the Sixth Amendment principles set forth in Hurst v. Florida. In the State's notice of supplemental authority filed on June 14, 2016, it stated:

> In support of the State's position in Argument V, the State gives notice of the following supplemental authority: United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013) (holding that the jury's determination that a factor sufficiently outweighs another is not a finding of fact, but a moral judgment.).

However, Gabrion does not support what had been the State's position as to Argument V in its previously filed answer briefs. Indeed, the parenthetical description of the holding of Gabrion suggests an argument at odds with its previously stated position.

The State's position in its briefing

In response to Argument V as set forth in the initial brief which relied upon Ring v. Arizona,[2] the State's answer brief contained a two-page argument. It asserted that the Ring argument lacked merit because the jury had returned guilty verdicts on various counts that made Phillips "independently eligible for a death sentence under Florida law." (AB 63). The State continued: "This satisfies any right to jury sentencing that Phillips reads into Ring." The State distinguished the grant of certiorari review in Hurst since "Hurst did not involve the contemporaneous

[2]Phillips argued in his initial brief that because the Florida statute required "a factual determination that the aggravating circumstances found are sufficient to warrant the imposition of a death sentence," that factual determination had to be made by a unanimous jury under the logic of Ring. (IB 79).

felony aggravator, which this Court's precedent clearly establishes does not implicate Ring." (Id.).

After the decision in Hurst issued, Phillips revisited Argument V in his supplemental initial brief filed on February 17, 2016, and relied upon Hurst as establishing that his death sentences stood in violation of the Sixth Amendment.[3] In its supplemental answer brief, the State argued: "Hurst does not apply in this case as there is a recidivist aggravator and Appellant was under probation at the time of the offense." (Supp AB 5). The State observed: "This Court, based on the exception, has repeatedly observed that Ring does not apply to cases involving the recidivist aggravators, such as the prior violent felony aggravator or the under sentence of imprison aggravator."[4]

---

[3]Phillips relied upon language within Hurst that observed that under Florida law it was the trial judge who made the factual findings that were required before a death sentence could be imposed. (Supp IB 9). Phillips argued that in the wake of Hurst, "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.')." (Supp IB at 10) (emphasis added).

[4]The State's cites Gabrion for the proposition that the requirement in the federal statute that the aggravators must outweigh the mitigator asks a federal jury to make a moral judgment, not determine a fact. This assertion is only relevant if a death sentence in Florida is authorized not upon the finding of one aggravator, but upon findings that 1) the aggravators are sufficient to justify a death sentence, and 2) the mitigators are insufficient to outweigh the aggravators. The State's reliance upon Gabrion implies a recognition that its previous argument Hurst only requires the jury to find one aggravator is wrong.

(Supp AB 6). The State then asserted: "In the wake of Hurst that same logic, based on the exception for prior convictions, remains valid and applies." (Supp AB 6-7).

The State did note that Phillips had argued "that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravators factors outweigh the mitigating factors to justify a sentence of death." (Supp AB 7). The State responded: "Appellant's argument is misplaced." (Supp AB 8). "In Hurst, the United States Supreme Court specifically extended the Sixth Amendment protections first identified in Apprendi v. new Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to Florida cases." (Supp AB 8). "In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case." (Supp AB 9). The State then summed up its position:

> Accordingly, Appellant's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance."

(Supp AB at 10). The State then summed up its view of Hurst: "The holding in Hurst limited the required jury factfinding to the existence of one aggravating factor." (Supp AB 13).

Nowhere within either its Answer Brief or its Supplemental Answer Brief did the State address § 921.141(3), Fla. Stat.

(2010), which set forth Florida's capital sentencing scheme and identified the factual findings necessary to authorize a death sentence.[5] Nor did the State address the discussion in Hurst regarding when under Florida law a defendant became eligible to receive a death sentence:

> [T]he 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); see Steele, 921 So.2d, at 546.

