IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-1949

MICHAEL L. KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TWELFTH JUDICIAL CIRCUIT FOR SARASOTA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 08-CF-1087

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND PRELIMINARY STATEMENT

Michael Lee King was sentenced to death on December 4, 2009. Mr. King's case is currently pending before this Court on his appeal of the circuit court's denial of his Motion to Vacate Judgment and Sentence. A procedural history and statement of facts is contained in his Initial Brief, which was filed on April 2, 2015. The case is calendared for oral argument before this Court on February 4, 2016.

On January 12, 2016, the United States Supreme Court [hereinafter U.S. Supreme Court] in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). On January 19, 2016, this Court directed the parties to file supplemental briefs addressing the applicability of *Hurst* to the instant case.

SUMMARY OF THE ARGUMENT

Mr. King was sentenced to death under a statute that was held to be unconstitutional by the U.S. Supreme Court in *Hurst*, 2016 WL 112683. Under Fla. Stat. § 775.082(2), Mr. King should be automatically sentenced to life imprisonment. In the alternative, *Hurst* should apply retroactively to all individuals sentenced under the unconstitutional statute. The error in question is a structural error, and can never be harmless, as it infects the entire trial process. The only just remedy is to vacate

Mr. King's sentence of death and either impose a sentence of life imprisonment or allow him a new penalty phase proceeding.

ARGUMENT

Mr. King was sentenced under the capital sentencing scheme the U.S. Supreme Court held unconstitutional in *Hurst*. Under Florida law, the maximum punishment a defendant may receive for a capital crime on the basis of a conviction alone is life imprisonment. Under the unconstitutional scheme, however, he could be sentenced to death if an additional sentencing proceeding "result[ed] in findings by the court that [he] shall be punished by death." Fla. Stat. § 775.082(1). Fla. Stat. §§ 921.141(2) and (3) set forth a proceeding in which the jury rendered an "advisory vote," and the court independently found and weighed the aggravating and mitigating circumstances before entering a sentence of life or death.

In *Hurst*, the U.S. Supreme Court nullified the above-mentioned statutory provisions. Applying *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), the Court held that "[t]he Sixth Amendment requires a jury, not a judge, to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 2016 WL at 3. The Sixth Amendment guarantees that

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This right, in conjunction with the Due Process Clause, requires that each element of

> a crime be proved to a *jury beyond a reasonable doubt*. . . . "[A]ny fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that *must be submitted to a jury*."

Hurst 2016 WL at 4-5, *quoting* U.S. Const. Amend. VI.; *citing Alleyne v. United States*, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013); and *quoting Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added).

Under *Hurst*, the jury's fact-finding role is protected, as is the necessity that the facts it finds justifying a death sentence be found beyond a reasonable doubt. *Hurst* specifically rejects any notion that a jury's advisory recommendation can now be used as the necessary factual finding required under *Ring*. *See Hurst*, 2016 WL 112683 at 6-7 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding *Ring* requires.").

During his trial proceedings, Mr. King filed motions arguing that Florida's sentencing scheme was unconstitutional, and these motions were denied. R2/358-61; R3/501-12.[1] He also argued for a change of venue due to the high profile nature

[1] The trial court denied Mr. King's Motion to Prohibit Any Reference to the Jury's Role at a Penalty Phase as being "Advisory" or to the Jury's Penalty Verdict as being a "Recommendation" because the Florida Standard Jury Instruction 7.11 reflected the "current state of the law." R5/839. The trial court denied Mr. King's Motion to Bar Imposition of Death Sentence on Basis that Florida's Capital Sentencing Procedure is Unconstitutional under *Ring v. Arizona* and cited to Florida's decisions in *Williams v. State*, 967 So. 2d 735, 768 (sic) (Fla. 2007) (Pariente, J., concurring) and *Taylor v. State*, 937 So. 2d 590 (Fla. 2006). R5/840. In sum, the trial court

of his case. R4/653-731; R5/815-820. The trial court reserved ruling on the motion pending jury selection and determined that it would re-consider the motion if a fair and impartial jury could not be selected. R5/830. There was no change in venue. The jurors were told during *voir dire* that their decision was advisory and that the trial court had the final decision as to sentencing. R13/272. *Hurst* has expressly clarified the role of the impartial jury in capital cases and directly changes the dynamics of the trial and *voir dire*. This is turn affects a court's ability to seat a fair and impartial jury in high profile cases such as Mr. King's because the jury's role is no longer purely advisory. A jury's knowledge that its findings directly determine whether a person may be sentenced to death necessarily impact the questions of fairness and impartiality for each of its members.

