IN THE SUPREME COURT OF FLORIDA
Case Nos. SC14-1775 & SC15-1233

RICHARD KNIGHT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

RICHARD KNIGHT,
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 January 19, 2016, entered *sua sponte*, ordering the filing of supplemental briefing by the parties to address the application of *Hurst v. Florida*, 2016 WL. 112683 (Jan. 12, 2016), to Mr. Knight's case. Oral argument is presently set in this appeal for February 2, 2016. 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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INTRODUCTION

At the guilt phase of Mr. Knight's trial, the jury was instructed on the elements of the crimes with which he was charged. The jury was instructed that it had to unanimously find, beyond a reasonable doubt, that each and every element of the offense was proven by the State beyond a reasonable doubt and that it was required to render an actual verdict after due deliberation of the evidence, making the requisite findings that the State had proven each and every element of the crimes beyond a reasonable doubt. During the jury charge, the court sternly reminded the jurors that "[f]or two centuries we have lived by the Constitution and the law and no juror has the right to violate the rules we all share" and that if they did not carry out their solemn responsibility to deliberate and render a verdict on each and every element of the offenses, "your verdict will be a miscarriage of justice" (V35/3639; 3644). The jurors were reminded that "[a]ll of us are *depending upon you* to make a wise and legal decision in this matter" and that any lapse in carrying out their duties and obligation would be inexcusable (V35/3639) (emphasis added). The form signed and returned by the jury after its guilt phase deliberation stated "WE, THE JURY, ***find as follows*** *as to the Defendant in this case*" (V60/354-55) (emphasis added).

Imagine now if, during the guilt phase of Mr. Knight's trial, the jury was instructed on the elements of the crime with which he was charged, then told to merely return an advisory recommendation by a majority vote because its role was

simply advisory and that it was only being asked to "advise and recommend" to the court whether Mr. Knight was guilty. And then the judge, after receiving the jury's advice and recommendation that Mr. Knight was guilty and, notwithstanding such recommendation, was required to go through all the elements of the crime and make written findings as to each element and return an independent judgment as to Mr. Knight's guilt. Would anyone say that was compliant with the Sixth Amendment? Yet this is precisely what occurred at Mr. Knight's penalty phase.

All that we know is that the jurors in this case conducted what amounts to a straw poll and simply advised and recommended to the trial court that it sentence Mr. Knight to death. The jurors were repeatedly instructed, from voir dire until the jury charge at the penalty phase, that its role in terms of sentencing was vastly different from its role at the guilt phase. Jurors were repeatedly instructed that, unlike at the guilt phase, they were only required to render to the court an "advisory opinion" or a mere "recommendation" as to whether the court should sentence Mr. Knight to death. They were repeatedly instructed that they were *not* required to make any of the actual *findings* set forth in Florida's capital sentencing statue that would make Mr. Knight eligible for the death penalty,[1] much less unanimously so beyond

[1] *See* §921.141(3), Fla. Stat. (assigning to trial court alone the responsibility of finding "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.").

a reasonable doubt. No dire warnings about "miscarriages of justice" or violating the Constitution or how much "we" were all "depending on" the jurors were given to the jury prior to deliberating for its penalty phase recommendation; to the contrary, the jury was again instructed, just before deliberating the penalty, that the final responsibility rested with the court. Not surprisingly, 49 minutes after they retired to deliberate, after being reminded and instructed that their role was merely advisory and all they were required to do was make a "recommendation" to the court, the jurors returned their recommendations to the court, by 12-0 votes, having signed the forms provided by the court which read: "a majority of the jury, by a vote of 12 to 0, ***advise and recommend*** *to the court that it impose the death penalty"* on Mr. Knight (V60/491-92) (emphasis added). And the jury did was it was told to do: essentially conduct a straw poll with regard to whether it would recommend and advise the court that it sentence Mr. Knight to death.

Barely two weeks ago, the Supreme Court issued *Hurst v. Florida,* 2016 WL 112683 (U.S. Jan. 12, 2016). *Hurst* found Florida's capital sentencing scheme—which provided the framework for the above-proceedings in this case—violated the Sixth Amendment. On January 19, 2016, this Court ordered supplemental briefing addressing "the application, if any," of *Hurst* to Mr. Knight's case. Mr. Knight's counsel has endeavored to provide the Court with the best brief possible in light of the truncated briefing schedule and the far-reaching implications of *Hurst*—some of

which counsel has not the time to even contemplate because *Hurst* is a profound decision with a myriad of implications on Florida's capital sentencing process and on Mr. Knight's case. *See generally* Reply to Response to Habeas Petition in *Lambrix v. State/Lambrix v. Jones*, Case Nos. SC16-8 & SC16-56), and the briefs of various amici submitted on Mr. Lambrix's behalf. *See generally* Amicus Brief of Capital Habeas Unit (CHU); Amicus Brief of the American Civil Liberties Union of Florida (ACLU); Amicus Brief of the Florida Association of Criminal Defense Lawyers (FACDL).

