IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-1213

TAVARES J. WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT FOR POLK COUNTY, STATE OF FLORIDA
Lower Tribunal No. CF00-2727A-X

SECOND SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to Wright's Second Supplemental Initial Brief will be in the form SIB2/[page number], and references to the State's Second Supplemental Answer Brief will be in the form SAB2/[page number].

ARGUMENT

The Appellant Wright relies on the arguments presented throughout the briefs he has filed in this matter. While he will not reply to every issue and argument raised by the Appellee in its Second Supplemental Answer Brief, he expressly does not abandon the issues and claims not specifically replied to.

I. Wright's waiver of an unconstitutional sentencing proceeding does not preclude him from relief following *Hurst.*

The Appellee's assertion that *Hurst* is inapplicable to Wright's case because he waived his right to a *jury recommendation* is over-simplified. SAB2/3. In support the Appellee simply points to the plea colloquy to in an effort to show that Wright's waiver was knowing and intelligent. SAB2/3. The Appellee also makes the unfounded assertion this particular moment in time contradicts Wright's intellectual disability ("ID")[1] claim because his trial attorney – who was not yet aware of the extent of his ID – described him as articulate and bright. SAB2/3; R33/5092. Neither of the Appellee's contentions can stand because it is clear from the trial proceedings, the post-conviction evidentiary hearing, and the ID evidentiary hearing that there is insurmountable evidence demonstrating that Wright is neither "articulate" nor

[1] This terminology is used interchangeably with the outdated terminology it has replaced, "mental retardation" or "mentally retarded" ("MR").

"bright." Wright is intellectually disabled.

Notwithstanding Wright's inability to make a knowing, intelligent, and voluntary waiver, the fact that the sentencing scheme discussed during the plea colloquy has been found to be unconstitutional renders the plea colloquy itself meaningless. The Appellee gives the example of *Missouri v. Nunley*, 341 S.W.3d 611, 620-21 (Mo. 2011) in support of its assertion that waiver of the jury during the penalty phase results in the abandonment of *Ring*-based challenges. SAB2/4. However, unlike Florida's, the Missouri sentencing scheme[2] required jury sentencing rather than a mere recommendation to be forwarded to the judge; therefore the court's plea colloquy included questions about waiving "sentencing by a jury." *Id*. at 619-20. That is not the case here. Wright was facing sentencing under an unconstitutional scheme that left all factual findings up to the judge. A plea colloquy that furthered this unconstitutional scheme cannot be valid.

Furthermore, because of his ID, Wright was unable to make a knowing, intelligent, and voluntary waiver. From the trial proceedings and the first post-conviction evidentiary hearing, it is clear that only *after* the plea colloquy was

[2] The Supreme Court of Missouri found *Ring* to be retroactive to defendants who did not waive jury trials. *Nunley* was the first case before that court where the defendant pled guilty and waived jury *sentencing*. *See Nunley*, 341 S.W.3d at 619. Wright did not waive his jury trial, nor did he specifically waive a jury sentencing.

conducted, trial counsel discovered uncontroverted evidence that Wright had deficiencies in his intellectual functioning and decision making skills.[3] The plea colloquy occurred on November 16, 2004. R33/21. A combined penalty phase and *Spencer*[4] hearing was held on May 10 and May 11, 2005. RS1/128-160; RS2/161-321; RS3/322-482; RS4/483-532. It was only after Dr. Waldman testified at the combined penalty phase/*Spencer* hearing that Wright was mentally retarded, that trial counsel Carmichael[5] filed a Notice of Intent to Reply Upon § 921.137 Florida Statutes, Barring Imposition of the Death Penalty Due to Mental Retardation, on June 30, 2005. R5/743-44. Then, the trial court appointed Drs. Kremper and Freid to evaluate Wright for MR/ID, R5/745, and both experts testified at a special hearing regarding MR/ID on September 22, 2005. R5/748-832.

This Court in summarizing the penalty phase facts noted the following:

> [O]ne defense expert determined that Wright has *borderline intellectual functioning, including impairments in his frontal lobe functioning for reasoning and judgment*, [but] the expert testified that Wright did not satisfy the requirements for statutory mitigation or qualify as mentally retarded under section 921.137, Florida Statutes (2000).

