IN THE SUPREME COURT OF FLORIDA
Case No. SC13-2422

GERHARD HOJAN,
Petitioner,

v.

JULIE L. JONES, ETC.,
Respondents.

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT IN LIGHT OF *HURST V. FLORIDA*

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PRELIMINARY STATEMENT

This Supplemental Brief is being filed in accordance with the Court's Order of February 17, 2016, ordering the filing of supplemental briefing by the parties to address the application of *Hurst v. Florida*, 136 S. Ct. 616 (2016), to Mr. Hojan's case. The following symbols will be used to designate references to the record in this appeal:

"V. R." – volume and page number of record on direct appeal to this Court;

"V. PCR." – volume and page number of record on appeal to this Court following the rule 3.851 motion;

All other references will be self-explanatory.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Prior to trial, Mr. Hojan moved to declare Florida's sentencing statute unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (R. 87-96). For example, the motion argued, *inter alia*, that

> [u]nder Florida law, a defendant cannot be sentenced to death unless the judge—not the jury—makes specific findings of fact. In particular, before a sentence of death may be imposed under Florida Statute §921.141 (3), the court 'shall set forth in writing its findings upon which the sentence of death is based as to the facts . . . [t]hat sufficient aggravating circumstances exist . . . and . . . [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' (emphasis added). *Thus, §921.141 explicitly requires two separate findings of fact by the trial judge before a sentence of death can be imposed: the judge must find as a fact that (1) 'sufficient aggravating circumstances exist' and (2) 'there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'* [1] A defendant thus may be sentenced to death only if the sentencing proceeding 'results in findings by the court that such person shall be punished by death.' Fla. Stat. §775.082 (1).

(R. 89) (emphasis in italics added). The pretrial motion further argued that the statute was "explicit that, without these required findings of fact by the trial judge, the

[1] *See Hurst v. Florida*, 136 S. Ct. 616, 623 (2016) ("the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.' Fla. Stat. §775.082(1) (emphasis added). The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' §921.141(3).

defendant must be sentenced to life imprisonment" (*Id*.).[2] It went on to contend that any reliance on "the jury's advisory verdict as the basis for imposing a sentence of death is erroneous" because the Sixth Amendment cannot be satisfied "by relying on a jury's advisory verdict" (*Id*.).[3] Because death was not a constitutionally-permissible penalty, the pretrial motion also argued that life imprisonment was the only possible penalty (R94-95).

The penalty phase began on November 24, 2003. For each count of first-degree murder, the jury recommended a sentence of death by a vote of 9-3 (R. 781-82; 2649). The trial court sentenced Mr. Hojan to death on August 2, 2005 (R. 3133). In its written findings of fact in support of the sentences of death, the trial court found the following six (6) aggravating circumstances: (1) that Mr. Hojan committed a prior capital felony—the contemporaneous murders and attempted murder; (2) that the murders were committed in the course of an armed kidnaping; (3) that the murders were committed to avoid arrest; (4) that the murders were committed for financial gain; (5) that the murders were heinous, atrocious, or cruel (HAC); and (6) that the murders were cold, calculated, and premeditated (CCP). The trial court also

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[2] *See Hurst*, 136 S. Ct. at 622 ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole").

[3] *See Hurst*, 136 S. Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires").

found the statutory mitigating circumstance that Mr. Hojan had no significant prior history of criminal activity; however, the court found this mitigator was undercut by Mr. Hojan's crimes that were contemporaneous to the murders. The two nonstatutory mitigating circumstances that were found were: (1) that Mr. Hojan was a good son, parent, and provider, and (2) that he showed good behavior while incarcerated and during the proceedings.[4]

Further, on direct appeal, Mr. Hojan renewed his challenges to the constitutionality of Florida's sentencing statute on a number of grounds. These arguments were rejected on the merits by this Court, which addressed each of the arguments raised:

> We deny Hojan's claims asserting error under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Hojan's case also involved convictions for multiple contemporaneous crimes. This Court has held that such facts—found unanimously by a jury—satisfy the requirements of *Ring*. *See, e.g. Rodgers v. State*, 948 So. 2d 655, 673 (Fla. 2006); *Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). Accordingly, we deny Hojan's *Ring* claims.
>
> Further, Hojan's *Apprendi* claims have also been previously rejected by this Court. First, this Court has rejected claims that the State is required to provide notice of the aggravating factors it intends to prove in the penalty phase. *See, e.g. Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003). Second, this Court has also rejected the claim that the jury must report its findings. *See, e.g. Walker v. State*, 957 So. 2d 560, 569 (Fla. 2007); *Porter v.*

[4] Mr. Hojan was also sentenced to consecutive life sentences on all other counts except for the attempted felony murder of Nunn, upon which sentence was withheld because Mr. Hojan was sentenced on the attempted murder count.

