IN THE SUPREME COURT OF FLORIDA

CASE NO. SC1401701
LOWER TRIBUNAL NO. 16-2008-CF-2887

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

RAYMOND BRIGHT,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Charles W. Arnold
Judge of the Circuit Court, Division CR-H

APPELLEE/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF ON THE APPLICATION OF THE U.S. SUPREME COURT'S DECISION IN HURST V. FLORIDA TO THE INSTANT CASE

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INTRODUCTION

This Court ordered that Bright file this supplemental brief addressing the application, if any, of Hurst v. Florida, No. 14-7505, 2016 WL 112683, 2016 U.S. LEXIS 619 (Jan. 12, 2016), upon Bright's case. Hurst is a landmark case revamping the constitutional landscape as to what the Sixth Amendment demands before a defendant is eligible to be sentenced to death, with profound ramifications on every case where a defendant was sentenced to death in Florida, including Bright's case.[1, 2]

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[1] However, Bright notes at the outset that this Court need not here resolve any of the complex and reaching issues that Hurst generates if this Court is persuaded by the Bright's guilt phase claims, i.e., that the postconviction proceedings removed any proof beyond a reasonable doubt that Bright was not acting in self-defense when he committed this act.

[2] Undersigned attorneys petition this Court to take the opportunity, upon the Hurst decision, to consider again whether the penalty of death now violates the Eighth Amendment, as was urged by Justice Breyer in his dissent to the order denying a petition for certiorari for Alabama death row inmate Christopher Brooks several days ago. Brooks v. Alabama, Nos. 15-7786, 15A755, 2016 U.S. LEXIS 852, at *2 (Jan. 21, 2016) ("Moreover, we have recognized that Alabama's sentencing scheme is 'much like' and 'based on Florida's sentencing scheme.' *Harris v. Alabama*, 513 U. S. 504, 508, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995). Florida's scheme is unconstitutional. *See Hurst*, *ante*, at 1, 577 U.S. ___, 2016 U.S. LEXIS 619 (BREYER, J., concurring in judgment). The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures ***only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment***. *See Glossip v. Gross*, 576 U. S. ___, ___, 135 S. Ct. 2726, 192 L. Ed. 2d 761, 815-816 (2015) (BREYER, J., dissenting). I respectfully dissent.") (emphasis added).

Bright is aware that numerous briefs have already been filed by the parties and *amici curiae* relating to the legal consequences of Hurst upon a pending postconviction capital case in Lambrix v. Jones, Case No. SC16-56. Given the limited number of pages allotted for this supplemental brief, Bright will attempt to highlight the distinctions of his procedural history and provide a general analysis of Hurst, and will also cite to the Lambrix briefs for additional arguments as to Hurst's various ramifications.

RELEVANT PROCEDURAL HISTORY

Bright was charged with premeditated murder for the 2008 killing of two persons within his home, despite that Bright unwaveringly asserted that he acted in self-defense. Prior to his 2009 trial, Bright filed a "Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional Under *Ring v. Arizona*," in which he cited multiple constitutional flaws in Florida's system that were later validated in Hurst, such as:

- It requires the trial judge to make findings necessary to impose the sentence of death
- The jury's recommendation is merely advisory

Exhibit 1 (Bright's pre-trial Ring motion, relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002)). The trial court denied this motion without analysis. Exhibit 2 (trial court order denying Bright's pre-trial Ring motion).

At his trial Bright was found guilty on both counts of premeditated murder. The trial court proceeded to the penalty phase according to F.S. 921.141, which Hurst has now found to be constitutional. A penalty-phase under that flawed statutory scheme was held before the trial jury, during which the jury was instructed that its advisory verdict could be based on one of the following three potential aggravators for each victim: (1) Bright had previously been convicted of a felony involving the use or threat of violence (the 1990 conviction for robbery[3]); (2) Bright had previously been convicted of a felony involving the use or threat of violence (the contemporaneous murder of the other victim); and (3) the murder was especially heinous, atrocious, or cruel ("HAC"). Exhibit 3 (penalty jury instructions). The jury recommended that Bright be sentenced to death by a vote of eight to four as to each victim. Exhibit 4 (penalty verdict forms). The jury's verdict forms did not specify as to which aggravating factors the jury found had been proved beyond a reasonable doubt. Id.