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

I. Pretrial Proceedings.

Mr. Knight filed a series of pretrial motions attacking the constitutionality of Florida's capital sentencing scheme on federal constitutional grounds, including the Sixth and Eighth Amendments. For example, he filed a motion to declare Fla. Stat. §941.141 unconstitutional due to its failure to provide adequate guidance to the jury as to the finding of aggravating and mitigating circumstances (V62/689-90); a motion to declare §941.141 unconstitutional because only a bare majority of jurors was sufficient to "recommend" a sentence of death (V62/691-92); and a motion to declare §941.141 unconstitutional for lack of adequate appellate review (V62/693-

712).[2] He also filed a motion entitled "Motion to Declare the Florida Death Penalty Statute Unconstitutional Based on the Clear Mandate of the United States Supreme Court Decision of *Ring v. Arizona*" (V62/802-24). This motion argued, *inter alia*, that the "Florida capital sentencing statute was designed to deny the jury a role in making the findings of fact on which eligibility for a death sentence depends" and that under the extant statute, the jury's finding of guilt at the guilt phase "will reflect no more than a finding of premeditated first-degree murder" and that "it is the Court, not the jury, who actually must make the necessary findings of fact" to determine Mr. Knight's death eligibility (*Id*. at 803; 817). He also argued that the constitutional infirmity in the statute was more acute because the jury's penalty phase "verdict" is "merely advisory" and thus cannot satisfy the fact-finding requirement of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (V62/819) (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985). All these motions were denied.

Mr. Knight also filed a motion to permit argument and testimony at the penalty phase concerning reasonable doubt as to the proof of the aggravating circumstances (V60/403-05). Mr. Knight argued, in part:

[2] Including among the various grounds for this particular motion was the argument that "Florida law does not require special verdicts" and thus "the appellate court is in no position to know what aggravating and mitigating circumstances the jury found" (V62/701).

> 4. In order to counter the allegations that the State has proven prior violent felony, heinous, atrocious and cruel, during the commission of the felony of child abuse aggravator, and victim under the age of twelve aggravator, it is urged that the Court permit counsel to present further evidence and to argue to the jury that the State has failed to meet its burden to establish beyond a reasonable doubt that these aggravating factors exist as to the Defendant. Although it may be argued that the Defendant was a principle in these acts, the jury may well find, consistent with *Edmond/Tyson* that the Defendant's actions are not sufficiently culpable to merit the imposition of death if the jury were to have a reasonable doubt as to whether or not the Defendant was the actual perpetrator of all of the criminal conduct for which he was convicted.
>
> 5. It is understood that the Appellate Courts have consistently refused Defendant's request to argue residual or lingering doubt as a mitigating factor per se.[] This mitigating factor of residual doubt is requested in this case in the interest of fairness. However, the evidence of a second culprit is not offered in this case to establish merely lingering doubt as a mitigating factor. Rather, it is being offered to counter the proof that the Defendant is guilty of all of the aggravating facts which the State will be offering.

(*Id*.) (footnote omitted). This motion, too, was denied (V60/423).[3]

[3] Prior to closing argument at the penalty phase, Mr. Knight renewed his motion, noting that the State had brought into the courtroom "all of the evidence that was submitted at trial" to presumably use "to argue various aggravating factors" (V55/1101). Defense counsel reminded the court that he wanted to also argue to the jury and present evidence that would have negated some of the aggravating circumstances "such as contemporaneous [capital felony conviction] . . . [and] victim under the age of twelve" (*Id*. at 1102). Defense counsel argued that it would be unfair to deprive Mr. Knight of the ability to argue that these aggravators were not established, or were due lesser weight, but the court refused to alter its prior ruling prohibiting the defense from arguing these points (*Id*. at 1102).

II. Trial Proceedings.

During voir dire, prospective jurors in Mr. Knight's case were repeatedly told that their role in terms of sentencing was merely advisory and that they were merely returning a nonbinding recommendation to the court. *See, e.g.* V15/1488 ("the jury would reconvene for the purposes of rendering an advisory recommendation as to what sentence should be imposed"); V15/1489 ("The final—the final determination of the sentence . . . is up to me. . . . If you recommend the death penalty, the Court will give great weight and consideration to your recommendation").

