IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-436; SC14-2108
LOWER TRIBUNAL NO. 16-2004-CF-6675

JOHN F. MOSLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

Honorable Judge Michael R. Weatherby
Judge of the Circuit Court, Division CR-B

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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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The current appeal challenges the trial court's January 14, 2014 order denying Mosley's 3.851 motion for postconviction relief.[1] The merits briefing on this appeal has been completed by both parties, and oral argument took place on October 7, 2015. This Court has not yet issued its opinion in this case. On January 12, 2016, the U.S. Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016).

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. In response to Mosley's motion, this Court granted both parties

[1] Mosley presents seven issues in this appeal: (1) The prosecution committed a Giglio violation in knowingly allowing its main witness, Bernard Griffin, to testify untruthfully at Mosley's trial; (2) The prosecution committed a Brady violation in failing to inform the defense that its main witness, Bernard Griffin, received favorable treatment prior to his testimony in Mosley's trial and was informed that he would not receive a prison sentence if he cooperated in testifying against Mosley; (3) Newly discovered evidence exists that Bernard Griffin knew that he would receive a non-prison sentence in exchange for his testimony in Mosley's trial and received preferential treatment by the prosecutor; (4) Defense counsel was deficient for failing to strike Juror "R" and Mosley was prejudiced where Juror "R" was actually biased; (5) Trial counsel was deficient in failing to request an alibi jury instruction where an alibi defense was presented at trial; (6) Trial counsel was deficient in failing to object to numerous instances of prosecutorial misconduct in Mosley's trial amounting to fundamental error; and (7) Mosley's trial was fraught with procedural and substantive errors, which cannot be viewed as harmless when considered as a whole.

leave to file supplemental briefs to address the application of Hurst upon this case.[2]

RELEVANT PROCEDURAL HISTORY

In July of 2004, Mosley was indicted for the murders of Lynda Wilkes and her infant son Jay-Quan Mosley. (1 R 1, 11.) On November 18, 2005, a jury convicted Mosley of two counts first-degree murder. (4 R 607-608.)

Prior to his sentencing, Mosley filed a motion seeking to declare Florida's statutory death penalty sentencing scheme, Fla. Stat. Section 921.141, unconstitutional. (1 R 137-149.) In it, defense counsel argued—among other things—that Florida's statutory death-sentencing scheme violated the principles of Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, defense counsel argued that Florida's death-sentencing scheme was deficient because the jury was not told how many juror votes were needed to find an aggravating circumstance (1 R 146), and because it did not require a unanimous or majority jury finding of even one, single aggravating circumstance. (1 R 146; 3 R 334.) The trial court denied this motion. (2 R 352; 3 R 337.)

Defense counsel also filed motions to require the jury to write out its findings on the aggravating circumstances and to instruct the jury that its aggravating-circumstance findings must be unanimous. (3 R 340; 4 R 656.)

[2] Mosley 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, and he will cite to those briefs in reference to some of the issues handled at greater length.

Counsel filed a written request for a special verdict form identifying the total jury vote for each individual aggravating circumstance and for the recommendation of death. (4 R 667.) These requests were also denied. (3 R 342; 4 R 658, 671.)

The trial court proceeded to the penalty phase according to F.S. 921.141, which Hurst has now found to be constitutional.

The State submitted the following aggravating circumstances to the jury as to the murder of victim Lynda Wilkes: (1) Defendant was previously convicted of another capital felony (contemporaneous murder), (2) The capital felony was committed for pecuniary gain, and (3) The capital felony was a homicide and was committed in a cold, calculated, and premeditated ("CCP") manner without any pretense of moral or legal justification. (3 R 501; 20 R 2173.) The State submitted those same three aggravating circumstances for the murder of victim Jay-Quan Mosley, plus the aggravating circumstance of the victim of the capital felony being less than 12 years of age. (3 R 502.)