The trial court followed the jury's recommendation and sentenced Bright to death on both counts, finding all three of the aggravating factors

[3] "During the penalty phase, the parties stipulated that in 1990, Bright was convicted of armed robbery. A Pensacola police sergeant testified that Bright was arrested for robbing a convenience store while using a knife. During the robbery, Bright leaned over the counter in an attempt to remove money from the register, but he never went behind the counter." Bright v. State, 90 So. 3d 249, 254-55 (Fla. 2012). Bright was sentenced to probation for that offense.

that were submitted to the jury in the penalty phase. Bright v. State, 90 So. 3d 249, 256-57 (Fla. 2012). During his oral pronouncement of sentence and in his sentencing order, the trial judge clarified that, if not for the HAC aggravator, he would have sentenced Bright to life. Exhibit 5 at 5-6 (sentencing transcript) ("And Mr. Bright, I don't mind telling you that I take no delight in imposing the sentence in this case. Quite frankly, but for the heinous and atrocious and cruel aggravator in this case, I would not be imposing this sentence that I am going to impose."); Exhibit 7 at 21 (sentencing order) ("As noted above, this Court gave great weight to the heinous, atrocious, or cruel aggravating circumstance. Had this aggravating circumstance not been present in this case, this Court may have found a life sentence to be appropriate.").

On direct appeal, Bright again challenged Florida's death penalty arguing "Florida's death penalty statute violates Ring in a number of areas including the following":

> [T]he judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous….

Exhibit 7 (excerpt from Bright's initial brief on direct appeal). This Court denied Bright's Ring claim in a footnote. Bright, 90 So. 3d at 264 n.7. This Court did find that the trial court erred in considering the prior violent felony aggravator twice, but found that the error was harmless, based on the following analysis:

> The improper doubling of an aggravating circumstance by a trial court is subject to a harmless error review; that is, this Court must determine beyond a reasonable doubt that the error did not contribute to the imposition of the death sentence. Here, the sentencing order reflects that the erroneous double finding of the prior violent felony aggravating circumstance did not contribute to the imposition of death. As previously discussed, the trial judge expressly stated that had HAC not been applicable, life sentences would have been imposed for the murders. Therefore, we hold that the improper double finding of the prior violent felony aggravating circumstance constitutes harmless error.

Id. at 261 (citation omitted).

The same trial judge who presided over the trial also presided over Bright's R. 3.851 postconviction proceedings and issued the order this Court considers now. The trial court granted Bright's motion to vacate his sentence based on ineffective assistance of trial counsel in the penalty phase. The State has appealed the penalty phase aspect of the trial court's order while Bright appealed the denial of his motion for a new trial.

ARGUMENT

I. Hurst and Constitutional Scope

The United States Supreme Court "granted certiorari [in Hurst] to determine whether Florida's capital sentencing scheme violates the Sixth Amendment in light of Ring. [] We hold that it does." Hurst at 4. Such a definitive rejection of Florida's "capital sentencing scheme" has not occurred since 1972 in Furman, and even then it was not Florida's own sentencing scheme that was directly considered.

Following the Supreme Court decision in Furman v. Ga., 408 U.S. 238 (1972), that the death penalty violated the Eighth Amendment due to an arbitrariness and lack of procedural safeguards in practice,[4] the Florida legislature adopted its current "hybrid" capital sentencing scheme under F.S. 921.141 in which the jury considers aggravating and mitigating circumstances and renders an advisory verdict by a majority vote, but the trial judge must make additional specific findings before a defendant

[4] In Furman, the Supreme Court ruled 5-4 in a one-paragraph opinion that the imposition of the death penalty in the cases before it violated the Eighth Amendment, but none of the majority justices joined the opinion of any other. Three majority justices (Stewart, White, Douglas) articulated concerns related to arbitrariness related inadequate laws in place to assure some rational basis to determine when the death penalty was applied, and when it was not. The other two majority justices (Brennan, Marshall) found that the death penalty *in itself* violated the Eight Amendment.

becomes eligible to be sentenced to death. See Proffitt v. Florida, 428 U.S. 242, 247-50 (1976).

