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IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE,

Appellant,

v.

STATE OF FLORIDA

Appellee.

Case No. **SC13-2245**

LOWER TRIBUNAL NO. 16-2005-CF-010263D

*** CAPITAL CASE ***

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, FLORIDA
HON. MICHAEL R. WEATHERBY, CIRCUIT JUDGE

SUPPLEMENTAL BRIEF CONCERNING *HURST v. FLORIDA*

December 1, 2016

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TABLE OF CONTENTS

TABLE OF CONTENTS..i

TABLE OF CITATIONS...iii

INTRODUCTION...iii

RELEVANT PROCEDURAL HISTORY..1

ARGUMENT...1

I. Remand is Appropriate in Light of Hurst...................1

A. Appellant Preserved a Hurst Claim........................2

B. Hurst Applies to Appellant...............................3

C. Appellant Wins Under Harmless Error 10

D. There are No "Automatic" Aggravating Circumstances in Florida..23

CONCLUSION..25

TABLE OF CITATIONS

Apprendi v. New Jersey, 530 U.S. 466 (2000)....5, 14
Caldwell v. Mississippi, 472 U.S. 320 (1985)....14, 16, 18, 19
Cole v. State, 36 So.3d 597, 606 (Fla. 2010)....1, 2, 23
Danforth v. Minnesota, 552 U.S. 264 (2008)....4
Downs v. Dugger, 514 So.2d 1069 (Fla. 1987)....6
Falcon v. State, 162 So.3d 954 (Fla. 2015)....3, 4, 5, 6
Gardner v. Florida, 430 U.S. 349 (1977)....7
Hall v. State, 541 So.2d 1125 (Fla. 1989)....2, 6
Hildwin v. Florida, 490 U.S. 639 (1989)....3
Hitchcock v. Dugger, 481 U.S. 393 (1987)....2, 23, 25
Hurst v. Florida, 136 S.Ct. 616 (2016)....1, 2, 9, 10, 11
Hurst v. State, 2016 WL 6036978 (Fla. Oct. 14, 2016)
....1, 2, 3, 10, 13, 14, 20, 22
Johnson v. Alabama, 136 S.Ct. 1837 (2016)....9
Kirksey v. Alabama, 136 S.Ct. 2409 (2016)....10
Linkletter v. Walker, 381 U.S. 618 (1965)....4
McCloud v. State, SC12-2103, 2016 WL 6804875....20, 21
Miller v. Alabama, 132 S.Ct. 2455 (2012)....3, 5, 6
Montgomery v. Louisiana, 136 S.Ct. 718 (2016)....21, 23, 29
Perry v. State, 2016 WL 6036982 (Fla. Oct. 14, 2016)....17, 18
Riley v. Wainwright, 517 So.2d 656 (Fla. 1987)....6
Ring v. Arizona, 536 U.S. 584 (2002)
....1, 2, 6-11, 14-15, 17-20, 22-24
Russell v. Alabama, 137 S.Ct. 158 (2016)....10
Schriro v. Summerlin, 542 U.S. 348 (2004)....4, 7
Spaziano v. Florida, 468 U.S. 447 (1984)....9
State v. Dixon, 283 So.2d 1 (Fla. 1973)....17
Stovall v. Denno, 388 U.S. 293 (1967)....4
Sullivan v. Louisiana, 508 U.S. 275 (1993)....12
Teague v. Lane, 489 U.S. 288 (1989)....3, 4, 7, 8, 9, 10
Thompson v. Dugger, 515 So.2d 173 (Fla. 1987)....2, 6
Wimbley v. Alabama, 136 S.Ct. 2387 (2016)....10
Witt v. State, 387 So.2d 922(Fla. 1980)....3, 4, 6, 7

STATUTES

§ 921.141, Fla.Stat. 1, 8, 16, 17, 24

OTHER AUTHORITIES

Florida Rule of Criminal Procedure 3.850 6
Florida Rules of Appellate Procedure Rule 9.210...............26

INTRODUCTION

This Court granted Appellant Tiffany A. Cole's request to file this supplemental brief addressing claims under *Hurst v. Florida*, 136 S.Ct. 616 (2016) ("*Hurst*"). Appellant notes that this Court addressed *Hurst* and expanded upon its protections in *Hurst v. State*, SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016).