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[3] Wright argued in his Initial Brief before this Court, that trial counsel rendered prejudicial ineffective assistance of counsel by failing to adequately investigate, prepare, and present available mitigation; this included evidence of Wright's ID. *See* IB/9-64.

[4] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[5] Trial counsel Carmichael was responsible for the penalty phase presentation. PC12/2113.

> To the contrary, the other defense expert testified that Wright *was of low intelligence*, which approached that of mental retardation due to fetal alcohol syndrome. In that expert's opinion, Wright could not balance a checkbook, maintain a household, or keep his refrigerator stocked. However, this expert did not consider the recognized standardized intelligence tests required by section 921.137 to be the measure of mental retardation and conceded that under the statutory definition, Wright would not be considered mentally retarded.
>
> A special hearing was held to specifically address whether Wright met the statutory criteria for mental retardation. Wright's scores from each doctor's evaluation fell within the borderline range, but did not drop below 70. Thus, the trial court found that under the statutory requirements, Wright was *not* mentally retarded. *The court noted that there was evidence to the contrary, but held that such evidence did not fall within the purview of the applicable statute*.

Wright v. State, 19 So. 3d 277, 289-91 (Fla. 2009) (emphasis added). Several experts have determined that Wright has deficient intellectual functioning, a fact that certainly calls into question his understanding of the plea colloquy and the consequences of waiving a *jury recommendation*. *See Atkins v. Virginia*, 536 U.S. 304, 318, 122 S.Ct. 2242, 13 L.Ed. 335 (2002). ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they

are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." (internal footnotes omitted)). Further, the lower court found that it was "clear that [Wright] was a slow learner in school and never did well academically" and that "[h]e has been manipulated, bullied, and taken advantage of throughout his life." SR11/1863-64; 1865 (finding by clear and convincing evidence that Wright's intellectual condition has existed his entire life).

Trial counsel Carmichael's uninformed statement during the plea colloquy does nothing to contradict Wright's ID claim in light of this overwhelming expert evidence and the findings of the lower court. Furthermore, during the evidentiary hearing on Wright's Rule 3.203 motion, Carmichael recalled concerns early on that Wright might be ID, and he hired a number of experts to evaluate him. SR5/770. As Carmichael recalled, Wright's IQ was very close to the bright line cutoff of 70 required for a legal ID determination at the time, but it was not below it. SR5/776. At the time of trial, the only defense expert who was offering the opinion that Wright was mentally retarded was Dr. Waldman. SR5/781. Carmichael's personal opinion is that Wright "suffers from severe difficulties such to the point that [he] think[s] [Wright]'s walking around today in a retarded state." SR5/772. This is not a

description of a bright, articulate person capable of making a strategic decision.

Carmichael and co-counsel Hileman acknowledged that Wright had difficulty communicating and understanding. Hileman testified that Wright always listened but the interactions were one-sided; he always responded tersely, indicating he understood, but he never engaged in a detailed discussion that led Hileman to believe he actually did; he frequently went off on tangents indicating lack of understanding; he constantly needed refocusing; he asked questions indicating a lack of understanding; and he required Hileman to repeat himself multiple times in an attempt to ensure he understoodSR4/710-11; 722. Although Wright understood on a superficial level what the State's witnesses would testify to, he was not able to assess the weight of the evidence and the consequences of the presentation of the evidence in a realistic way. SR4/715. He participated minimally in his own case. SR4/718. Hileman described additional problems related to Wright's poor judgment, testifying that his judgments grew "out of some irrelevancy as opposed to the main facts that [Hileman] was trying to get him to focus on." SR4/716. He demonstrated an incapacity to relate facts to consequences, and it was difficult to communicate with him rationally. SR4/716. He was easily manipulated by others, and his judgment was poor in terms of the kind of advice he listened to, leading him to disregard Hileman's advice not to talk to other inmates about his case and go off on tangents due to those

communications. SR4/718-19.