Although Florida's hybrid system was approved by the U.S. Supreme Court multiple times following Furman (e.g., Proffitt (1976); Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989)), its constitutionality came into serious doubt after the Supreme Court's Apprendi and Ring decisions.

In Ring, the Supreme Court was faced with evaluating the constitutionality of Arizona's capital sentencing scheme, which it had once before found constitutional in the post-Furman era in Walton v. Arizona, 497 U.S. 639 (1990). In the Arizona scheme, the jury played no role in the penalty phase once it announced its verdict of guilt, and it was up to the trial court to decide whether at least one aggravating factor justified the imposition of the death penalty, as was required by the Arizona statute. In announcing its holding that Arizona's statute was unconstitutional, the Supreme Court quickly surveyed the development of its Sixth Amendment jurisprudence over the preceding twelve years:

> In *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." *Id.*, at 649. Ten years later, however, we

> decided *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), which held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492.
>
> *Apprendi*'s reasoning is irreconcilable with *Walton*'s holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring, 536 U.S at 588-89.

Clearly, this caused constitutional concerns for Florida's statute, which this Court recognized immediately. See Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002). However, this Court felt constrained in Bottoson to affirm the constitutionality of Florida's capital scheme after Ring, until and unless the U.S. Supreme Court explicitly overruled its pre-Ring decisions of Hildwin and Spaziano, which approved of Florida's post-Furman capital sentencing scheme. Id. at 695 (citing Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989), for the proposition that it was bound to follow U.S. Supreme Court precedent directly on point until it was overruled by the Supreme Court itself).

In Hurst, the U.S. Supreme Court did just that, explicitly overruling Hildwin and Spaziano, and, in a decisive vote of 8-1, holding that Florida's sentencing scheme is unconstitutional.[5] The Supreme Court found three distinct aspects of Florida's statutory scheme to be unconstitutional: (1) that the judge rather than the jury had to make the "critical findings" that the aggravators were **sufficient** to outweigh the mitigators,[6] (2) that the jury was not required to make **specific** findings as to the aggravators and mitigators,[7]

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[5] Justice Breyer concurred in the judgment, finding that the Eighth rather than Sixth Amendment dictated that Florida's scheme was unconstitutional. 2016 U.S. LEXIS 619, at *16. Justice Alito was the lone dissenter, based on his skepticism as to the validity of Ring's central holding and his belief that at the very least it should not be extended to Florida's statute. 2016 U.S. LEXIS 619, at *17-22; see also the textual distinctions between F.S. 921.141(2), related to the jury's role, and F.S. 921.141(3), related to the judge's role.

[6] E.g., 2016 U.S. LEXIS 619, at *12 (Jan. 12, 2016) ("The trial court alone must find 'the facts . . . [t]hat ***sufficient*** aggravating circumstances exist' and '[t]hat there are ***insufficient*** mitigating circumstances to outweigh the aggravating circumstances.' §921.141(3); see Steele, 921 So. 2d, at 546. '[T]he jury's function under the Florida death penalty statute is advisory only.' *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." (emphasis added)).

[7] E.g., 2016 U.S. LEXIS 619, at *15 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge ***to find an aggravating circumstance***, independent of ***a jury's factfinding***, that is necessary for imposition of the death penalty.") (emphasis added).

and (3) that the jury's decision was not **binding** upon the trial court.[8, 9] See generally Lambrix Habeas Reply at 18-54; Lambrix ACLU Amicus.

Hurst's wholesale repudiation of Florida's statutory scheme leaves the Florida capital landscape uprooted in a manner similar to what Furman did for the whole nation. This supplemental brief will proceed to consider Hurst and its applicability to Bright in light of (1) the issues of retroactivity, (2) the applicability of harmless error analysis, and (3) the potential remedies for the constitutional violations suffered.

II. Hurst and Retroactivity

Each state has the authority to determine its own procedural standard for whether cases in collateral proceedings should be allowed a retroactive

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[8] E.g., 2016 U.S. LEXIS 619, at *11 ("Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not ***binding*** on the trial judge."). Therefore, if there was any doubt left after Ring, it is now clear that it would be unconstitutional for a judge to sentence to death in the face of a jury's finding that any aggravators were insufficient to outweigh the mitigators.