Especially in light of these recent developments, and as detailed below, Appellant files this brief to bring her *Hurst* claim to the Court's attention and to respectfully request this Court to remand her case back to trial court for new sentencing phase proceedings or for an evidentiary hearing to determine the effect of *Hurst* error in Appellant's case. To further support such findings, Appellant submits that: (1) Appellant preserved a *Hurst* claim; (2) *Hurst* applies to Appellant; (3) Appellant wins under harmless error analysis; and (4) there are no "automatic" aggravating circumstances in Florida.

RELEVANT PROCEDURAL HISTORY

This brief incorporates the procedural history previously presented in Appellant's Initial Brief on July 1, 2014. Appellant notes that in direct appeal proceedings in this Court, Appellant raised several issues, including a claim that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). This Court rejected that claim, noting Appellant had a prior violent felony aggravator present. *Cole v. State,* 36 So.3d 597, 611 (Fla. 2010).

ARGUMENT

I. Remand is Appropriate in Light of *Hurst*

Appellant's case should be remanded to the trial court so that she may plead a claim for sentencing relief under *Hurst* or get an evidentiary hearing to determine the effect of *Hurst* error in her case. In *Hurst*, the Supreme Court struck down as unconstitutional the statutory provisions under which Appellant was sentenced to death, Fla.Stat. §§ 921.141(2) and (3), which provided that a judge, as opposed to a jury, must conduct the fact-finding of aggravating circumstances necessary to impose the death penalty. The Supreme Court confirmed that what it had previously held in *Ring v. Arizona*, 536 U.S. 585 (2002), applied equally to Florida: juries must conduct all fact-finding of aggravating circumstances necessary to impose the death penalty.

Fundamental fairness requires that Appellant be given an opportunity to now seek relief under *Hurst*.

A. Appellant Preserved a *Hurst* Claim

Appellant does not believe that preservation of *Hurst* claims is required, just as this Court did not require "preservation" for petitioners who were retroactively afforded the benefit of *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *See, e.g.*, *Hall v. State*, 541 So. 2d 1125 (Fla. 1989); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default."). But even assuming such a requirement, Appellant has preserved a claim for *Hurst* relief. As stated above, Appellant previously argued that Florida's capital sentencing scheme was unconstitutional in light of *Ring*. This Court denied relief. *Cole*, 36 So.3d at 611. In *Hurst*, the Supreme Court confirmed the validity of what Appellant argued to this Court: "Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Hurst*, 136 S.Ct. at 621.

Appellant previously did all that she could to challenge Florida's unconstitutional death penalty statute. To the extent

that preservation is a component of a successful *Hurst* claim, which it should not be, Appellant is in compliance.

B. *Hurst* Applies to Appellant

This Court should reject any suggestion that Appellant cannot pursue *Hurst* relief on the ground that her sentence became "final" before *Hurst* issued. The *Hurst* decision of the United States Supreme Court and the *Hurst v. State* decision from this Court are retroactive under the Florida retroactivity test articulated in *Witt v. State*, 387 So.2d 922 (Fla. 1980). Furthermore, *Hurst* is also retroactive under the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288 (1989).

This Court recently reaffirmed the continuing validity of Florida's retroactivity test, established in *Witt*, for determining whether new decisions of the United States Supreme Court that are favorable to criminal defendants are to be applied to cases on collateral review in Florida's state courts. *See Falcon v. State*, 162 So.3d 954, 960 (Fla. 2015) (holding that *Miller v. Alabama*, 132 S.Ct. 2455 (2012) is retroactive). Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.*

Florida's *Witt* test is distinct from the federal retroactivity test established in *Teague*. *See Falcon*, 162 So.3d at 955-56 (determining retroactivity under *Witt* and *Teague* requires separate inquiries); *see also Witt*, 387 So.2d at 928 ("We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . ." The federal retroactivity test was designed with "[c]omity interests and respect for state autonomy" in mind, *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004), and a state may grant broader retrospective relief when reviewing its own state convictions. *See Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008).

The *Hurst* decisions satisfy the first two *Witt* retroactivity factors. They also satisfy the third *Witt* factor because they constitute "a development of fundamental significance," i.e., a change in the law that is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).'" *Falcon*, 162 So.3d at 961 (quoting *Witt*, 387 So.2d at 929) (internal brackets omitted).