Of Carmichael's 50-something homicide cases, Wright's was the most difficult to try because he was the most difficult client to communicate with. SR5/762. Carmichael too testified that Wright failed to understand the issues and he frequently had to repeat himself and re-explain core issues; SR5/752; 754; 764. Wright seemed to understand things after he experienced them, but "it was very difficult for him to take verbal statements and make them concrete." SR5/754. He had developed a "social patina" which would make a person think he understood something when he really did not, so for a long time, Carmichael thought Wright understood him because he would laugh, smile, and make appropriate comments or gestures; however, later Carmichael concluded that Wright did not really understand what his attorneys were talking about. SR5/752-53. For example, during trial Carmichael would hear Hileman explain to Wright what was going to happen next, and Wright would nod and smile, but when Carmichael spoke with him in the holding cell he would find that he did not really understand. SR5/753. Other times, Hileman or Investigator Bolin would tell Carmichael that they discussed certain things with Wright, and when Carmichael spoke with Wright about these things it was as if he was hearing them for the first time. SR5/754-55. Likewise, Wright did not understand why, for example, his attorneys could not call somebody to testify

about his good character. SR5/789. He would ask Carmichael about it every time they spoke, and despite being given the same answer, it seemed like he was getting a new one. SR5/789-90.

The trial attorneys testified as to Wright's decision-making shortcomings specifically with regard to rejection of a plea offer. After two mistrials in the capital case, Wright's lawyers had discussions with the State about the possibility of a life offer, and Hileman felt that the State would be willing to make such an offer if Wright were willing to accept it. SR4/712; SR5/736. At the time, Wright already had more than one life sentence from his non-capital case, and Hileman felt that, in light of the evidence in guilt phase, accepting a life in avoidance plea would be in Wright's best interest. SR4/712. Hileman tried to speak with him about the possibility of an offer, but Wright "was not able to process that information because his responses were *non sequiturs*" that did not address the issue. SR4/712. Despite there being little or no downside to accepting a life in avoidance offer (given the fact that he already had more than one life sentence) and a very large upside (given the fact that he was facing the death penalty) Wright was not interested. SR4/713-14. Hileman is not sure whether Wright understood the situation because he never gave an explanation that made any sense. SR4/714. Instead, he seemed to be focused on the fact that there had already been two mistrials in the capital case, and he therefore

discounted the need to consider the alternative of a plea arrangement. SR4/714. Additionally, Wright was convinced that his co-defendant, Samuel Pitts, was going to testify favorably for him at trial, even though Hileman knew otherwise and told him as much. SR4/714-15. Hileman described this as unrealistic and "magical thinking". SR4/714-15.

Carmichael corroborated Hileman's observations. He testified that the attorneys tried to convince Wright to be willing to accept a life offer (1) because he was already under a life sentence and (2) because they believed they had not persuaded the jury in the second trial that he was innocent, and the State's case against him would be even stronger in the third trial. SR5/758. Wright seemed incapable of grasping what his attorneys were telling him, and he could not understand that he could resolve all of his cases by agreeing to a life sentence. SR5/758. Instead, Wright perceived every mistrial as a step closer to victory. SR5/758. Wright was never able to provide Carmichael with his reasoning for not wanting to accept a life offer. SR5/761.

By viewing the entirety of the records on appeal and the briefing in this matter, this Court will gain a full picture of Wright's vast deficiencies in intellectual functioning. He is far from "bright" and "articulate." Moreover, even though the lower court concluded it could not find ID by clear and convincing evidence, it

expressed concerns about the propriety of executing Wright and recommended to this Court that it conduct a new proportionality review in the case. SR11/1865. The Appellee's simple notion that *Hurst* is inapplicable because of a plea colloquy during which Wright waived a jury recommendation is misguided, as the colloquy was based on an unconstitutional statute and Wright's intellectual deficiencies make it impossible for him to enter a knowing, intelligent, and voluntary waiver.

II. Wright is entitled to a life sentence under Fla. Stat. § 775.082(2) because the *Hurst* decision invalidated capital punishment in Florida in the same manner as *Furman v. Georgia.*

Wright stands by his argument that Fla. Stat. § 775.082(2) mandates a life sentence in the wake of *Hurst.* The Appellee argues that the subsection was enacted after *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972) to "protect society in the event that capital punishment as a whole were to be deemed unconstitutional." SAB2/5. This statement is incorrect, as the subsection took effect after *Furman* but was enacted before that decision in anticipation of it. *See* Charles W. Ehrhardt and L. Harold Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility?* 64 J. CRIM. L. & CRIMINOLOGY 10, 10-11 (1973) [*Appendix A*]. The provision was never applied because this Court held invoking it was unnecessary, instead determining that it could resentence all prisoners then on death row to life imprisonment without the "ministerial formality" of remanding their