Hurst v. Florida, 136 S.Ct. at 622 (emphasis added). The United States Supreme Court in Hurst clearly and definitively stated when a defendant in Florida became "eligible for death" under Florida law. Eligibility rested not upon the finding of one aggravator, but when the requisite "findings by the court" were

---

[5]Section 921.141(3), as written before March 7, 2016, provided: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment." In order to impose a death sentence, the statute required the judge to make specific findings of fact: "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings." The statute direct the judge when imposing a death sentence to: "set forth in writing its findings upon which the sentence of death is based as to **the facts:** (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (Emphasis added).

made. For a defendant to be eligible for a death sentence as the Supreme Court held in Hurst, "[t]he trial court must find **'the facts ...** [t]hat sufficient aggravating circumstances exist' and **[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'**" Id. (emphasis added).[6]

Again, the State did not address the statutory language the Supreme Court relied upon for its conclusion that a defendant was not eligible for death until the requisite written findings of fact were made by the presiding judge. Instead, the State's argument was that under Apprendi, Ring and Hurst, the Sixth Amendment only required the finding of one aggravating circumstance to render a capital defendant death eligible - "This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific findings as to the existence of an aggravating circumstance." (Supp. AB 10). Accordingly, the State argued that any error in Phillips' case was harmless because "[t]he jury's unanimous verdict for the

[6]As noted in Hurst, Florida law required the judge to make two separate findings before a death sentence could be imposed. She had to first find that "sufficient aggravating circumstances existed." In order to make that finding, she had to first determine what aggravators were present and then find that they were sufficient to warrant a death sentence. The second finding that the judge had to make was whether there were sufficient mitigating circumstances to outweigh the aggravating circumstances. Only this second finding involved weighing. The first finding required an evaluation of the aggravation that is no different than that required by the word "especially" in the "especially heinous, atrocious or cruel" aggravating circumstance. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

contemporaneous felonies unquestionably qualified Appellant for the death sentence."[7] (Supp AB 17).

Submission of United States v. Gabrion

On June 14, 2016, the State filed its notice of United States v. Gabrion as supplemental authority.[8] In a parenthetical

---

[7]An entirely different harmless error is required if the error under Hurst is the written findings of fact necessary for the imposition of a death sentence was made by the judge and not by the jury. By ignoring the magnitude of the error identified in Hurst, the State significantly understated the jurisprudential upheaval that is Hurst, and made a facile harmless error argument. A shift away from its previous argument that Hurst was extremely narrow in scope means that the State's position on harmless error and retroactivity are completely undercut.

[8]This filing occurred one week after the oral argument in Perry v. State, Case No. SC16-547. There, the constitutionality and construction of the re-written death penalty statute was at issue. In that argument, considerable attention was given to the applicability of Hurst to language in the revised statute requiring the jury to determine: "[w]hether sufficient aggravating factors exist;" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2)(b)(2), Fla. Stat. (2016). Of course under the old version of the statute applicable at the time Phillips was sentenced, the judge was required to make these findings as was discussed by the Supreme Court in Hurst v. Florida, 136 S.Ct. at 622 ("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); see Steele, 921 So.2d, at 546."). During the Perry argument, the State's position that Hurst was narrow and merely required a jury finding of one aggravating factor frayed badly. The next week, the State submitted Gabrion as supplemental authority in Phillips' appeal, and at least ten other pending appeals. See Davis v. State, Case No. SC11-1122; McCloud v. State, Case No. SC12-2103; Jackson v. State, Case No. SC13-1232; Mullens v. State, Case No. 13-1824; Sexton v. State, Case No. SC 14-62; Williams v. State, Case No. SC-14-814; Johnson v. State, Case No. SC14-1175; Morris v. State, Case No. 14-1317; King v. State, Case No. 14-1949; Durousseau v. State, Case No. 15-1276.

to the citation of Gabrion, the State wrote, "holding that the jury's determination that a factor sufficiently outweighs another is not a finding of fact, but a moral judgment." According to the State's notice, this holding in Gabrion supported "the State's position in Argument V." An examination of Gabrion belies the State's position that the decision supports the State's argument that Hurst and Ring are narrow rulings that a jury only needs to find the existence of one aggravating factor.