Hurst's purpose is advanced by retroactive application. Retroactivity would ensure that all defendants' Sixth Amendment

rights are protected, and is in conformity with the Court's understanding that "[c]onsiderations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases." *Falcon*, 162 So.3d at 962 (internal quote omitted). Retroactive application of *Hurst* would not have a substantially injurious effect on the administration of justice, as the number of potential *Hurst* claimants is both finite and manageable. As of December 2016, Florida's total death row population was less than 400. *See* Death Row Roster, Florida Department of Corrections, available http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited Dec. 1, 2016). Retroactive application of new rules affecting much larger populations have been approved; in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Supreme Court approved of retroactive application of a new rule prohibiting mandatory life sentences for juveniles, which one study estimated could impact as many as 2,300 cases nationwide. *See* John R. Mills, Anna M. Dorn, and Amelia C. Hritz, No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders, The Phillips Black Project, available http://www.phillips black.org/s/JLWOP-2.pdf (last visited Dec. 1, 2016).

Hurst's retroactivity should not be truncated, i.e., limited to a subset of death sentences, such as those "finalized" after *Ring*, or after *Apprendi v. New Jersey,* 530 U.S. 466 (2000). In *Falcon,* which applied *Witt* and ruled retroactive the decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (holding that mandatory life sentences for juveniles are unconstitutional), this Court announced that "any affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for post-conviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller.*" *Falcon,* 162 So.3d at 954 (emphasis added).[1] This Court did not limit *Miller* retroactivity to only some prisoners. Especially here, "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person

[1] In the context of capital punishment, this Court applied the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances, retroactively. *See, e.g.*, *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656, 660 (Fla. 1987). This Court permitted all impacted individuals to seek *Hitchcock* relief. *See Hall v. State*, 541 So.2d 1125 (Fla. 1989) (holding that *Hitchcock* claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So.2d 713 n.1 (Fla. 1991) ("Because this petition was filed prior to our disposition of *Hall* . . . we will allow the instant claim to be raised in a petition for a writ of habeas corpus."). And so, in circumstances analogous to the current post-*Hurst* landscape, when the Supreme Court in *Hitchcock* rejected this Court's interpretation of *Lockett*, as the Supreme Court has now rejected this Court's interpretation of *Ring*, the Court found *Hitchcock* retroactive.

of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So.3d at 962 (quoting *Witt,* 387 So.2d at 929) (emphasis added).

Arbitrarily denying relief to some defendants sentenced to death but not others would be particularly egregious. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977). The question should not be how many executions based upon unconstitutional death sentences Florida will tolerate before *Hurst* is given effect. This Court's history of adherence to principles of fundamental fairness opposes such a miserly approach.

The decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that *Ring* is not retroactive under *Teague* in federal habeas proceedings), should have no effect on this Court's retroactivity analysis. As noted above, Florida courts follow *Witt*, not the federal approach of *Teague v. Lane*, 489 U.S. 288 (1989), which was developed with "[c]omity interests and respect for state autonomy" in mind. *Summerlin*, 542 U.S. at 364.

However, even if *Teague* applies because of the special nature of the unconstitutionality of Appellant's death sentence and the watershed nature of the United States Supreme Court's ruling, *Hurst* should be retroactively applied under the federal approach. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 728 (2016) (*Teague* "requires the retroactive application of new substantive and watershed procedural rules *in federal habeas proceedings*." (emphasis added)). *Hurst* is retroactive under *Teague* notwithstanding *Summerlin*, 542 U.S. at 364, which held *Ring* not retroactive in an Arizona case evaluated under *Teague*. Although *Hurst* was based on the reasoning of *Ring*, the two cases are not interchangeable because of the differences between the Arizona capital sentencing scheme at issue in *Ring* and the Florida death penalty statute invalidated by *Hurst*. For instance, unlike Arizona's law, Florida's now-defunct death penalty law required not only that aggravating factors be found to impose a death sentence, but also required factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstance to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). That distinction is why, unlike the harmless-error review that occurs under *Ring* with respect to the finding of aggravating circumstances like a prior or contemporaneous felony conviction, such review is different

in the *Hurst* context because it is not easy to determine whether and how the jury's "sufficiency" fact-finding was affected. In *Hurst* cases, individualized state-court harmless error inquiries must take place.