At the conclusion of the penalty phase, the jury recommended life for the murder of Wilkes and death for the murder of Jay-Quan by a vote of 8-4. (21 R 2489-2490.) The judge followed the jury's recommendation and sentenced Mosley to life for the murder of Wilkes, and to death for the murder of Jay-Quan. (27 R 2636.)

In sentencing Mosley to death, the trial court found the same four

aggravators that were submitted to the jury. The trial court found no statutory mitigation but found and weighed twenty-nine non-statutory mitigators. (6 R 984-993.) Significantly, the trial court found in its sentencing order that: "[I]f there were ever a case which supports the proposition that Florida juries be asked to specify which aggravating factors they find from the evidence, this is the one. Had that been required as a matter of law, this Court would have had a much better understanding of the manner in which the jury reached its diverse recommendations." (6 R 993.)

Mosley filed a direct appeal to the Florida Supreme Court, and he raised a Ring v. Arizona, 536 U.S. 584 (2002) claim entitled "Florida's death penalty scheme violates due process, the Sixth Amendment and *Ring v. Arizona* and its progeny." (Direct Appeal Initial Brief, 71-80.)

This Court denied relief and affirmed Mr. Mosley's conviction and sentence, reasoning that Mosley's Ring claim was defeated by the existence of the violent prior felony aggravator for the contemporaneous murder conviction. Mosley v. State, 46 So. 3d 510, 518 n.9 (Fla. 2009).

ARGUMENT

I. *Hurst* is fundamentally significant in Florida's capital jurisprudence

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, 136 S. Ct. 616. Such a definitive rejection of Florida's "capital sentencing scheme" has not occurred since 1972 in Furman v. Ga., 408 U.S. 238, and even then it was not Florida's own sentencing scheme that was directly considered.

In Furman, the Supreme Court ruled that the death penalty, as imposed in each of the three cases before it (two from Georgia and one from Texas), violated the Eighth Amendment due to an arbitrariness and lack of procedural safeguards in practice.[3] In response to this ruling, 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 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

[3] 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.

came into serious doubt after the Supreme Court's decision in Ring.

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. 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.

This caused serious constitutional concerns for Florida's statute, which this Court recognized immediately. See e.g., 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.

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.[4] The Supreme Court found three distinct aspects of Florida's statutory scheme to be unconstitutional: (1) that the jury was not required to make **specific** findings as to the aggravators and mitigators,[5] (2) that the judge

[4] 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 Ring should not be extended to Florida's statute. Hurst, 136 S. Ct. at 624-27; 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.

[5] E.g., Hurst, 136 S. Ct. at 623-24 ("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).

rather than the jury had to make the critical findings that the mitigators were not **sufficient** to outweigh the aggravators,[6] and (3) that the jury's decision was not **binding** upon the trial court.[7, 8] 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

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[6] E.g., Hurst, 136 S. Ct. at 622 ("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., Hurst, 136 S. Ct. at 621 ("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.

[8] 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 certainly a violation of the Sixth Amendment. See generally Lambrix Habeas Reply at 35-43.

to Mosley in light of (1) the issue of retroactivity, (2) the applicability of harmless error analysis, and (3) the potential remedies for the constitutional violations suffered.

II. *Hurst* should be applied retroactively to Mosley's case

Each state has the authority to determine its own procedural standard for whether cases in collateral proceedings should be allowed a retroactive 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." Id. at 931.

A. Hurst should be held to be broadly retroactive under the principles set forth in Witt

Given the fact that Hurst shatters Florida's capital sentencing scheme in a way unmatched since Furman, 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.

See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (finding retroactive Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), which held that 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) (finding retroactive Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987), which held 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); Falcon v. State, 162 So. 3d 954 (Fla. 2015) (finding retroactive Miller v. Alabama, 132 S. Ct. 2455 (2012), which held that mandatory life sentences without the possibility of parole). See Bottoson, 833 So. 2d at 717 n.50 (Fla. 2002) (Anstead, dissenting).