Gabrion issued in the direct appeal of a federally imposed death sentence. The decision issued from the Sixth Circuit Court of Appeals in 2013, over two years before Hurst issued from the Supreme Court. The capital proceedings in Gabrion were pursuant to the federal death penalty statute, i.e. 18 U.S.C. § 3591, et seq. Under that statute, the federal jury is the sentencer and determines whether a death sentence is imposed. Gabrion, 719 F.3d at 532 ("If the jury recommends death, the district court is required to impose that sentence. See 18 U.S.C. § 3591(a)(2).").

Thus, unlike the statute that governed Phillips' sentencing, the federal statute provided for the jury to be unquestionably the sentencer in Gabrion. This means that not only does Gabrion pre-date Hurst, it involves a markedly different capital sentencing scheme, one in which the jury is the sentencer. That means that Hurst and the right to a jury trial are not implicated

at all in Gabrion.[9]

The portion of the Gabrion decision that the State indicates it was submitting as supplemental authority concerned whether the jury instructions were erroneous. The Sixth Circuit explained:

> Here, the jury found beyond a reasonable doubt that Gabrion killed Timmerman intentionally and that two statutory aggravating factors were present. The jury also determined, unanimously, that the government's aggravating factors sufficiently outweighed the mitigating ones to justify a sentence of death. But Gabrion argues that the jury was required to make the latter determination—i.e., the "outweighs" one—beyond a reasonable doubt. The district court did not instruct the jury to that effect, so Gabrion says we must vacate his sentence.

Gabrion, 719 F.3d 532. Thus, the issue raised was whether the jury had to find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt.[10]

The Sixth Circuit noted that Gabrion had

> cite[d] the Supreme Court's holding in Apprendi v. New

---

[9]This is similar to the State's citation to Kansas v. Carr, 136 S.Ct. 633 (2016), in briefing or oral argument in other pending appeals with Hurst issues. In Kansas, the jury is the sentencer in capital cases. Thus, the issue there did not involve an alleged violation of the Sixth Amendment right to a jury. Instead, the issue was whether the jury instructions comported with the Eighth Amendment. In addition, Kansas law did not require a factual determination that sufficient aggravating factors existed to justify a death sentence. See State v. Marsh, 102 P.3d 445, 466 (Kan. 2004) (Davis, J., dissenting). Florida law on the hand requires a factual finding that sufficient aggravators exist to justify a death sentence; this is a finding of fact which under Hurst must be made by a jury.

[10]The federal statute unlike Florida's statute does not require a finding of fact that sufficient aggravating factors exist to justify a sentence of death.

> Jersey, 530 U.S. 466, 489, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). There, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490, 120 S.Ct. 2348. Gabrion says that the jury's "outweighs" determination is a "fact" that increases his maximum sentence from life to death, and thus must be proved beyond a reasonable doubt.

Gabrion was not arguing his right to a jury determination; he had a jury determination. He was asserting his right to have the jury told that the Government bore the burden of proving that the aggravators outweighed the mitigators beyond a reasonable doubt.

Because Gabrion had a jury sentencing, his challenge was not a Sixth Amendment challenge to his death sentence. See Ring v. Arizona, 536 U.S. at 588 ("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions."). Instead, Gabrion's challenge was based on the due process clauses of the Fifth and Fourteenth Amendments. Gabrion relied upon Apprendi because it addressed a due process right under the Fourteenth Amendment requiring imposing the beyond-a-reasonable-doubt burden of proof on the Government. Apprendi, 530 U.S. at 477 ("Winship, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")." Apprendi did also address the Sixth Amendment right to a jury trial. Id, 530 U.S. at 476-77 ("the guarantee that '[i]n all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6."). But, it was not that aspect of Apprendi at issue in Gabrion; jury sentencing had occurred.