Further, *Hurst* was grounded on the standard of proof beyond a reasonable doubt, whereas *Ring* was not, and the standard of proof beyond a reasonable doubt has always been understood to have retroactive application. As District Judge Hinkle of the United States District Court for the Northern District of Florida noted in a recent order, that although *Summerlin* held *Ring* to be non-retroactive under *Teague*, the same cannot be automatically assumed for *Hurst* because *Summerlin* "did not address the requirement for [the jury to find aggravating circumstances based on] proof beyond a reasonable doubt." *Guardado v. Jones*, N.D. Fla. 4:15-cv-256, ECF No. 20 (Order) at 3–4.

Put simply, *Hurst* is more robust than *Ring*, and *Summerlin*'s retroactivity ruling cannot be assumed to automatically apply to *Hurst* because the Arizona law at issue in *Ring* and the Florida law at issue in *Hurst* are fundamentally different. In *Hurst* itself, the Supreme Court overruled its prior cases that formed the basis for this Court's ruling—in cases such as the instant—that *Ring* was non- retroactive. *See Hurst*, 136 S.Ct. at 616 (overruling *Hildwin* and *Spaziano v. Florida,* 468 U.S. 447

(1984)). It should also be noted that the United States Supreme Court's early reticence to hold *Ring* retroactive under *Teague* may be eroding, as highlighted by the recent decision in *Montgomery*. And most recently, in *Johnson v. Alabama*, the Supreme Court granted a *Hurst*-based petition for rehearing, in a case where the certiorari petition had not made a *Hurst* or *Ring* argument, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. *See* 136 S.Ct. 1837, at *1 (2016). The Court thereafter followed that approach in three other cases. *See Wimbley v. Alabama*, 136 S.Ct. 2387, at *1 (2016); *Kirksey v. Alabama*, 136 S.Ct. 2409, at *1 (2016); *Russell v. Alabama*, 137 S.Ct. 158, at *1 (2016). Given such indications about the state of federal retroactivity law, *Hurst* should be deemed retroactive under *Teague* and federal law.

Additionally, the United States Supreme Court's decision in *Hurst*, and this Court's decisions in *Hurst v. State*, and *Perry v. State*, SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016), also highlight that the constitutional protections now afforded capital prisoners in Florida have Eighth Amendment implications, as they are required by evolving standards of decency.

C. Appellant Wins Under Harmless Error

The United States Supreme Court in *Hurst* declined to reach the State of Florida's harmless error argument and stated that

it was leaving any question of harmless error to be first addressed by Florida courts on remand:

> Finally, we do 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, 136 S.Ct. at 624. In declining to rule on the State's harmless error argument, the Supreme Court referred this Court to *Neder*, noting parenthetically that the failure to instruct on an uncontested element in that case had been found harmless. In *Neder*, the Court explained that harmless error may be available in cases involving constitutional error, but also recognized that there are many cases where it is not appropriate to hold constitutional error subject to harmless error analysis (i.e., for errors that "are so intrinsically harmful as to require automatic reversal," *Neder*, 527 U.S. at 7). The *Hurst* error in Appellant's case is structural error that can never be harmless, and Appellant's case is factually distinguishable from *Neder*.

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. Further, in *Neder*, the omitted element (the materiality of the defendant's unreporting of taxes owed by $5

million) was not contested and all elements that were contested were properly submitted to the jury. *See id.* at 15. Here, Appellant did contest whether she should be sentenced to death, along with many of the facts that the State argued would support such a finding, and Appellant would contest it again in a new proceeding. Moreover, a reversal in Appellant's case on the basis of *Hurst* would not require a retrial of her guilt on first degree murder. A reversal here would require remanding 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, which Appellant would contest. This distinguishes *Neder* and demonstrates that Appellant's error should be found structural and not harmless.

In Appellant's case, "[s]ince . . . there has been no jury verdict within the meaning of the Sixth Amendment, . . .[t]here is no *object* . . . upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough."). "[T]o hypothesize a guilty verdict that never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the

jury-trial guarantee." *Id.* at 279. The deprivation of the jury-trial guarantee, as in Appellant's case, has "consequences that are necessarily unquantifiable and indeterminate" and therefore "unquestionably qualifies as 'structural error.'" *Id.* at 281-82.