The penalty phase testimony took place on May 22 and 23, 2006, and then continued until July 24, 2006, when the jury returned its advisory recommendations. Both sides presented extensive testimony, including lay witnesses and mental health experts. Before deliberations began in the penalty phase, the trial court instructed the jurors per the standard jury instructions that it was their "duty to advise the court" as to what punishment should be imposed and that the "final decision" rested with the court (V55/1145-46) (emphasis added). The terms "advisory sentence" and "recommend" were repeated to the jury during the court's instructions on several occasions (V55/1146, 1149, 1153, 1154, 1155).

The jurors were then instructed to consider the following aggravating circumstances as to the murder of Odessia Stephens: (1) that Mr. Knight has been previously or contemporaneously convicted of another capital offense or a felony

involving the threat of violence (only the contemporaneous conviction for the murder of Hanessia Mullings qualified); and (2) especially heinous, atrocious, or cruel (V55/1146-47). As to the murder of Hanessia Mullings, the jury was instructed on the following aggravating circumstances: (1) that Mr. Knight has been previously or contemporaneously convicted of another capital offense or a felony involving the threat of violence (only the contemporaneous conviction for the murder of Odessia Stephens qualified); (2) that the crime was committee for the purpose of avoiding or preventing a lawful arrest; and (3) especially heinous, atrocious, or cruel (V55/1147-48). Following the instructions, the jurors were told that they would be taken to the jury room "to render [their] advisory opinions" (V55/1157).

At 3:50 PM, the jury began deliberating (V55/1158). Between 3:50 and 4:00 PM, the attorneys and court gathered the exhibits to provide to the deliberating jurors and, at 4:00PM a recess was taken (V55/1162-63). At 4:49 PM, the jurors announced they had reached advisory recommendations (V55/1163). The forms signed by the jury simply indicated that it recommended and advised, by a 12-0 vote, that the court impose the death penalty on Mr. Knight (V55/1164-65). The forms revealed no "findings" made by the jury about any eligibility factors set forth in Florida's statute because they were not instructed to make any such findings.

In its written sentencing order, the trial court recognized its sole responsibility for making the necessary factual determinations to sentence Mr. Knight to death

while affording the jury's recommendations great weight (V37/3707). As to the murder of Odessia Stephens, the court found two aggravating circumstances: (1) the contemporaneous conviction for the murder of Hannesia Mullings, and (2) especially heinous, atrocious, or cruel (V37/3708-10). As to the murder of Hannesia Mullings, the court found three aggravating circumstances: (1) the contemporaneous conviction for the murder of Odessia Stephens, (2) especially heinous, atrocious or cruel, and (3) the victim was under the age of 12 (V37/3711-13). The court, however, specifically rejected the avoiding arrest aggravating circumstance that had been submitted to the jury and argued by the State to the jury (V37/3711-12).[4]

III. Direct Appeal Proceedings.

On direct appeal, Mr. Knight raised, *inter alia*, his Sixth Amendment-based challenge to Florida's capital sentencing scheme in light of *Ring* (*see* Point V, Initial Brief, *Knight v. State,* No. SC07-841, at a). He noted he that preserved his *Ring*-based challenge at the trial level by way of pretrial motions, which were denied (*Id*. at pp. 58-59). He also noted that the trial court had instructed the jurors prior to the

[4] *See Stringer v. Black*, 503 U.S. 222, 232 (1992) ("when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale").

penalty phase that its role was merely advisory and that the "final decision" was left to the judge (*Id*. at 58). And he argued:

> Whereas Knight acknowledges this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, *Ring* raises serious doubts about the statute's constitutionality. The United States Supreme Court has, moreover, denied certiorari review of the Florida's Capital Sentencing Scheme on Sixth Amendment challenges under *Ring*, *e.g. Bottoson v. Moore*, 833 So.2d 693 (Fla.), *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, 537 U.S. 1069 (2002), effectively leaving the issue open.
>
> Though Knight's trial judge instructed jurors that the ultimate decision on an appropriate sentence was the sole responsibility of the trial judge, *Ring v. Arizona* is the law of the land and the jury's Sixth Amendment role was diminished by these instructions in contravention of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).
>
> Because the jury did not make specific findings as to each of the aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of *each* aggravating and *each* mitigating factor, ***nor can we be certain whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.***
>
> The capital sentencing scheme utilized to sentence Knight to death was unconstitutional and deprived Knight of his rights to a jury trial and due process under the Sixth Amendment to the United States Constitution. The role of the jury provided for in Florida's capital sentencing scheme, and in Knight's capital trial, fails to provide the necessary Sixth Amendment safeguards mandated by *Ring v. Arizona* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
>
> *Ring* extended the holding of *Apprendi* to capital sentencing schemes by overruling *Walton v. Arizona*, 497 U.S. 639 (1990). The *Ring* Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a sentencing judge sitting without a jury, to find an