> *Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Third, this Court has rejected the claim that a nonunanimous jury sentencing recommendation is unconstitutional. *See, e.g. Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Hodges v. State*, 885 So. 2d 338, 359 n.9 (Fla. 2004). Fourth, this Court has rejected burden-shifting claims that argue Florida's capital sentencing statute or jury instructions unconstitutionally place the burden on the defendant to prove that sufficient mitigating circumstances exist to outweigh the aggravators. *See, e.g. Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003); *Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002). Finally, this Court has also rejected claims that telling a jury that it only *recommends* a sentence of life or death, while the final decision on the sentence is up to the judge unconstitutionally dilutes the jury's responsibility. *See, e.g. Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993). Accordingly, we deny Hojan's *Apprendi* claims as well.

Hojan v. State, 3 So. 3d 1204, 1209 n.2 (Fla. 2009).[5]

[5] Mr. Hojan reasserted, for preservation purposes, his *Ring*-based claim in his Rule 3.851 proceedings and in the appeal from the denial therefrom (*See* Initial Brief, *Hojan v. State*, Case No. SC13-05, at 86-87).

SUMMARY OF THE ARGUMENT

The death sentences in Mr. Hojan's case unquestionably violate the Sixth Amendment, as *Hurst v. Florida* has made clear. The jury never made the requisite findings necessary to render Mr. Hojan eligible for the death penalty nor did it make any findings of each fact necessary to sentence him to death. *Hurst* is a decision warranting retroactive application, particularly given that he previously raised a claim based on *Ring v. Arizona* and *Apprendi v. New Jersey*. The error is not amenable to harmless-error analysis because it is structural in nature. Mr. Hojan must be sentenced to life imprisonment.

ARGUMENTS AND AUTHORITIES

I. Introduction.

The 8-1 decision in *Hurst v. Florida,* 136 S. Ct. 616 (2016) establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong and can only be described as a development of fundamental significance and jurisprudential upheaval. *See Hughes v. State,* 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment."). *Hurst* also establishes that Mr. Hojan's trial and appellate counsel were correct in their arguments to the lower court (at trial) and to this Court (on direct appeal) that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment and that he should be sentenced to life imprisonment. In light of the foregoing arguments and authorities, Mr. Hojan submits that he must be given the benefit of *Hurst* and be resentenced to life imprisonment under the mandatory language of §775.082(2), Fla. Stat. (2015).

II. The *Hurst* Decision.

In *Hurst,* the Supreme held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 136 S. Ct. at 619. Specifically, the Court held that "[t]he Sixth Amendment requires a jury,

not a judge, to find *each fact* necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id*. (emphasis added). The *Hurst* Court identified what those critical fact-findings are, leaving no doubt as to how Florida's capital sentencing statute must be read:

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

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

Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily-defined facts *in addition to* the verdict unanimously finding the defendant guilty of first-degree murder. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* Fla. Stat. § 921.141(3); *Hurst*, 136 S. Ct. at 622. *Hurst* identified these findings (set forth in the statute itself) as the operable findings that must be made by a jury. Neither of these factual determinations was made by Mr. Hojan's

jury.

Hurst's holding is girded on the principle that findings of fact statutorily required to render a Florida defendant death eligible are elements of the offense, separating first-degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227 (1999). In *Ring*, the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment.[6] The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002), of the potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida*, 490 U.S. 638 (1989), which held that the Sixth Amendment "does not require that the specific

[6] In Arizona, the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640–641. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre *Apprendi* decision—*Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of *Apprendi*." 536 U.S., at 603. *Walton*, for its part, was a mere application of *Hildwin's* holding to Arizona's capital sentencing scheme. 497 U.S., at 648.

Hurst, 136 S. Ct. at 623 (emphasis added).