cases to the trial court. *See id.* at 12 (*citing Anderson v. State*, 267 So. 2d 8 (Fla. 1972) and *In re Baker*, 267 So. 2d 331 (Fla. 1972)).[6] Furthermore, in 1973, in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), this Court upheld the newly-enacted Fla. Stat. § 921.141 and acknowledged that the Supreme Court did not abolish the death penalty itself in *Furman*. *Dixon*, 283 So. 2d at 7 ("Capital punishment is not, Per Se, violative of the Constitution of the United States . . . or of Florida."). *Dixon*, 283 So. 2d at 7. Rather, this Court held that it was the *procedure* by which the death sentence was imposed that made it constitutionally infirm. *Id.* at 6.

The Appellee attempts to distinguish *Hurst*'s ruling from that of *Furman*, claiming that "*Furman* was a decision that invalidated all death penalty statutes in the country." SAB2/6. *Furman* invalidated Georgia's and Texas' statutes, and like other state courts, this Court in *Donaldson v. Sack*, 265 So. 2d 499, 501 (Fla. 1972) determined that *Furman* applied to invalidate Florida's statute as well. However, the fact that the *Furman* ruling ultimately invalidated all death penalty statutes is not as

[6] The fact that Fla. Stat. § 775.082(2) was never actually invoked to commute death sentences to life imprisonment is immaterial. In fact, the reason the defense did not want it to be invoked was that it would deprive former death row inmates of the possibility of parole when they were resentenced to life, and in commuting the sentences, this Court allowed the former death row inmates that option. *Anderson*, 267 So. 2d at 9 ("The defendants request that they be resentenced at an early time because of the existence of Chapter 72-118 which becomes effective October 1, 1972. This statute requires imposition of a life sentence without parole.")

important as the fact that, by determining that capital punishment was imposed by way of an unconstitutional statute, *Furman* rendered the death penalty itself unconstitutional. The fact's importance is underscored by the State's argument that "*Hurst* did not determine capital punishment to be unconstitutional; *Hurst* only invalidated Florida's procedures for implementation." SAB2/4. This Court concluded the same about *Furman.*

The Appellee also argues, regarding *Anderson*, that "[t]here is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court determined the current rules for retroactivity." SAB2/6. *Anderson* and *Baker* do not contain explicit legal analysis because the Attorney General in 1972 *recognized* that Fla. Stat. § 775.082(2) applied in light of *Furman* and therefore moved for relinquishment to the circuit courts for resentencing proceedings, a fact that the Appellee also points out. SAB2/6. Only if the death row prisoners had moved for relief under Fla. Stat. § 775.082(2) and the State argued in opposition would it have been necessary for this Court to produce an opinion with a more detailed analysis. Furthermore, the Appellee's point about retroactivity is not persuasive in light of the fact that almost 44 years have passed

since Fla. Stat. § 775.082(2) was enacted but it has not been removed from the statute books.

In *Donaldson*, this Court recognized that once it took effect, Fla. Stat. § 775.082(2) would apply to mandate a life sentence for those individuals sentenced under the statute rendered unconstitutional by the holding in *Furman. Donaldson*, 265 So. 2d at 505. ("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.") If Fla. Stat. §775.082(2) was enacted in anticipation of *Furman*, and *Furman* invalidated capital sentencing statutes themselves without holding that capital punishment could never be constitutionally imposed, then it is a far reach to now read that same subsection to only apply in the event of such a holding. Like *Furman*, *Hurst* might have applied to invalidate every state's death penalty sentencing scheme if every state still had a scheme as constitutionally unsound as Florida's. *Furman* and *Hurst* are not distinguishable in terms of the impact of Fla. Stat. § 775.082(2), and this Court should take the approach the Colorado Supreme Court did following *Ring* – applying its version of 775.080(2) to resentence individuals sentenced under the unconstitutional statute to life in prison. *See Woldt*

v. People, 64 P. 3d 256, 258-59, 262-72 (Colo. 2003). A life sentence is mandated for Wright.

III. *Hurst* should apply retroactively, a position supported by the Florida and federal analyses holding retroactive the case of *Miller v. Alabama,* 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012).