aggravating circumstance necessary for imposition of the death penalty."

The jury in Knight's case was clearly instructed they were not the ultimate sentence and that their role was limited to issuing a recommendation and advisory opinion to the judge, who was the sole person responsible for sentencing. As Knight was never found guilty *beyond a reasonable doubt* by a unanimous jury on *each* aggravating factor of capital murder, his death sentence should be vacated.

In *Bottoson* and *King*, this Court revisited its holding in *Mills v. Moore*, 786 So.2d 532 (2001), addressing the concerns raised by *Ring* and its impact upon Florida's capital sentencing structure. The *Bottoson* and *[King]* decisions resulted in each Florida Supreme Court Justice rendering a separate opinion. In both cases, a plurality *per curiam* opinion announced the result denying relief in those cases. In each of the cases, four justices wrote separate opinions specifically declining to join the *per curiam* opinion, "concur[ring] in result only." *Bottoson*, 833 So.2d at 694-95; *King*, 831 So.2d at 145, based on facts germane to those particular cases.

This serious constitutional issue is not dead, and the United States Supreme Court's interpretation of the Sixth Amendment to the United States Constitution in *Ring v. Arizona*, that only a jury may make the elemental findings necessary to imposed a sentence of death, should no longer be frustrated or ignored.

Though "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be determined by a jury like any other element of an offense, *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n.19), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence may be imposed. Florida's death penalty scheme does not require a jury verdict, but a mere "advisory sentence" which a single person, the trial judge, may then deign to take into account in finding the defendant guilty of the death penalty, in derogation of the Sixth Amendment and the very basis for our jury system.

Knight asks this Court to revisit its position in *Bottoson* and *King* because *Ring* presents a major change in constitutional jurisprudence

> which would allow this Court to rule on the unconstitutionality of Florida's Death Penalty statute. This Court should find section 921.141(5)(i), Florida Statutes, violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Ring v. Arizona*, and vacate Knight's death sentences, remanding for imposition of life imprisonment without the possibility of parole.

(Point V, Initial Brief, *Knight v. State*, No. SC07-841, at pp. 59-62).

In its Answer Brief, the State acknowledged that Mr. Knight was challenging Florida's capital sentencing statute on a number of grounds, including that it did not comply with *Ring*, that it permitted the jury to be instructed that its recommendation was advisory in contravention of *Caldwell*, that it provided for a death recommendation based on a mere majority vote, and did not require the jury to make a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt (Answer Brief, *Knight v. State*, No. SC07-841, at 47). In response to Mr. Knight's arguments, the State argued, *inter alia*, that, in Florida, "death eligibility occurs at the time of conviction" (*Id.* at 47 (citing *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001)).[5] It also asserted that Florida's capital sentencing scheme

[5] *But see Hurst*, 2016 WL 112683 at *6 ("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.'". *Id.*

"is constitutional" (Answer Brief at 49) (citing, *inter alia*, *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)).[6] It contended that there was no *Caldwell* violation because "[t]his Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility" (Answer Brief at 51-52).[7] Because, in the State's view, Florida's statute "is not implicated by *Ring* or *Caldwell*," it urged affirmance of Mr. Knight's death sentence.

In Mr. Knight's direct appeal, the Court addressed and rejected the merits of Mr. Knight's challenge:

> Knight's final claim challenges the constitutionality of Florida's death sentencing scheme set forth in section 921.141, Florida Statutes (2000). This argument is without merit. We have repeatedly rejected arguments to revisit this issue. *See Abdool v. State*, 53 So.3d 208, 228 (Fla. 2010) ("This Court has also rejected [the] argument that this Court should revisit its opinions in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002), and find Florida's sentencing scheme unconstitutional.") (citing *Guardado v. State*, 965 So.2d 108, 118 (Fla. 2007)), *petition for cert. filed*, No. 10-10531 (U.S. Apr. 25, 2011).