Instead, the Sixth Circuit in Gabrion was faced with the due process issue under the Fifth and Fourteenth Amendments as to the proof beyond a reasonable doubt standard.[11] In rejecting the jury instruction challenge and the applicability of Apprendi, the court in Gabrion ultimately relied upon the United States Supreme Court's construction of the federal death penalty statute in Jones v. United States, 527 U.S. 373, 376-77 (1999).[12] There, the

---

[11]The due process right at issue in Gabrion, as was noted there, was discussed at length in In re Winship, 397 U.S. 358 (1970). The due process right to proof beyond a reasonable doubt has not been tied to the Sixth Amendment right to trial by jury. For example, in Martin v. Ohio, 480 U.S. 228, 233-36 (1987), the Supreme Court did not find it was unconstitutional for Ohio to impose the burden of proof on a murder defendant as to the affirmative defense of self-defense at her jury trial, which if proven by the defense would entitle the jury to acquit. See Gilmore v. Taylor, 508 U.S. 333, 341 (1993)("The cases following Cupp in the Winship line establish that States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but that they may place on defendants the burden of proving affirmative defenses."); Patterson v. New York, 432 U.S. 197, 210 (1977) ("We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."). When state law provides for an affirmative defense which if proven results in an acquittal, the right to a jury trial remains intact.

[12]See Gabrion, 719 F.3d at 533 ("That makes this case different from any in which the Supreme Court has applied Apprendi. Here, Gabrion was already 'death eligible' once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were

Supreme Court concluded that under the terms of the federal statute, a defendant was not "death eligible unless the sentencing jury also finds that the Government has proved beyond a reasonable doubt at least one of the statutory aggravating factors." Id. Obviously, the Supreme Court's construction of the federal statute was binding on the court in Gabrion.

The Supreme Court's construction of the federal statute in Jones should be compared with its construction of Florida's statute in Hurst: "[T]he 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). Hurst, 136 S.Ct. at 622. The Supreme Court in Hurst did not stop there. It further indicated that under the Florida statute:

> 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); see Steele, 921 So.2d, at 546.

Id. The Supreme Court clearly recognized that Florida's statute identified the questions of whether sufficient aggravators existed and whether there were sufficient mitigators to outweigh the aggravators as questions of fact.[13]

---

present. Jones, 527 U.S. at 377, 119 S.Ct. 2090.").

[13]Again, it is worth noting that they are two separate facts under Florida law and as set forth in Hurst. Whatever else can be said of Gabrion, it did not involve a statute requiring a finding

Despite ultimately relying on the Supreme Court's construction of the federal statute in Jones to reject Gabrion's burden of proof claim, the Sixth Circuit in Gabrion in dicta discussed whether the word "outweighs" as used in the federal statute was meant as a factual determination:

> Section 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment.

Gabrion, 719 F.3d at 532-33. And it is this dicta in Gabrion that the State has relied upon for its parenthetical description of Gabrion in its notice of supplemental authority.

Besides being dicta that attempts to construe the federal statute and not the Florida statute that has now been construed by the Supreme Court in Hurst, the discussion in Gabrion does not address Maynard v. Cartwright, 486 U.S. 356 (1988), and Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, an aggravating factor had been legislatively defined as requiring a determination of whether the murder had been "outrageously or

---

of fact that "sufficient aggravating circumstances existed" to justify the imposition of a death sentence.

wantonly vile, horrible and inhuman." 446 U.S. at 428. In Maynard, an aggravating factor had been legislatively defined as requiring a determination of whether the murder had been "especially heinous, atrocious or cruel." 486 U.S. at 363-64.[14] While both aggravators were found by the Supreme Court to be overbroad because they gave the jury "unfettered discretion" to impose a death sentence, the Supreme Court did not hold that an aggravating factor in a capital case could not require the jury to render a moral judgment in deciding whether the factor had been established. In fact, aggravating factors in capital cases often call for a moral judgement. See Gregg v. Georgia, 428 U.S. 153, 222 (1976) (White, J., concurring) ("As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are **particularly serious** or for which the death penalty is **peculiarly appropriate** as they