[9] Although not explicitly found by the opinion in Hurst, the conclusion seems unavoidable from its explicit holdings, in conjunction with Florida law that all elements of a crime must be found unanimously by a jury, that the jury's verdict must be unanimous as to the requisite capital findings in the penalty phase. Florida's bare majority requirement is clearly a violation of the Sixth Amendment as well. See generally Lambrix Habeas Reply at 35-43.

application of a newly-found principle of constitutional law. See Danforth v. Minnesota, 552 U.S. 264 (2008) (holding that states are not bound to adopt the more restrictive federal retroactivity standard). Florida's three-prong retroactivity analysis was established in the case of Witt v. State, 387 So. 2d 922, 928 (Fla. 1980). Given that the Hurst decision (1) "emanate[d] from . . . the United States Supreme Court" and (2) is undeniably "constitutional in nature," the sole question facing this Court now as to the retroactive application of Hurst is whether it (3) "constitutes a [constitutional] development of fundamental significance." Witt at 931.

Given the fact that Hurst shatters Florida's capital sentencing scheme in a way unmatched since Furman, it is abundantly clear that this is a constitutional development of "fundamental significance." See generally Lambrix Habeas Reply at 54-83; Lambrix CHU Amicus at 2-17. Further, finding Hurst to be retroactive would be consistent with extensive Florida caselaw applying Witt's more generous retroactivity standard, as noted in Justice Anstead's dissent in Bottoson:

> See, e.g., James v. State, 615 So. 2d 668 (Fla. 1993) (applying retroactively Espinosa v. Florida, 505 U.S. 1079, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992), wherein Florida's jury instruction on the "heinous, atrocious, or cruel" aggravating circumstance was held to be impermissibly vague under the Eighth Amendment); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (applying retroactively Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), wherein the use of victim

> impact evidence in a capital trial was held to be irrelevant and impermissibly inflammatory in violation of the Eighth Amendment . . . ; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (applying retroactively Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987), wherein Florida's jury instructions in capital cases were held to impermissibly limit the sentencer's consideration of nonstatutory mitigating circumstances in violation of the Eighth Amendment).

833 So. 2d at 717 n.50 (Fla. 2002). Other important examples of cases that have been found to be retroactive under Florida law are Gideon v. Wainwright, 372 U.S. 335 (1963) (its holding that all felony defendants are entitled to public defenders was noted to be retroactive in Witt, 387 So. 2d at 927), and Miller v. Alabama, 132 S. Ct. 2455 (2012) (its holding that mandatory life sentences without the possibility of parole was found to be retroactive in Falcon v. State, 162 So. 3d 954 (Fla. 2015)).[10]

In its Habeas Response in the Lambrix brief, the State primarily focuses its argument that Hurst is not of "fundamental significance" upon the fact that this Court found that Apprendi and Ring should not be applied retroactively in the cases of Hughes v. State, 901 So. 2d 837, 843-44 (Fla. 2005), and Johnson v. State, 904 So. 2d 400 (Fla. 2005), respectively.

[10] Today the U.S. Supreme Court issued another decision related to Miller and analyzing the distinction between federal and state retroactivity, now holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Montgomery v. La., No. 14-280, 2016 U.S. LEXIS 862, at *16 (Jan. 25, 2016).

(Lambrix State Response at 6-16.) There are two crucial problems with this argument.

First, as was argued by the dissent in both Hughes and Johnson, the majority in those opinions relied too heavily upon the federal standard for retroactivity, which is more restrictive than Florida's standard, as noted in Witt. E.g., Johnson, 904 So. 2d at 418 n.13 (Fla. 2005) (Anstead, dissenting). This distinction between the federal and state standards is grounded upon the need for comity in federal collateral review of final state decisions. Id. Secondly, and even more importantly, the U.S. Supreme Court has made it clear that this Court—trapped under the Hildwin holding—underestimated and misunderstood the fundamental constitutional significance of Ring in its decision in Bottoson (Hurst, 2016 U.S. LEXIS 619, at *8), which necessarily sabotaged its Witt analysis in Johnson. Given that the critical retroactivity analysis is grounded upon a proper understanding of the constitutional import of the new constitutional rule, this Court must now recognize that Johnson provides no reliable guidance as to whether Hurst, in light of the new understanding of Ring's significance, should be found to be retroactive.