Knight v. State, 76 So. 3d 879, 889 (Fla. 2011).

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[6] *But see Hurst*, 2016 WL 112683 at *8 ("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").

[7] *But see Hurst*, 2016 WL 112683 at *6 (under Florida's statute the jury's function is advisory only and "[t]he State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires").

SUMMARY OF THE ARGUMENT

Like *Furman v. Georgia*, the recent decision in *Hurst v. Florida* represents a tectonic shift in capital jurisprudence and can only be described as a development of fundamental significance and jurisprudential upheaval. *Hurst* held that Florida's capital sentencing scheme violated the Sixth Amendment because it permitted a jury, not a judge, to find each fact necessary to impose a sentence of death; and, *Hurst* held, a jury's mere recommendation is not enough. The *Hurst* Court explained that the eligibility facts that must be found under Florida's capital sentencing scheme were (1) that sufficient aggravating circumstances exist, and (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *See* §921.141(3), Fla. Stat. Neither of these facts were found by Mr. Knight's jury (and have not been found by any jury in any capital case under the now-unconstitutional sentencing scheme in Florida). *Hurst* applies to Mr. Knight especially in light of the fact that at trial and on direct appeal he preserved his Sixth and Eighth Amendment challenges to Florida's statute. *Hurst* error is structural and not amenable to harmless error analysis and Mr. Knight must be resentenced to life imprisonment pursuant to the mandatory language of §775.082(2), Fla. Stat. (2015). Mr. Knight should be permitted to amend his pending habeas corpus petition or, in the alternative, be granted leave to file a Rule 3.851 motion in light of *Hurst.*

ARGUMENTS AND AUTHORITIES

IN LIGHT OF *HURST V. FLORIDA*, MR. KNIGHT'S DEATH SENTENCES MUST BE VACATED AND HE MUST BE SENTENCED TO LIFE IMPRISONMENT.

I. Introduction.

The 8-1 decision in *Hurst v. Florida*, 2016 WL 112683 (U.S. Jan. 12, 2016), is a tectonic shift in Florida capital law[8] and requires a global paradigm shift in our understanding of the Sixth Amendment aspects of Florida's death penalty scheme. *Hurst* 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. Knight's trial and appellate counsel

[8] Not only was this Court's decision in *Bottoson v. Moore* expressly overturned, the Supreme Court expressly held that its decisions in *Hildwin v. Florida* and *Spaziano v. Florida* had not survived *Apprendi* and *Ring*. *Hurst* also implicitly overturned *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), and every subsequent decision by this Court relying upon either *Mills* or *Bottoson*. It also overturned every decision by this Court resting upon *Spaziano* and/or *Hildwin*. The tectonic shift in Florida capital law engendered by *Hurst* is comparable only to that which was created by *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Appendices A, B, C, and D to Reply to Response to Petition for Habeas Corpus, *Lambrix v. Jones*, No. SC16-56. Indeed, not since *Furman* has the Florida capital sentencing scheme been declared unconstitutional.

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. Knight 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).[9]

II. The *Hurst* Decision.

In *Hurst,* the Supreme held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 2016 WL 112683 at *3. 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*. 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

[9] This statutory provision provides:

> 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

> 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 *6 (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* § 921.141(3); *Hurst*, 2016 WL 112683 at *6. *Hurst* identified these findings as the operable findings that must be made by a jury. Neither of these factual determinations was made by Mr. Knight's jury despite a request to the trial court that the jury be required to make these requisite findings; because they were not, Mr. Knight argued and argues here, that he was not death eligible and must be sentenced to life imprisonment.

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.[10] The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson* 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*, which held that the Sixth Amendment "does not require that the specific 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*) was misplaced and contrary to *Apprendi* and *Ring*:

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that

[10] 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 *by the court* that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

> "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, 2016 WL 112683 at *8 (emphasis added).

Mr. Knight'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." *See, e.g.* V15/1488-89; V55/1145-46; 1149, 1153, 1154, 1155. The form signed and returned to the court after the jury's 49-minute deliberation merely stated that "a majority of the jury, by a vote of 12 to 0, *advise and recommend to the court that it impose the death penalty"* on Mr. Knight (V60/491-92).[11] The jury made no findings as to the eligibility facts necessary to make Mr. Knight death eligible and the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 2016 WL 112683 at *6; *Caldwell v. Mississippi.* Mr. Knight's death sentences unquestionably violate the Sixth Amendment.