It would be substantially injurious to Mr. King if he continues to be denied the Sixth Amendment right to a constitutional jury sentencing that he specifically sought. He is entitled to relief under *Hurst* and respectfully requests that this Court consider the following:

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denied the motions in accordance with the standard jury instruction and case law at the time that misinterpreted the effect of *Apprendi* and *Ring* on Florida's capital sentencing scheme. R5/838-39; 840; 844.

I. Section 775.082, Florida Statutes, Mandates a Life Sentence Following *Hurst.*

Fla. Stat. § 775.082(2), first enacted in 1972 as Fla. Stat. § 775.082(2) and (3), provides in relevant part:

> 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).

See Ch. 72-118, Laws of Fla. (1972).

Under this statutory provision, Mr. King is entitled to an automatic life sentence. It was enacted in anticipation of the ruling in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which ultimately determined that the death penalty as imposed and carried out at the time violated the Eighth and Fourteenth Amendments. *See Donaldson v. Sack*, 265 So. 2d 499, 505 n. 10 (Fla. 1972). All individuals under sentence of death at the time *Furman* was decided were ultimately resentenced to terms not exceeding life imprisonment. *See Anderson v. State*, 267 So. 2d 8 (Fla. 1972)*; In re Baker*, 267 So. 2d 331 (Fla. 1972).

In *State v. Whalen*, 269 So. 2d 678, 679 (Fla. 1972), during the time between *Furman* and the legislature's enactment of new capital sentencing statutes, this

Court, citing *Donaldson*, held that "at the present time capital punishment may not be imposed" and therefore "there are currently no capital offenses in the State of Florida." Like *Furman*, *Hurst* invalidated under the United States Constitution the statutory procedures by which Florida sentences a person to death, creating a situation in which, until constitutional provisions are enacted, capital punishment cannot be imposed. According to this Court in *Whalen*, "if there is no capital offense, there can be no capital penalty." *Id.* Like *Furman*, *Hurst* removed capital offenses, however temporarily, from Florida law.

With no capital offenses and therefore no capital penalty,Fla. Stat. § 775.082(2) leaves no discretion to the courts as to the remedy. In this case, the court having jurisdiction over Mr. King, "a person previously sentenced to death for a capital felony," is this Court. Therefore it is this Court's statutory duty to sentence Mr. King to life imprisonment as provided in subsection (1) of the same statute. The portion of Fla. Stat. § 775.082(1) providing for judge-made findings justifying the death penalty has been nullified pursuant to the *Hurst* decision. *See, supra*, p. 2. However, the remaining portion of that subsection provides that, if the death penalty is not imposed, a person who stands convicted of a capital felony "shall be punished by life imprisonment and shall be ineligible for parole." This Court need look no further than Fla. Stat. § 775.082(2) for the remedy correcting the constitutional

injury occasioned by Florida's capital sentencing scheme prior to the *Hurst* decision. It mandates a life sentence for each person sentenced under it, including Mr. King.

II. Where Fact-Finding is Necessary, *Hurst* Claims Should Be First Brought in Trial Courts.

If this Court determines that Fla. Stat. § 775.082(2) does not provide a remedy for Mr. King in light of *Hurst*, it should either relinquish jurisdiction to the circuit court so that Mr. King can raise and develop a *Hurst* claim[2] or pass on the issue as it applies to Mr. King's case in its current procedural posture. Neither *Hurst* nor *Ring* are the subject of Mr. King's pending appeal. The retroactivity and harmless error questions raised by *Hurst* are complex and require fact-finding. It would be appropriate to address these issues first in the trial court, to be appealed to this Court as necessary, as this Court has done in previous cases involving new Supreme Court law. *See, e.g.*, *Roy v. Wainwright*, 151 So. 2d 825, 826-827 (Fla. 1963) (describing a motion for post-conviction relief as the proper means for seeking relief for "state