Mr. Hojan's jury was repeatedly told that its role in determining the sentence to be imposed was merely advisory and that it was only required to provide the court with an "advisory opinion" or "recommendation." The jury made no findings as to the eligibility facts necessary to make Mr. Hojan death eligible and the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Mr. Hojan's death sentences unquestionably violate the Sixth Amendment.

III. *Hurst* Applies to Mr. Hojan.

Hurst is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and fairness dictates that

Hurst be given retroactive effect in this case. *See Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015). *See also James v. State*, 615 So. 2d 668 (Fla. 1993). Only a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify under *Witt*, *see Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citation omitted), and *Hurst*, perhaps more so than virtually any other case decided since *Furman v. Georgia*, 408 U.S. 238 (1972), satisfies this standard. On the basis of *Furman*, this Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972).[7] There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with undeniably unconstitutional executions. Under §775.082(2), Fla. Stat., a life sentence *must* be imposed on Mr. Hojan, as this Court has no discretion to do otherwise. *Anderson*, 267 So. 2d at 9 (finding that §775.082(2) requires "an automatic sentence and a reduction from the sentence previously imposed," because "[t]he Court has no discretion").

[7] In *Anderson*, this Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of *Furman v. Georgia*, . . . the death sentence imposed in these cases is illegal.").

However, if §775.082(2) is not applied here when the capital sentencing scheme has been held to be unconstitutional and a retroactivity analysis is deemed necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst*, unlike *Furman*, states unequivocally that "[w]e hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 619. *Hurst*, unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman*, did not fragment the United States Supreme Court at all. On the contrary, *Hurst* was an 8-1, resoundingly unified pronouncement from the Supreme Court that Florida's sentencing of capital defendants has long been unconstitutional. In Florida, *Hurst* is just as much a sweeping jurisprudential upheaval of fundamental significance as was *Furman*. In Florida, *Hurst*, just as *Furman* was, must be retroactively applied.

In other scenarios, when less-momentous decisions have been handed down by the Supreme Court, this Court has applied those decisions retroactively. For example, after the decision was handed down in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this Court, applying *Witt*, ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1988); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). This Court also recognized that it had been previously

misapplying *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)).[8]

The upheaval caused by the *Lockett/Hitchcock* scenario is less momentous than the ramifications of the *Apprendi/Ring/Hurst* scenario. In *Lockett/Hitchcock*, at no time was there a determination that Florida's capital sentencing scheme was unconstitutional. In *Lockett/Hitchcock*, no Supreme Court decision upholding Florida's capital sentencing scheme was declared overruled by the Supreme Court, and no legislative fix was required. This Court's determination that *Hitchcock* warranted retroactive application means that under *Witt* the substantially greater upheaval in Florida law created by *Hurst* certainly must be applied retroactively. Moreover, the error identified in *Hurst* is structural and not amendable to any harmless-error analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991); Amicus Brief of the CHU, filed in *Lambrix v. Jones*, No. SC16-56 (arguing

[8] *Espinosa v. Florida*, 505 U.S. 1079 (1992) presented a scenario in line with *Hitchcock*. *Espinosa* held "if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082. In *James v. State*, this Court applied retroactively a claim based on *Espinosa*. 615 So. 2d 668, 669 (Fla. 1993). This Court conducted no *Witt* analysis in *James* but Mr. James received the benefit *Espinosa* even though his conviction was final years before *Espinosa* issued in 1992. *Hurst* is a much greater upheaval in the law than *Espinosa* was.

that *Hurst* error is structural because it "infect[s] the entire trial process"). *See also Riley v. Wainwright*, 517 So. 2d 656, 659 (Fla. 1988) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure").

This Court recently reaffirmed the continuing validity of the *Witt* test to determine 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. *Falcon*, 162 So. 3d at 954. This Court applies decisions retroactively provided that they (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* at 960.

This Court's *Witt* test is distinct from, and not impacted by, the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 307 (1989). *See Falcon*, 162 So. 3d at 955-56 (recognizing that 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 . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which 'changes of law' will be cognizable under this state's post-conviction relief machinery."). After all, 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). The federal test was never intended to prohibit a state from granting broader retrospective relief when reviewing its own state convictions. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). States may grant more expansive retroactive effect to new rules than is required by federal law, *id.* at 277, 282, and Florida traditionally has done so. The critical question, therefore, is whether *Hurst* meets Florida's *Witt* test.