Rather, Hurst ushers in a new Furman-like era of constitutional upheaval, and this necessitates a finding that its holding should be applied

retroactively to all defendants who were sentenced to death under Florida's current statutory scheme.

However, the retroactivity analysis is even simpler as to Bright's individual case. Bright's attorney's filed a pre-trial Ring motion in his case in 2009, alleging constitutional arguments that the Supreme Court finally ruled upon in Hurst. Exhibit 1 (Bright's pre-trial Ring motion). Further, Bright raised these arguments again in his direct appeal, and was denied by this Court on the basis of precedent. Bright, 90 So. 3d at 264 n.7.

As this Court noted in conducting its retroactivity analysis in James v. State as to Espinoza: "James, however, objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the Espinosa ruling." 615 So. 2d 688, 669 (Fla. 1993). The same applies to Bright. For Bright, to have persevered in asserting this constitutional violation in light of Ring, and then for him to be prevented from having his claims re-heard after they were vindicated by the Supreme Court of the United States, would be strikingly arbitrary, a violation of equal protection, and unconscionable under basic standards of fairness.

III. Hurst and Harmless Error

In Hurst, the U.S. Supreme Court left harmless error analysis to the Florida courts, but it should be noted at the outset that the high court did not find that this particular type of error necessarily *would* be harmless in any cases; it only noted that *some* types of constitutional error related to the elements of a crimes have been found to be harmless in particular cases. Hurst, 2016 U.S. LEXIS 619, at *15-16 (citing Neder v. United States, 527 U.S. 1, 18-19 (1999)).

Given the fundamental and sweeping nature of the constitutional deficiencies that the Supreme Court found in Hurst as to Florida's entire capital sentencing procedure, this Court should find that Hurst error is structural error in all cases, not subject to harmless error review. E.g., Arizona v. Fulminante, 499 U.S. 279, 291, 308-09 (1991). Further, given the fact that Florida's statute (unconstitutionally) does not require that specific findings as to which aggravators and mitigators that the jury found, Hurst claims present complicated and fact-sensitive analysis of each particular case that would result in too much speculation to be able to find harmless error beyond a reasonable doubt. See Combs v. State, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the sentencing judge

can only speculate as to what factors the jury found in making its recommendation. . . .”). Finally, the fact that the juries in every single Florida death penalty case were (unconstitutionally) told that their verdict was merely advisory rather than essential for a sentence of death, it is now apparent that the jury instructions also violated the Eighth Amendment, as set forth in Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) (“This 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.’ In this case, the State sought to minimize the jury’s sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”). See generally Lambrix FACDL Amicus at 13-21 (This *amicus* also cites to several scholarly articles that provide a compelling analysis of the negative psychological impact of a jury being told that its decision is only advisory.).

As to Bright's case, even if this Court found that harmless error analysis were necessary, it is apparent on the face of the record that harm occurred.[11]

Bright's jury was instructed on three potential aggravating factors as to each of the two victims: (1) prior violent felony (prior armed robbery conviction), (2) prior violent felony (contemporaneous murder), and (3) HAC, and the jury returned a death recommendation with a vote of 8-4 as to each victim. Exhibit 3 (penalty jury instructions). On direct appeal, this Court found sentencing error in the fact that the trial court found the prior violent felony aggravator twice; however, this Court found that the error was harmless, and its reasoning is crucial for any harmless error analysis as to Hurst:

> Here, the sentencing order reflects that the erroneous double finding of the prior violent felony aggravating circumstance ***did not contribute*** to the imposition of death. As previously discussed, **the trial judge expressly stated that had HAC not been applicable, life sentences would have been imposed for the murders**. Therefore, we hold that the improper double finding of the prior violent felony aggravating circumstance constitutes harmless error.

[11] As will be argued in the next subsection of this brief, Bright's position is that if this Court deems that a harmless error analysis is necessary, Bright should be permitted to litigate that issue first before the trial court upon the filing of a successive Rule 3.851(d)(2)(B) motion directly based upon Hurst.