---

[14]As to Florida's especially heinous, atrocious or cruel aggravator, this Court wrote:

> It is our interpretation that heinous means **extremely wicked or shockingly evil**; that atrocious means **outrageously wicked and vile**; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to **set the crime apart from the norm** of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d at 9 (emphasis added).

are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries even given discretion not to impose the death penalty will impose the death penalty in a substantial portion of the cases so defined.").[15]

As Godfrey and Maynard made clear, overbroad statutory language that extends unfettered discretion to the jury does not mean that the State does not have to prove the existence of the statutorily defined fact beyond a reasonable doubt. The solution is instructing the jury on a proper narrowing construction which the State must show beyond a reasonable doubt is satisfied.

Unlike the statute at issue in Gabrion, Florida's statute provided that the judge had to issue written findings of fact in which she identified what aggravators and mitigators had been established, found that sufficient aggravators existed, and found insufficient mitigators existed to outweigh the aggravators. See Campbell v. State, 571 So.2d 415, 419 (Fla. 1990).[16] As the

---

[15]The Georgia aggravating factors found to be acceptable included: "whether a defendant has a 'substantial history of serious assaultive criminal convictions,'" whether the defendant "creat[ed] a 'great risk of death to more than one person,'" and whether "the murder was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.'" Gregg, 428 U.S. at 201-02. These aggravators clearly require a judgment which the court in Gabrion suggests does not constitute a fact under Apprendi.

[16]See Parker v. Dugger, 498 U.S. 308, 313 (1991) ("A Florida statute defines certain aggravating and mitigating circumstances relevant to the imposition of the death penalty. Fla.Stat. §§

Supreme Court stated in Hurst: "**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)." 136 S.Ct. at 622 (emphasis added). The Supreme Court also found that the statute required that the judge "**must find 'the facts ...** [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" Id. (emphasis added). On appeal, the judge's findings have been treated as factual determinations that must be supported by competent and substantial evidence. Campbell v. State, 571 So.2d at 420 ("To be sustained, the trial court's final decision in the weighing process must be supported by 'sufficient competent evidence in the record.' Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981)."); Swan v. State, 322 So.2d 485, 489 (Fla. 1975) ("Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death

---

921.141(5), 921.141(6) (1985 and Supp.1990). The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances. Fla.Stat. § 921.141(3) (1985)."); Espinosa v. Florida, 505 U.S. 1079, 1080 (1992) ("the trial judge charges the jurors to consider "[w]hether sufficient aggravating circumstances exist," "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances," and "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death.").

penalty.").

Gabrion simply is not relevant to Hurst and Florida's statute. Additionally, Gabrion does not support the State's position in its briefing and oral argument that Hurst only requires the jury to find one aggravating factor. Instead, the State's submission of Gabrion as supplemental authority suggests a recognition that Hurst found that a Florida capital defendant was not eligible for a death sentence "until 'findings by the court that such person shall be punished by death'" are made. Hurst, 136 S.Ct. at 622. So now, the State seeks to attack whether weighing is a fact. The problem for the State is that the statute says it's a fact, and the Supreme Court in Hurst quoted the statute saying it was fact under Florida's statute.

Regardless of whether weighing is a fact, the finding that "sufficient aggravating circumstances exist" is a finding of fact. Swan v. State. Under Hurst, Phillips was entitled to a binding unanimous jury verdict on the factual question of whether sufficient aggravating circumstances existed to justify the imposition of death sentences. The failure to accord him that right requires this Court to vacate his death sentences.

CONCLUSION

Phillips' death sentences cannot stand. He was deprived of his right to a binding unanimous jury verdict finding all the facts statutorily required for death sentences to be imposed.

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 12th day of July, 2016.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Fla. Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

Counsel for Mr. Phillips

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.

/s/ Martin J. McClain
MARTIN J. MCCLAIN