Hurst satisfies the first two *Witt* retroactivity factors because (1) it is a decision of the United States Supreme Court, and (2) its holding—that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-findings that subject a defendant to a death sentence. *See Witt*, 387 So. 2d at 931; *Falcon*, 162 So. 2d at 960. The determinative question therefore is whether the third factor is established, i.e., whether *Hurst* "constitutes a development of fundamental significance." *See Witt*, 387 So. 2d at 931.

In determining whether a Supreme Court decision "constitutes a development of fundamental significance," this Court has explained that, "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories." *Witt*, 387 So. 3d at 929. The first category of fundamentally significant decisions includes "those changes in law 'which place beyond the authority of the state the power to regulate certain conduct

or impose certain penalties.'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929). The second category includes "'those changes of law which are 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). "The three-fold analysis under *Stovall* and *Linkletter* includes an analysis of '(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.'" *Id.* (quoting *Witt*, 387 So. 2d at 926). While *Stovall* and *Linkletter* pre-date the comity-based *Teague* retroactivity test now used by federal courts, this Court has indicated as recently as 2015 that Florida approves the *Stovall* and *Linkletter* factors, and that it is these factors that guide its analysis under *Witt* of whether a new Supreme Court rule "constitutes a development of fundamental significance." *See Falcon*, 162 So. 3d at 961. This is appropriate given Florida's right to give retroactive effect to a broader range of new Supreme Court rules than would be mandated for federal courts under the comity-based *Teague* approach.

Hurst is well-within the second category of fundamentally significant decisions described in *Witt*. With respect to the first *Stovall* and *Linkletter* consideration, the primary purpose of *Hurst* is to protect capital defendants' inaliable

Sixth Amendment right to have any fact that exposes them to a death sentence, a punishment which is not authorized by their conviction alone, be found by a jury. As to the second *Stovall* and *Linkletter* consideration, although Florida relied on the now-invalidated capital sentencing scheme in penalty phase proceedings, the number of affected cases is finite, easily determinable, and certainly *as manageable, if not more manageable, than the cases at issue in Falcon.*

The first two *Stovall* and *Linkletter* considerations indicate that *Hurst*'s "purpose would be advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring that all capital defendants' Sixth Amendment rights are protected, regardless of whether their sentences became final after *Hurst*'s publication. In that respect, *Hurst* is different from *Linkletter* itself, where the issue was whether the purpose of the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961)—deterring police from committing Fourth Amendment violations—would be advanced if applied retroactively. *Id.* at 636-37. The *Linkletter* Court held that *Mapp*'s purpose would not be advanced by retroactive application because the police could no longer be deterred from activity that had already occurred, and judicial chaos would result from "the wholesale release of guilty victims." *Id.* at 637.

In contrast, retroactive application of *Hurst* would not be futile or produce undesirable results. *Hurst*'s purpose is to ensure that death sentences are reached as the result of a constitutional proceeding, a purpose that would be advanced by

extending the protection to all capital prisoners. And unlike retroactive application of the exclusionary rule, applying *Hurst*'s Sixth Amendment imperative is in accord with the core idea that "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 or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

With respect to the remaining *Stovall* and *Linkletter* consideration, retroactive application of *Hurst* would not have any injurious effect on the administration of justice, but rather would promote "the integrity of the judicial process." *Id.* In *Linkletter*, the Court found that retroactive application of *Mapp* would "tax the administration of justice to the utmost" because it would require applying the exclusionary rule to innumerable cases and pieces of evidence. Here, by contrast, the retroactive application of *Hurst* would be finite in scope, limited to a specific number of current Florida death row inmates. The most that would be required would be a new sentencing placing the authority in the jury's hands to find the elements necessary for the court to decide whether to impose a sentence of death. The convictions of those inmates are not affected at all.

This Court has recognized in the retroactivity context that "[c]onsiderations of fairness and uniformity make it very 'difficult to justifying 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 (quoting *Witt*, 387 So. 2d at 929). Retroactive application of *Hurst* is the only just result.