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. (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. 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, 136 S. Ct. at 620), which necessarily sabotaged its Witt analysis in Johnson. Given that the 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.

B. Hurst should be held to be particularly retroactive in Mosley's case under this Court's holding in James v. State, 615 So. 2d 668 (Fla. 1993)

However, the retroactivity analysis is even simpler as to Mosley's individual case. Mosley's attorney's filed multiple pre-sentencing Ring motions in his case prior to his sentencing (1 R 137-149; 2 R 352; 3 R 334, 337), alleging

constitutional arguments that the Supreme Court finally ruled upon in Hurst. Further, Mosley raised these arguments again in his direct appeal, which was denied by this Court. 46 So. 3d at 518 n.9.

Under this Court's rationale in James v. State, 615 So. 2d 668 (Fla. 1993) (finding the defendant entitled in postconviction to raise his ***preserved*** vagueness challenge to the HAC instruction, after the U.S. Supreme Court years later embraced the defendant's position in Espinosa v. State, 505 U.S. 1079 (1992)), it would be fundamentally unfair to deny Mosley the opportunity to argue this claim now that the U.S. Supreme Court supports the position that Mosley has been arguing since 2005.

The single dissenting judge in James argued that the holding in Espinosa was not "a change of law of significant magnitude to require retroactive application," but this only underscores the majority's focus on the decisive fact that James preserved this objection ***in his own case***; in fact, the majority did not find it necessary to conduct any general retroactivity analysis under the Witt factors. James, 615 So. 2d at 669 ("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.").[9]

The same applies to Mosley. For Mosley, 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 and thus a violation of the Eighth Amendment, as well as unconscionable under basic standards of fairness.

III. The *Hurst* errors in Mosley's sentencing cannot be found to be harmless error

In Hurst, the U.S. Supreme Court left harmless error analysis to the Florida courts. However, 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 simply noted that *some* types of constitutional error related to the elements of a crimes have been found to be harmless in particular cases. 136 S. Ct. at 623-24 (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

[9] See also Rodriguez v. State, 919 So. 2d 1252, 1284 (Fla. 2005) ("To raise an *Espinosa* error in postconviction proceedings in which the sentence and conviction are final, the defendant must allege: (1) that the issue has been preserved for appeal by either an objection at trial or by submitting an expansive jury instruction; and (2) that appellate counsel pursued the issue on direct appeal. *See State v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995); *Lambrix v. Singletary*, 641 So. 2d 847, 848 (Fla. 1994); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993).").

review. E.g., Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (finding that the holding of In Re Winship, 397 U.S. 358 (1970) regarding the constitutional requirement of proof beyond a doubt in criminal cases is not subject to harmless error analysis).

But even if this Court found that harmless error analysis were necessary as to Hurst error, it is apparent on the face of the record in Mosley's case that harm occurred.

As was discussed above, Hurst found three distinct aspects of Florida's statutory scheme to be unconstitutional: (1) that the jury was not required to make **specific** findings as to the existence of aggravators that justify the imposition of death, (2) that the judge rather than the jury had to make the critical finding that the mitigators were **insufficient** to outweigh the aggravators, and (3) that the jury's decision was not **binding** upon the trial court. Each of these errors infected Mosley's sentencing proceeding and will be considered in turn.

A. The jury made no specific findings on which aggravators it found to have been proven beyond a reasonable doubt, and whether those specific aggravators justified imposition of the death penalty

The trial court sentenced Mosley to death for the murder of Jay-Quan based on four aggravating circumstances: (1) prior capital felony conviction (contemporaneous murder of Lynda Wilkes), (2) the murder was committed for pecuniary gain, (3) the murder was CCP, and (4) the victim was younger than

twelve years of age.