[11] In contrast, the form signed and returned by the jury after its guilt phase deliberation stated "WE, THE JURY, ***find as follows*** *as to the Defendant in this case*" (V60/354-55). *See* Amicus Brief of FACDL, filed in *Lambrix v. Jones*, No. SC-56 (discussing jury studies).

III. *Hurst* Applies to Mr. Knight.

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.[12] *See Falcon v. State,* 162 So. 3d 954, 962 (Fla. 2015); *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).[13] 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

[12] In fact, *Hurst* is to be given retroactive effect to all cases. *See generally Lambrix v. State/Lambrix v. Jones,* Case Nos. SC16-8 & SC16-56), and the briefs of various amici submitted on Mr. Lambrix's behalf.

[13] 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.").

unconstitutional executions. Under §775.082(2), Fla. Stat., a life sentence *must* be imposed on Mr. Knight, 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").

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*, No. 14-7505, 2016 WL 112683 at *3 (U.S. Jan. 12, 2016). *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. 1987); *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)).[14]

While the fallout from the *Lockett/Hitchcock* scenario in Florida was significant, there is no comparison—except *Furman*—to the ramifications of *Hurst.* 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

[14] *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.

the U.S. 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, unlike other errors identified by the Supreme Court in past decisions on Florida's capital scheme, 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 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").

IV. The Court should permit Mr. Knight to amend his state habeas petition or, in the alternative, permit him to file a Rule 3.851 motion to raise claims pursuant to *Hurst*.

Mr. Knight submits that he should be permitted to amend his pending state habeas petition to adequately raise his *Hurst* claim; his challenges were made at trial and raised and addressed on direct appeal. Moreover, the record here reveals that, to some extent, it is already known that trial counsel's strategy at the penalty phase would have changed in light of counsel's dogged attempts to present argument and evidence to rebut the existence and weight of *all* the aggravating circumstances that the State

intended to present (V60/403-05; V55/1101-02). When *Hitchcock* issued, this Court at first determined that *Hitchcock* claims could be addressed in state habeas petitions if such petitions were pending. *Hall v. State*, 541 So. 2d 1125, 1128 n.4 (Fla. 1989). It later determined that where resolution of the issue required consideration of non-record evidence when evaluating the impact of *Hitchcock* on specific penalty phase proceedings, the Court concluded that *Hitchcock* claims must be presented in Rule 3.850 motions. *Hall*, 541 So. 2d at 1128; *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991). Akin in a way to *Hitchcock, Hurst* has enormous implications for how trial counsel would approach a capital trial, and in particular the penalty phase proceeding. By changing who decides the facts necessary for death eligibility and by treating those facts as elements of the offense of capital murder, the decision in *Hurst* also changes the strategies that trial counsel in Florida would employ in a capital trial. Counsel must investigate by speaking with trial attorneys regarding how *Hurst* would change how the penalty phase was conducted. This kind of investigation requires time as it did in the post-*Hitchcock* cases. It also may require evidentiary development. For example, on its face, *Hurst* holds that a jury's decision as to the facts necessary under Florida statutes for rendering death eligible must be conclusive, not advisory. Certainly, this would cause trial counsel to object to any instructions informing a jury that its penalty phase decision is advisory. Trial counsel would undoubtedly go further in this regard and emphasize to the jury its

responsibility for a death sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Certainly, there are trial attorneys available to testify to this; but under the time parameters set by this Court, counsel does not have time to develop this except in the most rudimentary fashion.

In the alternative, Mr. Knight requests that the Court permit him to amend his presently pending petition for writ of habeas corpus. When that petition was filed in July, 2015, *Hurst* had not issued nor had it even been argued at the Supreme Court. Mr. Knight's *Ring*-based claims had been raised at the trial court, raised on appeal, and rejected on their merits by this Court. However, *Hurst* completely changed the legal landscape and Mr. Knight should be given an opportunity to present this Court with an actual *Hurst* claim unencumbered by the exigencies of the present briefing schedule and the imminent oral argument.

CONCLUSION

Based on the foregoing arguments and in light of *Hurst v. Florida*, Mr. Knight submits that the Court should vacate his unconstitutional sentence of death; and/or permit him to amend his pending state habeas corpus petition to raise a *Hurst* claim; and/or permit him to file a Rule 3.851 motion to raise a *Hurst* claim; and/or to permit him to supplement this brief in light of new developments or arguments unable to be made due to the shortness of the briefing schedule ordered by the Court; and/or grant any other relief as deemed just and proper by the Court.

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 25th day of January, 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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