[2] An example of what such a pleading might look like and the arguments that may be raised therein may be found in the Successive Motion to Vacate Judgment of Conviction and Sentence attached to the Motion to Relinquish Jurisdiction that was filed on January 22, 2016 in *State v. Lambrix*, No. SC16-56, which is currently pending before this Court. That pleading, although filed pursuant an extremely truncated time frame due to Mr. Lambrix's active death warrant, touches upon many of the considerations at issue in the cases in which the defendant was sentenced under the unconstitutional scheme denounced in *Hurst*, and Mr. King requests that this Court consider those arguments as they apply to his case.

prisoners who might have belatedly acquired rights which were not recognized at the time of their conviction"); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed. 2d 347 (1987) (holding that "[a]ppellate courts are reviewing, not fact-finding courts); *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (permitting life-sentenced juveniles two years to petition the trial court for relief under *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012)). Although Mr. King, through the filing of this brief, is complying with this Court's order[3], he explicitly does not waive the right to file a successive post-conviction motion under Fla. R.Crim. P. 3.851(e)(2) in such case that *Hurst* is held to apply retroactively.

III. ***Hurst* is Retroactive Under *Witt*.**

Should this Court determine that Fla. Stat. § 775.082(2) does not provide a remedy for Mr. King, it should nevertheless apply the *Hurst* decision retroactively to Mr. King's case. This Court determines retroactivity in post-conviction proceedings using the test set forth in *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980);

[3] On October 20, 2015, this Court scheduled Mr. King's case for oral argument on February 4, 2016. On January 12, 2016, the U.S. Supreme Court decided *Hurst.* On January 19, 2016, this Court ordered supplemental briefing on the applicability of *Hurst* to Mr. King's case and ordered the initial brief to be filed by noon on January 25, 2016, a time-frame much shorter than is necessary to address the myriad questions raised by the *Hurst* opinion and to which Mr. King objects, should any opinion emanating from this briefing foreclose his opportunity to develop and present a *Hurst* claim in the future, either in state or federal court.

See also, *Falcon*, 162 So. 3d at 960 (applying the *Witt* test and holding that *Miller*, 132 S. Ct. 2455, which "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" applies retroactively).[4] The retroactivity standard articulated by this Court in *Witt* held that a change in the law does not apply retroactively "unless the change (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. Under a *Witt* analysis, *Hurst* is applicable to all individuals sentenced to death under the unconstitutional statute, including Mr. King. The first two prongs of *Witt* are unquestionably satisfied, as *Hurst* emanates from the U.S. Supreme Court, and it is clearly constitutional in nature, as the Court held that Florida's sentencing scheme violates the Sixth Amendment.

Having satisfied the first two prongs of *Witt*, this Court must determine whether the change in law affected by *Hurst* "constitutes a development of

[4] In *State v. Lambrix*, No. SC16-56, currently pending before this Court, the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida filed an amicus brief in support of the Petitioner, which was accepted by this Court on January 19, 2016. Pages 5-17 of that brief contain a thorough analysis of the issue of *Hurst*'s retroactivity, and Mr. King asks that this Court consider the arguments raised therein as applied to his case in additions to the arguments presented here.

fundamental significance." This Court explained in *Witt*, "most major constitutional changes are likely to fall within two broad categories: (1) changes in the law that "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199(1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 6010 (1965]." *Witt*, 387 So. 2d at 929.

Hurst constitutes a "development of fundamental significance" because the change in the law is "of sufficient magnitude to necessitate retroactive application." As summarized in *Witt*, the relevant three-fold test considers: "(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." *Witt*, 387 So. 2d at 926. With regard to the first consideration in the three-fold test, the purpose of *Hurst* is to protect the Sixth Amendment right of capital defendants for their sentences to be based on a jury's verdict, as opposed to a judge's fact-finding. The purpose served by this rule is one a need for which has gone unanswered for far too long.