Mr. Hurst, in *Hurst v. State*, argued that "harmless error review cannot apply at all because the error identified by the Supreme Court in this case is structural—that is, error that is per se reversible because it results in a proceeding that is always fundamentally unfair." *Hurst*, 2016 WL 6036978, at *22. This Court gave guidance in applying harmless error review: a sentencing error "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst*, 2016 WL 6036978, at *23. "[T]he harmless error test is to be rigorously applied, and the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (internal citations and quotation marks omitted). Therefore, in the case of *Hurst* error, "the burden is on the State, as beneficiary of the error, to prove *beyond a reasonable doubt* that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the Petitioner]'s death sentence in this case." *Id.* (emphasis added). The Court further explained that a reviewing court

should not speculate as to why some jurors might have found death an appropriate penalty. *Id.* at *25

Though this Court applied harmless error review in Mr. Hurst's case, the Court found "that the error in *Hurst*'s penalty phase proceeding was not harmless beyond a reasonable doubt." *Id.* Because the error was found not harmless beyond a reasonable doubt, this Court vacated Mr. Hurst's death sentence and remanded for a new penalty phase. *Id.* at *25.

Even if Appellant's case, like Mr. Hurst's case, is subject to harmless error analysis, the *Hurst* error present on the face of the trial record demonstrates that the State could never prove that the error was harmless beyond a reasonable doubt. It cannot be harmless in Appellant's case, where the jury's advisory recommendation was not unanimous. Nor can it be harmless in a case in which the jury heard the defense argue it had established both statutory and non-statutory mitigators. This is without regard to the relevant non-record evidence regarding how the pre-*Hurst* law impacted and changed strategic decisions made during trial. This information should also be considered before constitutional error is determined to be harmless. *See Meeks v. Dugger*, 576 So.2d 713 (Fla. 1991).

It is possible that a reasonable jury could have voted to impose life sentences, rather than death sentences, on Appellant. The instructions on the importance of the jury's

role as to the sentence in Appellant’s case were not in compliance with *Caldwell*. The jury’s recommendation was devoid of the constitutionally required fact finding under *Hurst*, *Ring*, and *Apprendi*. *Hurst* requires a jury to find the elements of capital first-degree murder beyond a reasonable doubt. There is no such jury verdict in Appellant’s case. Appellant’s jury was not instructed that any aspect of its sentencing recommendation would be binding on the sentencing judge as required by *Caldwell*. Appellant’s jury did not specify which, if any, aggravating circumstances it found unanimously. Nor did the jury return a unanimous verdict finding “sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty.” Finally, the jury did not return a unanimous verdict finding insufficient mitigating circumstances existed to outweigh the aggravating circumstances. Indeed, it is entirely speculative as to whether the jury here, who voted 9–3 to recommend death, unanimously agreed on anything, or found a single aggravator beyond a reasonable doubt. Since Florida law requires unanimity, there is no way to conclude beyond a reasonable doubt that, if Appellant’s jury had been properly instructed, its determination of the statutorily defined facts would be binding on the judge.

In Appellant’s case, the judge found four statutory mitigating factors and combined six categories of non-statutory

mitigators. Had Appellant's counsel's thinking not been influenced by the statutory framework struck down by *Hurst*, Appellant and counsel would have pursued a different approach than the one taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. A jury properly instructed that it, not the judge, was to make the ultimate sentencing decision could find that any one of the aggravating circumstances in Appellant's case was *not*, as fact, sufficient to justify a death sentence. *See* § 921.141(c)(2). As such, there is no way to conclude that the jury unanimously found any specific aggravator in this case before making an advisory death recommendation. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding, in the mitigation context, that the Eighth Amendment is violated when there is uncertainty about the jury's vote).

Furthermore, the jury's consideration of the evidence in Appellant's case may well have been different if the jury had been required to conduct the fact finding, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell*, 472 U.S. at 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). Indeed, the Supreme

Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation marks omitted). This too highlights that relief is appropriate post-*Hurst*.

Additionally, Appellant should be granted relief under *Hurst* notwithstanding that one of the aggravating factors found by her trial judge was a prior violent felony conviction. Although *Ring* referred to an exception allowing Arizona judges to find the fact of a prior conviction, the Florida death penalty law under which Appellant was sentenced, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a death sentence, but also required factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). As far back as four decades ago, this Court made clear that the "sufficiency" fact determination "is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life

imprisonment in light of the totality of the circumstances present." *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). The Florida system under which Appellant was sentenced is qualitatively different than the Arizona system at issue in *Ring*, so that, constitutionally, Appellant's sentence does not stand after *Hurst*.