The Appellee argues that *Hurst* does not apply retroactively to Wright's case and proceeds to discuss the U.S. Supreme Court's determination in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004) that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 56 (2002), did not apply retroactively. SAB2/8-9. *Summerlin* is irrelevant as this Court analyzes retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), which is more expansive than the federal retroactivity analysis under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989), used in *Summerlin. See Falcon v. State*, 162 So. 3d 954, 956, n. 1 (2015). Furthermore, allowing *Hurst*'s retroactivity to be determined by *Ring*'s ignores the fact that many people, including Wright, were denied a *Ring*-compliant sentencing despite the fact that they were sentenced after that decision and raised the issue of its applicability at the time of trial. *Hurst* is a stand-alone opinion that warrants its own retroactivity analysis.

The Appellee suggests that this Court's opinion in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005) forecloses a *Witt* analysis of the *Hurst* opinion. SAB2/11. Wright

previously addressed *Johnson*, SIB1/14, and as discussed recently during oral argument in *Lambrix v. State*, the retroactivity analysis contained within *Johnson* is *dicta*.[7] Concerning the merits of Wright's *Witt* argument, the Appellee contends, "There can be no credible argument that Florida failed to apply *Ring* in bad faith" because of this Court's and the U.S. Supreme Court's prior decisions. SAB2/14. However, beginning just after *Ring*, this Court expressed serious concerns about the constitutional viability of Florida's capital sentencing scheme. *See Bottoson v. Moore*, 833 So. 2d 693, 703-34 (Fla. 2002) (Anstead, J.; Shaw, J.; Pariente, J.; Lewis, J.; each concurring in result only). In *State v. Steele*, 921 So. 2d 538 (Fla. 2005) this Court plainly urged the Legislature to revisit the statute. *Steele*, 921 So. 2d at 548-51. The State and the Legislature had every reason to anticipate that Florida's death penalty sentencing scheme was likely to be declared unconstitutional.

In *Falcon*, this Court applied the *Witt* test to *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012) and held that *Miller*, which "forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders", applies retroactively in post-conviction proceedings. The Appellee

[7] See Transcript of Oral Argument in Cary Lambrix v. Julie L. Jones,etc., p.9, SC-56 (Feb. 2, 2016), http://www.wfsu.org/gavel2gavel/transcript/pdfs/16-56.pdf.

argues that *Falcon* provides no support for the retroactive application of *Hurst* because this Court determined that *Falcon* announced a substantive rule. SAB2/17.

In *Falcon*, this Court determined that *Miller* was a "development of fundamental significance" under *Witt* because it placed "beyond the authority of the state the power to . . . impose certain penalties." *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929. It was with similar reasoning under a *Teague* analysis that the U.S. Supreme Court determined that *Miller* announced a substantive rule that is retroactive to cases on state collateral review in *Montgomery v. Louisiana.* No. 14-7505 (Jan. 25, 2016). However, in the same opinion, that Court determined that the individualized sentencing determination required by *Miller* is a "procedural requirement necessary to implement a substantive guarantee." *Montgomery* at 18.

Just as the U.S. Supreme Court in *Hurst* did not remove the death penalty as a possible penalty for first degree murder, the Court in *Miller* did not remove life in prison without the possibility of parole as a possible sentence for juvenile offenders.[8] Rather, as this Court explained in *Falcon*, under *Miller*, "a sentencer may impose a sentence of life imprisonment without the possibility of parole on a juvenile

[8] "We do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Miller*, 132 S.Ct. at 2469.

homicide offender, [but] the sentencer must first 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Falcon*, 162 So. 3d at 959 (quoting *Miller*, 132 S.Ct. at 2469). While there is certainly a procedural component to the holdings of both cases, *Hurst*, like *Miller*, is substantive in nature and would be retroactive under *Teague*. *Montgomery* at 14 (holding that "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish"). The fact-finding required by *Hurst* to be done by the jury is such a procedure because without that fact-finding, a defendant is ineligible for the death sentence.

IV. Fla. Stat. § 921.141 is unconstitutional on its face, not subject to a harmless error analysis, and cannot be interpreted consistently with *Ring* or *Hurst* to condition "death-eligibility" upon the existence of any one aggravating circumstance.