When the *Furman* Court abolished the death penalty, it did so under the Eighth

and Fourteenth Amendments. However, no two justices in favor of the holding agreed on the rationale. *See Furman,* 408 U.S. 238 (Douglas, J., Brennan, J., Stewart, J., White, J., and Marshall, J., filing separate opinions in support of judgments; Burger, C.J., Blackmun, J., Powell, J., and Rehnquist, J., filing separate dissenting opinions). Three justices, in concurring opinions, raised the issue of the arbitrary application of the death sentence as reason to find the death penalty unconstitutional. *Id.* at 240-57, 306-14 (Douglas, J., Stewart, J., White, J., concurring separately).

The legislature enacted a new statute following *Furman,* requiring a separate penalty phase hearing during which a judge and jury would weigh aggravating and mitigating evidence specific to the defendant. Fla. Stat. § 921.141 (1973). Ch. 72-724, Laws of Florida (1972). However, the legislature chose to make the jury's verdict only advisory. As *Hurst* now makes clear, in order to satisfy the Sixth Amendment's guarantee to a jury trial, "a jury's mere recommendation is not enough." *Hurst,* 2016 WL at 3. The jury must find every fact necessary to expose the defendant to a greater punishment than that authorized by a guilty verdict. *Id.* at 3-4.

The right to trial by jury has been held sacred since the nation's founding.

> "Trial by jury, as instituted in England, was to the Founders an integral part of a judicial system aimed at achieving justice." Accordingly, the Founders, mindful of "royal encroachments on jury trial" and fearful of

> leaving this precious right to the whims of legislative prerogative, included protection of the right in the Declaration of Independence and included three separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments.

Blair v. State, 698 So. 2d 1210, 1212-13 (Fla. 1997), *quoting* Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L.Rev. 723, 742, 744-45 (1993) (internal citations and footnotes omitted).

Justice is served when decisions are evenly applied and free from bias. A statutory capital sentencing scheme vesting the power to determine whether a person can be sentenced to death in one judge, versus twelve of that person's peers, cannot be trusted to produce results lacking in arbitrariness and bias. It has been known at least since *Ring*, that such a system is constitutionally invalid.

It has also been clear for some time that the sentencing scheme ruled unconstitutional in *Hurst* has done nothing in the 40-plus years since *Furman* to correct the injustices that decision attempted to address. According to the 2015 Annual Report of the Death Penalty Information Center, "[o]utlier practices in 3 states, California (14), Florida (9), and Alabama (6) accounted for more than half of all new death sentences in the country."[5] Furthermore, "63% of the new death sentences (31) came from the tiny 2% of counties responsible for more than half of

[5] Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, 3, *available at* http://deathpenaltyinfo.org/documents/2015YrEnd.pdf.

all the death-sentenced inmates in the United States," and "[m]ore than 20% of death sentences imposed in the U.S. since 2010 have been the product of non-unanimous jury recommendations of death – a practice barred in all states but Florida, Alabama, and Delaware."[6] Thus, the simple fact that a capital defendant was sentenced in Florida means that his exposure to an arbitrarily-applied death sentence was impermissibly increased, and this exposure was the result of the sentencing scheme held to be unconstitutional in *Hurst.* The first consideration in the three-fold test weighs heavily in favor of retroactive application.

With regard to the second consideration, the extent of reliance on the old rule, while it is true that the State has relied for 40-plus years on an unconstitutional sentencing statute in obtaining death sentences and carrying out executions, at least since *Ring* was decided the decision to do so has been misguided. *See Hurst*, 2016 WL at 8-9. In *Johnson v. State*, 904 So. 2d 400, 405-13 (Fla. 2005), this Court simultaneously rejected *Ring* as having no applicability in Florida and determined that it would not be given retroactive effect. *Johnson* was based upon the faulty premise that *Ring* did not apply in Florida; therefore, the retroactivity of *Hurst* cannot be decided based on *Johnson.* However, in *Johnson* this Court, in

[6] *Id.* at 3-4.