Also, this case implicates Eighth Amendment considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). This Court recently found the death-penalty statute signed into law by the Governor of Florida on March 7, 2016—which amended Florida's death penalty scheme from requiring a 7-5 vote (the standard in place at the time of Appellant's penalty phase) to requiring a 10-2 jury vote in favor of a death sentence, before imposing a sentence of death—to be unconstitutional because it does not require a *unanimous* death recommendation. *Hurst*, 2016 WL 6036978, at *24 and *Perry v. State*, 2016 WL 6036982, at *7. *At Appellant's penalty phase, the advisory jury votes for death were 9-3.* This Court confirmed that the right to a jury trial requires that the jury must unanimously find, as fact, 1) the existence of any aggravating factor; 2) that the aggravating factors are sufficient for the imposition of death; and 3) that the aggravating factors outweigh the mitigating circumstances.

Hurst, 2016 WL 6036978, at *10; *see also Perry*, 2016 WL 6036982, at *7. "The jury's recommendation for death must be unanimous." *Hurst*, 2016 WL 6036978, at *10; *see also Perry,* 2016 WL 6036982, at *8. The Eighth Amendment compels these unanimity requirements because had the jurors been properly instructed that they must unanimously find each fact necessary to impose death and unanimously determine that death is the appropriate punishment, the jury's consideration of the evidence in Appellant's case may well have been different. *See Caldwell,* 472 U.S. at 328-29. And the fact-findings must be made beyond a reasonable doubt.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). The overwhelming number of states—including Florida—have concluded that a person is ineligible to be sentenced to death where any juror has voted for life imprisonment. Under our society's current standards of decency and this Court's most recent opinions, Appellant's death sentences, with advisory jury votes of 9–3, are no longer tolerable under the Eighth Amendment. And even if such a sentence is permissible, the fact that jurors voted in Appellant's favor demonstrates that the error is not harmless.

See Hurst, 2016 WL 6036978, at *25 ("We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review. Thus, the error . . . has not been shown to be harmless beyond a reasonable doubt.").

Moreover, harmless error review is rendered even more problematic by the fact that capital penalty phase proceedings do not occur in a vacuum. For instance, a defense counsel's entire approach to the presentation of evidence would have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. Counsel would have given different advice to the Appellant, and the decision-making in this case would have been different. This is especially true in light of the fact that the jury's consideration of the evidence is different if the jury is required to make the sentencing findings, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell*, 472 U.S. at 328-29 (recognizing significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). A hearing is appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation,

and defense penalty-phase theories at the sentencing and resentencing; counsel's advice to the client; and the decisions of counsel and the client.

Furthermore, *Hurst* requires review of Appellant's death sentence, which is disproportionate to her co-defendant's sentence. "This Court generally conducts a qualitative assessment of capital cases to ensure that the death penalty is imposed against the most aggravated and least mitigated first-degree murder convictions." *McCloud v. State*, SC12-2103, 2016 WL 6804875, at *15 (Fla. Nov. 17, 2016). "However where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *Id.* (internal quotation marks omitted). "[W]hen a codefendant is equally as culpable as or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Id.* at 35-36. "Where factual findings clearly establish that the less culpable defendant is the only defendant receiving a death sentence, that error must be rectified. For instance, in *McCloud v. State*, this Court found the death sentence a disproportionate sentence where the non-triggerman was sentenced to death and his more-culpable co-defendants were not. *McCloud* is analogous to the instant case.

Here, Appellant's sentence stands in stark contrast to co-defendant Bruce Kent Nixon, Jr., who was at the crime scene and an active participant. Despite this, Nixon is serving a 45-year sentence. Appellant's co-defendant's term-of-life sentence necessarily precludes her own death sentence. *McCloud*, 2016 WL 680487, at *17. Accordingly, Appellant's sentence is disproportionate and any error cannot be harmless.

Finally, to the extent that Appellant's *Hurst* claim is subjected to further testing for harmless error, an evidentiary hearing is necessary to establish how defense counsel's approach to diminishing the weight of the aggravating factors at the penalty phase would have been different in a hypothetical penalty phase that comported with the constitutional principles announced in the *Hurst* decisions.