90 So. 3d at 261 (emphasis added). The trial court's statement that this Court refers to was made in both the sentencing order (Exhibit 6) and in the oral pronouncement of sentence. (Exhibit 5). As this Court has already accurately concluded that the finding of HAC was a "but for" cause of the trial court imposing the death penalty, it would be of no use for the State to argue that Ring is satisfied by the jury having necessarily found the violent prior felony (either through its verdict in the contemporaneous murder or the verdict of a different jury in the prior robbery conviction, under Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Thus, if the State cannot show that there is no reasonable possibility that Hurst's problems with Florida's statutory scheme did not contribute to the finding of HAC, then the error cannot be deemed harmless. The State cannot rely on either of the prior violent felony convictions to survive harmless error analysis in this case. And we have ***no idea*** whether or not a majority or even a single member of the jury found HAC beyond a reasonable doubt, as is constitutionally required before the trial judge could have even considered that factor, given the mysteries of the jury's finding in Florida's current statutory scheme.

Without a specific jury finding that HAC had been proven beyond a reasonable doubt, the trial court had no authority under Hurst to enter a

sentence of death on that aggravator, which is one of the central problems Hurst with the current Florida scheme:

> Florida does not require the jury to make the ***critical findings*** necessary to impose the death penalty. Rather, Florida requires a judge to find these ***facts***. Fla. Stat. §921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, ***but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances*** and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of ***a jury's findings of fact*** with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *accord*, *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make ***detailed findings*** about the ***existence*** and ***weight*** of aggravating circumstances; it has no jury findings on which to rely").
>
> . . .
>
> 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); see Steele, 921 So. 2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary ***factual finding*** that Ring requires.

Hurst, 2016 U.S. LEXIS 619, at *10-12 (emphasis added). This was precisely the mistake made by the Supreme Court in Walton, Spaziano, and

Hildwin, i.e., in finding that the jury did not have to make "specific findings" as to whether "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. at *14-15 (Jan. 12, 2016) (rejecting the state's *stare decisis* argument); F.S. 921.141. Any constitutional argument that, although the Sixth Amendment requires that the jury make findings as to existence and sufficiency of the specific aggravating circumstances, the trial court could base a sentence of death upon a specific aggravating factor that the jury found was not proved beyond a reasonable doubt, would be ludicrous.

IV. Hurst and Potential Remedies

A. F.S. 775.082(2)

However, in responding to Hurst this Court would not need to consider retroactivity or harmless error if it follows the clear path set forth by the Florida legislature, which it passed in 1972 in anticipation of Furman:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

Fla. Stat. § 775.082(2).

Hurst does nothing short of declare Florida's death penalty scheme unconstitutional, placing this Court in a similar position to the position it was placed in after the Supreme Court found inadequate safeguards in place in the state statutory schemes in Furman. See Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972) ("We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.").

Thus, this Court should find that Hurst triggers the provision of 775.082(2), which requires that all existing death sentences be commuted to life sentences, as was done after Furman in every murder case at every stage of the litigation process. See Donaldson, 265 So. 2d 499; Anderson v. State, 267 So. 2d 8 (Fla. 1972); Adderly v. Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972); In re Baker, 267 So. 2d 331 (Fla. 1972). There is no legal or prudential reason to do otherwise after Hurst. See generally Lambrix Habeas Reply at 67-70 (discussion of the prudential reasons and the interests of judicial economy in automatically commuting 390 death sentences to life

sentences, rather than holding a new sentencing hearing in each case); see also Anderson, 267 So. 2d at 10-11 ("Because of the great risk involved and the fact that the absence of a death penalty may be an incentive to a convicted murderer to escape or cause bodily harm to a guard while in transit, we hold that under our inherent jurisdiction the automatic life sentence may be imposed by this Court rather than proceed through the ministerial formality of imposition of such an automatic sentence by the trial court.").

Bright's posture is a bit unique as it relates to F.S. 775.082(2), given that the trial court vacated Bright's sentence of death based on a claim of ineffective assistance of counsel in the penalty phase, and this Court will be addressing the State's appeal of that order at Bright's oral argument next week. However, there is clear precedent from this Court indicating that Bright would get the benefit of such a ruling under F.S. 775.082(2), whether that order is issued prior to or after this Court's ruling on Bright's penalty phase claim, and regardless of what that ruling is.