considering the extent of reliance on the sentencing scheme now explicitly held unconstitutional, cited to the fact that 59 people had been executed between the reinstatement of the death penalty and the time of *the Ring* decision. *Id*. at 410. This Court reasoned that the number of executions showed the extent of the reliance. *Id.* The number of executions has now reached 91.[7] Far from being a factor weighing against retroactive application, the fact that 91 people have been executed after being sentenced in violation of their constitutional rights should be a factor weighing strongly *in favor* of retroactivity, as it applies more to the first consideration in the three-fold test of "sufficient magnitude" described in *Witt* than the second. The rule's purpose, ensuring capital defendants are sentenced to death only after receiving the jury determination guaranteed by the Sixth Amendment, cannot be emphasized enough.

"In determining whether a change in the law should apply retroactively, this Court must balance . . . the need for decisional finality with the concern for fairness and uniformity." *Falcon*, 162 So. 3d at 960. Although the State acquires an interest in the finality of a conviction once that conviction becomes final,

> the doctrine of finality can be abridged when a more compelling objective appears, such as ensuring

[7] *See* Florida Department of Corrections, *Death Row, available at www.dc.state.fl.us/oth/deathrow/#Statistics.*

> fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Falcon¸ 162 So. 3d at 960, *quoting Witt*, 387 So. 2d at 925. In *Falcon*, a case in which this Court determined whether the interest in finality was sufficient to justify depriving a person of liberty after being sentenced under an unconstitutional scheme, fairness and uniformity trumped finality. *Id.* When the thing at stake is not just liberty, but *life*, surely the interests of fairness and uniformity trump the State's interest in finality.

The most equitable solution to the retroactivity question presented *by Hurst* would be resentencing those individuals impacted to life imprisonment without parole, a sentence without mandatory review by this Court and without the complicated postconviction review process set forth by Fla. R. Crim. P. 3.851 and 3.852. The State's reliance on this unconstitutional sentencing scheme, especially in light of Florida's outlier status as discussed on p. 12, *supra*, was unwise and should not now serve to deprive those most deeply affected of the chance to have

their constitutional rights finally recognized and upheld. Thus, the first two considerations set forth in the three-fold test indicate that *Hurst*'s "purpose would be advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring that the Sixth Amendment rights of all capital defendants are protected and that their death sentences resulted from constitutional proceedings, regardless of whether or not their convictions and sentences were final when *Hurst* was decided.

The third consideration, "the effect on the administration of justice of a retroactive application of the new rule," also strongly favors retroactive application. The number of individuals who would be affected by retroactive application of *Hurst* is limited and easily determinable, as it would be limited to the individuals currently on death row whose cases are in the postconviction posture. There are currently 389 people on death row, and while the Department of Corrections does not divide them by case procedural posture on its roster, it is clear that the number of people who are in the postconviction phase is less than 389.[8]

If the sentences of every death-sentenced prisoner were automatically commuted to life sentences, Florida would suffer very little in terms of an impact on its administration of justice. In Fiscal Year 2014-2015, there were an average of

[8] Florida Department of Corrections, *Death Row Roster*, *available at* http://www.dc.state.fl.us/activeinmates/deathrowroster.asp.

100,563 prisoners housed in the Florida Department of Corrections.[9] The death row population therefore represents less than half of one percent of the Florida prison population. Such a small percentage would be easily absorbed by the general population facilities.[10]

Conducting new penalty phase trials for those affected also would also not represent a staggering undertaking. This Court indicated in *Johnson* that the retroactive application of *Ring* would result in problems due to the age of many of the cases and the resulting diminished ability of attorneys to locate witnesses and present evidence. 904 So. 2d at 411-12. Of the 389 people on death row, nearly half were sentenced after the year 2000.[11] Attorney files in capital cases are well-

[9] Florida Department of Corrections, *Average Daily Population Fiscal Year 2014-2015, available at* http://www.dc.state.fl.us/pub/pop/facility/avg1415.html.

[10] After *Furman*, 100 death-sentenced prisoners were resentenced to life in prison without any reported negative effect on the administration of justice. *See In re Baker*, 267 So. 2d 331.