As explained above, in order for a *Hurst* error to be harmless, this Court has held that the burden is on the State to establish that there is "no reasonable probability that the error contributed to the sentence." *Hurst*, 2016 WL 6036978, at *23. Without an evidentiary hearing, this Court would be constrained to conduct harmless error review based on its own or the parties' speculation, which this Court made clear is not permissible. *Id.* at *3.

An evidentiary hearing is necessary to determine whether counsel would have sought to diminish the weight of the

aggravating factors had he known that the jury, rather than the judge, would be making the findings of fact on those factors. The State would be required to demonstrate, beyond a reasonable doubt, that any difference in counsel's strategy had no reasonable probability of affecting Appellant's sentence.

Appellant respectfully requests that before this Court reaches any *Hurst* harmless error analysis, it must afford Appellant an opportunity to present evidence at a trial court hearing regarding the impact that pre-*Hurst* law had on defense counsel and the advice he had given his client, just as this Court did in *Meeks*. In *Meeks*, this Court, while considering a habeas petition raising a claim under *Hitchcock v. Duggar*, 481 U.S. 393 (1987), determined that the petitioner was entitled to an evidentiary hearing on the issue of harmless error, and it remanded the case to the trial court to conduct such a hearing. *See Meeks*, 576 So.2d at 716. If this Court finds the constitutional error in Appellant's case is subject to harmless-error analysis, this Court should remand Appellant's case to the trial court as it did in Mr. Hurst's case.

D. There are No "Automatic" Aggravating Circumstances in Florida

In a previous opinion in Appellant's case, this Court stated, that relief could be denied under *Ring,* because an aggravating circumstance found by the trial judge was a prior

violent felony conviction. *Cole,* 36 So.3d at 611. Such a view is not viable in Florida post-*Hurst,* because there are no "automatic" aggravators that can always be deemed "sufficient" for death eligibility in Florida. Trial court proceedings are appropriate in Appellant's case even though one of the seven aggravating factors found by her trial judge was a prior violent felony conviction. Although *Ring* referred to an exception allowing Arizona judges, instead of juries, to find the fact of a prior conviction, Florida death penalty law, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a death sentence, but also the factual determinations that "*sufficient* aggravating circumstances exist" to impose a death sentence, and that "there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). The Florida system under which Appellant was sentenced is qualitatively different than the Arizona system at issue in *Ring*.

In the context of Florida's capital sentencing structure, this Court cannot determine, without first remanding for trial court proceedings, whether a jury in a hypothetical capital sentencing proceeding that complied with *Hurst* would have made the same "sufficiency" findings as the trial judge.

Additionally, this Court, like all appellate courts, is ill-equipped to determine how much influence the trial judge's role as the "sufficiency" fact-finder had on defense counsel's presentation or the jury's deliberations in Appellant's case. *See Hall*, 541 So.2d at 1128 (explaining that "[a]ppellate courts are reviewing, not fact-finding courts . . . ."). As this Court has recognized in the context of *Hitchcock*, such harmless error determinations should be made first by trial courts following an evidentiary hearing. *See, e.g.*, *Meeks v. Dugger*, 576 So.2d 713, 716 (Fla. 1991); *Hall v. State*, 541 So.2d at 1125. Accordingly, this Court should remand so that Appellant may seek relief based on *Hurst* in circuit court. To the extent that harmless error review is applicable at all, the trial court should hold fact-finding proceedings to determine the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome in Appellant's case. And the trial court should also evaluate harmless error, if at all, as compared to a new sentencing statute, which has not yet issued.

CONCLUSION

For the foregoing reasons, Appellant, under *Hurst*, should be given the opportunity to present her *Hurst* issue to the circuit court or get an evidentiary hearing to present evidence regarding the impact the *Hurst* error had upon her sentencing.

Respectfully submitted,

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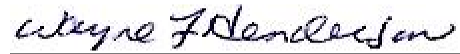
CERTIFICATE OF SERVICE

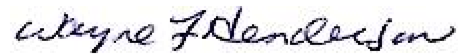
I CERTIFY that a true and correct copy of the foregoing was furnished by email to the Office of the Attorney General, Carolyn M. Snurkowski, carolyn.snurkowski@myfloridalegal.com on December 1, 2016.



Wayne Fetzer Henderson

CERTIFICATE OF COMPLIANCE

I CERTIFY that the size and style of type used in this brief is 12-point "Courier New," in compliance with Fla.R.App.P. 9.210(a)(2).



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