The Appellee argues that *Hurst* errors are automatically subject to a harmless error analysis and that Wright's position that this Court need not conduct one because they are structural errors is "quite curious given the fact that the Supreme Court remanded *Hurst* so that this Court could assess harmlessness." SAB2/19. It is the Appellee's position that is curious. The U.S. Supreme Court in *Hurst*, rather than remanding the case for a harmless error analysis, ended its inquiry without ever

deciding whether such an analysis was appropriate and remanded the case for "further proceedings not inconsistent with" the opinion. *Hurst*, 2016 WL at 8-9. That Court plainly stated, "*We do not reach* the State's assertion that *any* error was harmless." *Id.* at 8. It then noted that its general practice was to leave the consideration of harmless error to the states. *Id.* It is clear that the Court was simply acknowledging the State's argument, and its doing so cannot be interpreted as an order to this Court to conduct a harmless error analysis, an action that the principles of comity and federalism would disfavor.

Florida's capital sentencing scheme is facially unconstitutional because the trial judge renders the sentence without the jury finding the facts necessary to make the defendant eligible for the death sentence. *Hurst*, 2016 WL at 6 ("The State fails to appreciate the central and singular role the judge plays under Florida law. . . . 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.'") (quoting Fla. Stat. § 921.141(3)). The Appellee argues that "[i]n Florida, a defendant is eligible for a capital sentence if at least one aggravating factor is applied to the case" but it provides absolutely no support for this argument. SAB2/20. It was Arizona's capital sentencing statute, in *Ring*, that conditioned death-eligibility upon the finding of one aggravating factor, and the

constitutional problem in that case was that a trial judge and not a jury made that determination. *Ring*, 536 U.S. at 593. The Appellee would have this Court read *Hurst* in conjunction with the requirements for death-eligibility as set forth in *Arizona*'s pre-*Ring* capital sentencing statute. Such a reading is not possible. While the Legislature has always had the opportunity to require a separate "death-eligibility" determination conditioned upon the finding of only one aggravating circumstance, it has never done so.

The mere existence of one aggravating circumstance, even if it is uncontroverted, does not prove either of the factual determinations required by Fla. Stat. § 921.141 (3). In fact, in some cases, juries recommend life sentences even where multiple aggravating factors have been established. *See, e.g.*, *Robinson v. State*, 610 So. 2d 1288 (Fla. 1992), *Coleman v. State*, 610 So. 2d 1283 (Fla. 1992), and *Williams v. State*, 622 So. 2d 456 (1993).[9] In other cases, this Court has overturned death sentences on proportionality review even in the face of substantial aggravation where it found that the aggravation was overweighed by the mitigation that was presented. *See, e.g.*, *Delgado v. State*, 162 So. 3d 971 (Fla. 2015); *Farinas*

[9] In each of these co-defendant cases, tried separately, the judge overrode the jury's life recommendations and found that five or six aggravating circumstances had been established.

v. State, 569 So. 2d 425 (Fla. 1990). The Appellee argues that Wright had prior violent felony convictions and this fact alone made him death-eligible, SAB2/22, but clearly this cannot stand in light of the plain language of the statute. The Appellee also asserts that "there is no conceivable argument that a rational factfinder would not have found the existence of CCP and avoid arrest." SAB2/23. While this assertion has no bearing on the outcome of this proceeding because *Hurst* errors can never be harmless as the Appellee suggests, it is worth pointing out that the trial judge made these findings without the benefit of knowing the extent of Wright's intellectual disability. It is much more than conceivable – in fact it is extremely likely – that a rational factfinder would fail to find these aggravating factors in light of the overwhelming evidence presented in post-conviction regarding Wright's disability and its manifestation in terms of adaptive functioning deficits.

CONCLUSION

For the reasons discussed herein, as well as in Wright's Supplemental Initial Brief, Wright and all defendants sentenced to death under the unconstitutional statute are entitled to have their death sentences vacated and life sentences imposed or, in the alternative, new penalty phase proceedings consistent with *Hurst* in order to preserve the guarantees of the Sixth Amendment. *See Hurst*, 2016 WL at 1-4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SECOND SUPPLEMENTAL REPLY BRIEF OF APPELLANT has been emailed to Stephen D. Ake, Assistant Attorney General, at capapp@myfloridalegal.com and Stephen.Ake@myfloridalegal.com, and mailed via United States Postal Service to Tavares J. Wright, DOC #H10118, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 22nd day of February, 2016.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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