[11] Seventy-seven (20%) were sentenced in the 2010's, 113 (29%) were sentenced in the 2000's, 132 (34%) were sentenced in the 1990's, 59 (15%) were sentenced in the 1980's, and 13 (3%) were sentenced in the 1970's. *See Death Row Roster*, *supra*, n.10. Of the older cases, retroactive application is arguably more important under the first consideration in the three-fold test because "[b]etween 1972 and early 1992, Florida trial judges imposed death sentences over 134 juries' recommendations of life imprisonment." *Harris v. Alabama*, 513 U.S. 504, 521-22 n.8, 115 S.Ct. 1031, 130 L.Ed. 2d 1004 (1995) (Stevens, J., dissenting). Therefore, any person sentenced during that time is more likely to have been sentenced in an arbitrary and biased proceeding.

preserved and maintained due to the fact that Florida has provided for collateral representation in those cases. *See* Fla. Stat. § 27.701; § 27.702. Therefore, this concern about the effect on the administration of justice should be given much less weight against retroactive application than provided for in *Johnson.* Furthermore, new penalty phase proceedings would be spread out amongst every county with prisoners sentenced to death under the unconstitutional statute and would not be unduly burdensome on the courts' resources when viewed in light of the constitutional rights being protected.

Equal protection concerns are at issue in the determination of retroactivity as well. *See In re Baker*, 267 So. 2d at 334 ("We have already granted this requested relief to 27 members of the class of persons under sentence of death. There appears to be no reason why the remaining members of the class need be treated differently."). Each of the 389 prisoners currently on death row was sentenced under an unconstitutional sentencing scheme. Under *Hughes v. State*, 901 So. 2d 837, 839 (Fla. 2005), *Hurst* will apply to convictions that are not yet final. If *Hurst* is not applied retroactively to post-conviction cases, prisoners whose direct appeals are still pending will have their death sentences vacated, while prisoners with otherwise indistinguishable cases whose sentences are final will have no mechanism for relief. Justice requires that *Hurst* apply retroactively.

IV. *Hurst*'s Rejection of Reasoning Based on *Stare Decisis* Strongly Favors its Retroactive Application.

The U.S. Supreme Court found that this Court "considered *Ring* inapplicable in light of [the U.S. Supreme] Court's repeated support of Florida's capital sentencing scheme in pre-*Ring* cases," specifically citing to *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed. 2d 728 (1989) and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed. 340 (1984). *Hurst*, 2016 WL at 4. This Court reasoned that since the U.S. Supreme Court "never expressly" overruled *Hildwin* in *Ring* or otherwise, *Ring* was inapplicable to Florida. *Id., quoting Hurst v. State*, 147 So. 3d 435, 446-47 (Fla. 2014).

The U.S. Supreme Court has now expressly overruled *Hildwin* and *Spaziano* "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." *Id.* at 7-9. In doing so, it specifically rejected any argument pursuant to the doctrine of *stare decisis*, stating:

> "Although '"the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]" . . . [o]ur precedents are not sacrosanct.' . . . '[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.'" . . . And in the *Apprendi* context, we have found that "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent devel-opments of constitutional law."

Id. at 9 (internal citations omitted). In expressly overruling *Hildwin* and *Spaziano* and rejecting the doctrine of *stare decisis*, the U.S. Supreme Court indicated that retroactive application of *Hurst* is favored. The Court held that the logic of those decisions had been "washed away" by the subsequent developments of constitutional law in *Apprendi* and *Ring*. *Id.* at 8. Although not expressly overruled until *Hurst*, the U.S. Supreme Court held that those precedents contained no substantive reasoning supporting the unconstitutional sentencing scheme in light of *Apprendi* and *Ring* and indicated that this Court was not required to wait for a U.S. Supreme Court decision expressly overruling them. *Id.* at 7-9. Retroactive application is necessary to correct the injustices perpetuated by this faulty reliance.

V. A Harmless Error Analysis is Not Necessary Because the Error in Question Can Never Be Harmless.

The Court in *Hurst* declined to address the State's argument that the error in that case was harmless and instead left any harmless error analysis necessary to the state courts. *Id.* at 8. It is Mr. King's position that *Hurst* claims are claims of structural error, and are not subject to harmless error analysis at all.