This Court has determined that decisions similar to *Hurst* have constituted "development[s] of fundamental significance" that warranted retroactive application under the *Witt* test. *Hurst* is a Sixth Amendment decision. In *Witt* itself, this Court recognized the retroactivity of the Sixth Amendment ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding. *See Witt*, 387 So. 2d at 927. This Court's retroactive application of *Gideon* asked whether an individual had a lawyer during a criminal proceeding. Surely as significant, *Hurst* asks *who* made the critical factual findings authorizing a death sentence. The question of who decides whether a death sentence can be imposed—whether a judge, in contravention of the Sixth Amendment, or a jury, in comportment with the Sixth Amendment—is fundamentally significant within the meaning of *Witt*.

Hurst is also a death penalty decision. This Court found retroactive the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that in death penalty cases, trial courts are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *Hitchcock* followed the Supreme Court's prior decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), which

held that the Eighth Amendment prohibits the sentencer from refusing to consider or being precluded from considering any relevant mitigating evidence. Before *Hitchcock*, this Court interpreted *Lockett* to require that a capital defendant merely have had the opportunity to present any mitigation evidence, not to require an instruction that the jury must consider non-statutory mitigation. *See, e.g.*, *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). Shortly after the Supreme Court issued *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to benefit from *Hitchcock* retroactively because his jury did not receive a proper instruction. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a fundamental change in the law that must be retroactively applied. *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court thereafter continued to apply *Hitchcock* retroactively. *See, e.g.*, *Hall v. State*, 541 So. 2d 1125 (1989); *Meeks v. Dugger*, 576 So. 2d 713 (1991). Surely as significant is *Hurst*, which deals with who makes the findings determinative of death eligibility: jury or judge.

Hurst is about aggravation findings. This Court has found retroactive the Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that Florida's "heinous, atrocious or cruel" aggravating circumstances was, without a clarifying instruction, impermissibly vague under the Eighth Amendment and the

Court's prior decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988). Before *Espinosa*, this Court interpreted *Maynard*'s vagueness analysis of a similar Oklahoma aggravating factor to be inapplicable to Florida's aggravating factor. Following the contrary decision in *Espinosa*, this Court applied the *Witt* test and determined that *Espinosa* was retroactive, permitting the revisiting of previously rejected challenges to the "heinous, atrocious or cruel" aggravating circumstance. *James v. State*, 615 So. 2d 688, 669 (Fla. 1993); *see also Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994). Again, *Hurst* is no less significant.

In sum, under the *Witt* test, *Hurst* is no less fundamentally significant than *Hitchcock*, which addressed a jury instruction on the scope of mitigating evidence that could be considered during a penalty phase. *Hurst* is also no less fundamentally significant than *Espinosa*, which concerned a limiting instruction required for the consideration of one statutory aggravator. Indeed, *Hurst*'s reach is much broader than either *Hitchcock*'s or *Espinosa*'s. *Hurst* changes the nature of the penalty proceeding by shifting the authority to the jury to engage in fact-finding as to death eligibility. Not only does such a fundamental shift implicate the differences between judge and jury decision-making, but it also impacts the strategy and manner by which capital defense lawyers approach the penalty phase. Prior to *Hurst*, the focus of the penalty proceeding was on the scope and presentation of mitigating evidence to the jury. Under *Hurst*, the focus shifts towards combating aggravation.

This Court's decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), is also not a barrier to this Court's *Witt* analysis of *Hurst*. *Johnson* is no longer good law.

In *Johnson*, the Court considered the retroactivity of *Ring* in circumstances entirely different from those presented by *Hurst*. The *Johnson* Court ruled that *Ring*—which arose from a challenge to Arizona's death penalty statute—was not retroactive under Florida law because *Ring* had no applicability to Florida's capital sentencing scheme. *Johnson*, 904 So. 2d at 406. However, contrary to *Johnson*, the Supreme Court not only made clear in *Hurst* that *Ring*'s holding was applicable to Florida's capital sentencing scheme, but also directly addressed the underlying ideas that led to *Johnson* and ruled that they were violative of the Sixth Amendment.