In Lee v. State, this Court considered the case of a man who was convicted and sentenced to death a week before Furman was decided, and his attorney promptly filed and won a motion to correct illegal sentence before the trial court after Furman, resulting in his sentence being commuted

to life. 340 So.2d 474 (Fla. 1976). Subsequently, the state appealed that ruling to the First District Court of Appeal, which reversed the trial court's ruling, setting forth the following complex procedural history:

> Before the District Court rendered a decision, the death sentences of every other defendant condemned to death under Florida's pre-*Furman* death penalty statute were reduced. *In re Baker*, 267 So. 2d 331 (Fla. 1972); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972); *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972). At the time these decisions were rendered, appellant was under a sentence of life imprisonment and therefore was not affected by them. While appellant's appeal was pending before the District Court, the Legislature passed a death penalty statute designed to meet *Furman* objections, Section 921.141, Florida Statutes (1973), and the statute was upheld as constitutional by this Court, *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). Applying the new statute, the District Court reversed the order which had reduced appellant's sentence and held that subjecting appellant to the new sentencing procedure did not collide with constitutional ex post facto principles. *State v. Lee*, 286 So. 2d 596, 600 (Fla. 1st DCA 1974).

Id. at 475. Thus, because Lee had been *successful* in his motion before the trial court, it ironically resulted in the potential that he could be the lone person convicted of murder on death row at the time of Furman who could face being sentenced to death a second time. This Court held that the Fourteenth Amendment's could not tolerate such irony:

> Had the able attorney who represented the appellant at trial not requested the trial judge to reduce the death sentence under the then-recent *Furman* decision, this appellant's sentence would have been reduced to life in *Anderson v. State*, *supra*. The United States Supreme Court in upholding our death penalty statute this year noted specifically that it is our

> responsibility to "review each death sentence to ensure that similar results are reached in similar cases." *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 2969, 49 L. Ed. 2d 913 (1976), citing *State v. Dixon*, 283 So.2d 1, 10 (1973). We do not think the question of whether a person should live or be put to death by the State should be determined by the legal procedures of when his request for reduction of sentence was made. We hereby recede from our prior decision in *Lee v. State*, 294 So. 2d 305 (Fla. 1974), to the extent that it conflicts herewith.
>
> We have considered the issue carefully, and it is our judgment that the constitutional mandate of equal protection requires reduction of appellant's sentence from death to life.

Id. at 475. This well-reasoned and fundamentally fair approach should be adopted with respect to Bright as well, should this Court order all pre-Hurst death sentences commuted to life sentences. Otherwise, Bright could be stuck facing a sentencing hearing (and the potential of a new death sentence) under whatever amended statute the legislature passes, rather than automatically getting a life sentence with all the other persons who had been sentenced to death under the current statutory scheme. This would be a violation of equal protection of the same magnitude as that in Lee.

B. Successive Rule 3.851 Motion

If this Court were to find that F.S. 775.082(2) did not require that Bright's death sentence be automatically and permanently converted to a life sentence, and if the Court were to rule against Bright on both his guilt and penalty phase claims in this appeal, then Bright would alternatively request

that this Court relinquish jurisdiction to the trial court in order that Bright might file a successive Rule 3.851(d)(2)(B) claim based upon Hurst. Allowing this claim to be fully litigated before the trial court is essential for numerous legal and prudential reasons, and this was the approach wisely taken by this Court in Hall v. State, 941 So. 2d 1125 (1989) (requiring that 3.850 motions be filed in the trial court to allege Hitchcock claims), and Falcon v. State, 162 So. 3d 954 (Fla. 2015) (requiring that 3.850 motions be filed in the trial court to allege Miller v. Alabama claims). Further, the text of Rule 3.851(d)(2)(B) is clearly designed for exactly this type of scenario. Finally, there are numerous evidentiary findings that would need to be made as to any harmless error analysis, such as how the Hurst changes to Florida's capital sentencing scheme would affect defense trial strategy. See generally Lambrix Habeas Reply at 34-53, 83-86.

CONCLUSION

The foregoing sets forth Bright's analysis as to how Hurst would apply to his case. However, if this Court grants Bright's well-founded appeal protesting his innocence and requesting a new trial, the Hurst analysis becomes unnecessary here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant brief has been served to the Office of the Attorney General via e-mail at capapp@myfloridalegal.com and Patrick.delaney@myfloridalegal.com this 25th day of January, 2016.

/s/ Rick Sichta
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta
A T T O R N E Y