The U.S. Supreme Court recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards in *Arizona v. Fulminante,* 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural

errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome.[12] In determining whether *Hurst* errors are structural, this Court must determine whether the error identified in *Hurst* constitutes

[12] Examples of structural error, cited in *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999), include *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed. 2d 718 (1997), *citing Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed. 2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)). In *Sullivan*, the U.S. Supreme Court found that an erroneous jury instruction concerning proof of guilt beyond a reasonable doubt standard is not subject to a harmless-error analysis. 508 U.S. at 281-82. Where there is a reasonable likelihood that a jury does not believe that it must find proof beyond a reasonable doubt to find the defendant guilty, the erroneous instruction is a structural error that may not be cured through a harmless error analysis. *Id*.

Other cases have held that there must be reversal if: the community in which defendant was tried has been exposed to so much damaging publicity that he cannot get a fair trial there; there has been purposeful discrimination in the selection of grand or petit jurors; the defendant was denied the right to represent himself; part of the trial was conducted by a magistrate lacking jurisdiction; a juror was improperly excluded due to his beliefs about capital punishment; the constitutional error already required a showing of prejudice; the defendant was denied access to counsel during trial or denied the right to a public trial; there was a violation of the constitutional right to speedy trial; or in case of the appointment of an interested prosecutor. Lower courts have added to this list. 3B Charles Alan Wright et al., Federal Practice & Procedure, 855 (3d ed. 2004), *cited* in *Nelson v. Quarterman*, 472 F.3d 287, 333 (5th Cir. 2006).

a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed. 353 (1993).

The error resulting from a *Hurst* violation can never be harmless. The statute under which Mr. King and 388 other living citizens of this state were sentenced to death has been held to be unconstitutional in violation of the Sixth Amendment. A harmless error review in this context would be illogical, and would require the courts to hypothesize how a jury might have decided the sentence in a hypothetical proceeding consistent with *Hurst* and the Sixth Amendment.

According to Florida law, the element distinguishing death-eligible first-degree murder from first-degree murder, the maximum punishment for which is life imprisonment without the possibility of parole, is the existence of "sufficient aggravating circumstances" not outweighed by mitigating circumstances. *See* Fla. Stat. § 775.082; § 941.121. Every fact necessary to raise the penalty beyond the maximum must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Because Mr. King's jury was never required to find beyond a reasonable doubt sufficient aggravating circumstances not outweighed by the mitigating

circumstances, there is no way to determine whether the error was harmless.[13]

Hurst changes the dynamics of jury selection and death qualification, and its proper application will impact an attorney's strategy and decision-making throughout the trial. No longer will the jury's role in determining death-eligibility be advisory; it will make the ultimate decision of whether the defendant's life will be spared. Although the Florida Legislature has not yet enacted a statute to replace the one that was found unconstitutional in *Hurst*, thus leading to even more speculation regarding a harmlessness analysis, the landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will havto change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

CONCLUSION

Hurst reaches to the heart of an adversarial process where a capital defendant's life hangs in the balance, and expressly clarifies the role of the impartial

[13] The fact that the jury recommended death by a 12-0 vote is irrelevant and furthermore, evidence exists that the jury did not understand their role or how they were to determine the advisory verdict. See R30/3748-52.

jury in capital cases and directly changes the dynamics of the trial and *voir dire*. For the reasons discussed above, Mr. King and all defendants sentenced to death under the unconstitutional statute are entitled to have their death sentences vacated and life sentences imposed or, in the alternative, new penalty phase proceedings consistent with *Hurst* in order to preserve the guarantees of the Sixth Amendment. *See Hurst*, 2016 WL at 1-4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL INITIAL BRIEF OF APPELLANT has been emailed to Scott A. Browne, Assistant Attorney General, at capapp@myfloridalegal.com and Scott.Browne@myfloridalegal.com and Carol Dittmar, Assistant Attorney General, at Carol.Dittmar@myfloridalegal.com, and mailed via United States Postal Service to Michael L. King, DOC #132254, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 25th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

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

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