In light of *Hurst*, the retroactivity perspective of *Johnson* no longer carries any weight, not only because *Johnson* espoused a view of *Ring* that has now been repudiated by the Supreme Court, but also because there is no longer any need to analogize the law at issue in *Ring* to Florida's law; *Hurst* addressed Florida's law directly. Moreover, *Johnson* cited this Court's previous decisions in *Bottoson* and *King* for the proposition that Florida's capital sentencing scheme had been approved by the Supreme Court despite *Ring*. *Bottoson* and *King* relied on the Supreme Court's decisions in *Hildwin* and *Spaziano*. *Hurst* **explicitly overruled** *Hildwin* and *Spaziano*, leaving *Johnson* no remaining legs to stand on. *See Hurst*, 136 S. Ct. at 623-24 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . .

Time and subsequent cases have washed away the[ir] logic . . .").

IV. *Hurst* Error Not Amenable to Harmless Error Review.

The *Hurst* Court declined to reach the State's argument that the Sixth Amendment error arising from the jury's diminished fact-finding role at the penalty phase was harmless. *Hurst*, 136 S. Ct. at 624 ("[W]e do not reach the State's assertion that any error was harmless."). The Supreme Court observed that it "normally leaves it to state courts to consider whether an error is harmless." *Id.* (citing *Neder v. United States*, 527 U.S. 1, 25 (1999) (explaining that it is ordinarily left to lower courts to pass on harmlessness in the first instance). This Court is therefore the appropriate forum to resolve whether *Hurst* claims are subject to harmless error review and, if so, the standards by which such analysis should be conducted.

There is a serious question as to whether *Hurst* claims are subject to harmless error analysis at all, or whether they present claims of "structural" error that defy specific harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing between "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented."). In determining whether *Hurst* errors are structural or instead subject to harmless error review, this Court must

decide whether the Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role at the penalty phase—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Measured against that standard, *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" or whether the elements necessary for a death sentence exist. *See Neder*, 527 U.S. 1 at 8.

The structural nature of *Hurst* claims is further underscored by what Justice Scalia, writing for the Court, called the "illogic of harmless-error review" in the context of the Sixth Amendment constitutional error at issue in *Hurst*. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Because *Hurst* made clear that Florida's statute did not allow for a jury verdict on the necessary elements for a death sentence that was compatible with the Sixth Amendment, "the entire premise of [harmless error] review is simply absent." *Id.* at 280. Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence] actually rendered in [original] trial was surely unattributable to the error." *Id.* There being no jury

findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the *Hurst* error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of the aggravating circumstances] beyond a reasonable doubt—not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . .

Id. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* at 280.

The serious issues raised by the question of whether *Hurst* claims are subject to harmless error analysis at all underscores the practical problems the Court confronts at this juncture. A determination of whether an individual petitioner would have been sentenced to death, notwithstanding the Sixth Amendment infirmity baked into Florida's capital sentencing scheme that *Hurst* invalidated, would require courts to hypothesize whether—in an imaginary proceeding consistent with the *Hurst* and the Sixth Amendment—the jury (told that its function was to make fact findings and not merely render an advisory verdict by way of a straw poll) would have nonetheless found sufficient aggravating circumstances for a death sentence. The jury having never made findings as to aggravating circumstances, there is no

way to determine whether it would *still* have made those findings absent the Sixth Amendment error. This is particularly true in Mr. Hojan's case, where the jury returned a mere recommendation by 9-3 vote.

A further practical problem for harmless error analysis in *Hurst* cases is that penalty phase presentations do not occur in a vacuum. In a hypothetical proceeding where the jury's Sixth Amendment fact-finding role is respected as paramount, defense counsel's entire approach to the presentation of evidence will be different, given the inherent differences between judges and juries as fact-finders. *See Summerlin*, 542 U.S. at 356 (recognizing the differences between judge and jury fact finding). Appellate courts are ill-equipped to determine how much if any impact the relative fact-finding roles of the judge and jury impacted defense counsel's presentation of the penalty case. As this Court has recognized in the context of *Hitchcock* retroactivity, such determinations should be made in trial courts following evidentiary hearings. *See, e.g.*, *Meeks*, 576 So. 2d at 716; *Hall*, 541 So. 2d at 1125. The filing of a new 3.851 motion might be the appropriate way to assess any "harm" resulting from the *Hurst* error that occurred in his case should the Court determine that the error is even subject to harmless-error analysis.

CONCLUSION

Based on the foregoing arguments and in light of *Hurst v. Florida*, Mr. Hojan submits that the Court should vacate his unconstitutional sentences of death.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 10th day of March, 2016, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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