Hurst finds that it is error for the trial court to consider any aggravator that was not specifically found by the jury beyond a reasonable doubt. Hurst, 136 S. Ct. at 624 ("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 fact finding, that is necessary for imposition of the death penalty."). Further, Florida law requires that every element of a crime must be found unanimously by a jury, and Hurst declares that the finding of specific aggravators are elements of capital murder in Florida. See Fla. R. Crim. P. 3.440; Bottoson v. Moore, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring) (The requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created."); see generally Lambrix Habeas Reply at 35-43.

Thus, if the State cannot show that there is no reasonable possibility that the jury in Mosley's case did not unanimously find all four of those aggravating circumstances, then the Hurst error in this case cannot be found harmless. The State cannot show that here.

While the jury by necessity concluded that the prior capital conviction was proven by the contemporaneous murder, and while the jury surely concluded that the victim was less than twelve years of age, it is entirely possible that the jury

found that neither the pecuniary gain or CCP aggravator had been proven beyond a reasonable doubt, as the facts supporting both of those aggravators rested solely with the inconsistent testimony of co-defendant Bernard Griffin, who was given a probationary sentence for his role in these murders.[10]

Despite not knowing whether the jury found that Griffin's account in all its details was true, the trial court's sentencing order highlights its reliance on Griffin's testimony, particularly as to the pecuniary gain and CCP analyses. (E.g., R 980 ("It is undisputed from the evidence, particularly upon the testimony of Bernard Griffin….").) Thus, the trial court was left relying on its own judgment as to whether those aggravators had been proven, based on its own finding regarding Griffin's credibility on those issues.

Further, the trial court's order further explicitly reveals that it struggled with

[10] As to whether death is appropriate here, the major factual questions are—if Mosley was responsible for these homicides—how premeditated was this, and why did he do it? The answers to these questions determine whether a life or death sentence would be proportional, and both of these answers rely on the credibility of Griffin. The jury's finding of guilt tells us little about their findings as to the particular narrative that Griffin gave—a desperately heinous narrative—one that would please a prosecutor that was seeking death for Mosley and simultaneously held the liberty of Griffin in her hands. Griffin, after initially providing denials and various inconsistent accounts, became the star trial witness against Mosley, and later received a probationary sentence himself. Had the jury been required to made a specific finding as to each of the four aggravators, then we would know whether they believed that the State had proved beyond a reasonable doubt the whole picture that Griffin painted, or only the basic fact that Mosley was responsible for these murders. Griffin's testimony has been revealed to be highly unreliable, based on newly discovered evidence in post-conviction that forms the basis for the first three issues being litigated in this appeal.

the issue of how to deal with the fact that the jury by a majority recommended life as to one of the victims, and recommended death as to the other victim by a vote of 8-4. The trial court wished it had direction from the jurors as to their findings on each aggravating factor for the two victims:

> [I]f there were ever a case which supports the proposition that Florida juries be asked to specify which aggravating factors they find from the evidence, this is the one. Had that been required as a matter of law, this Court would have had a much better understanding of the manner in which the jury reached its diverse recommendations.

(6 R 993.)[11] Hurst would later embrace the proposition that the trial court referenced and strike down that element of Florida's capital sentencing scheme, but at the time when the trial court had to decide between a life and death sentence for John Mosley, it was left with a mystery as to the jury's findings on these critical aggravating factors.

Thus, because the State cannot show that there is no reasonable possibility that Hurst's problems with Florida's statutory scheme did not contribute to the trial court's findings of pecuniary gain and CCP, to both of which the trial court assigned "great weight," the error cannot be deemed harmless. Mosley, 46 So. 3d at 517.

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[11] The trial judge's comment here echoes the concern expressed by Justice Shaw is his concurring opinion in Combs v. State, 525 So.2d 853, 859 (Fla. 1988) ("the sentencing judge can only speculate as to what factors the jury found in making its recommendation. . . .").

The State cannot rely on the prior capital conviction to survive harmless error analysis in this case, as this Court did in denying the Ring challenge on direct appeal. Mosley, 46 So. 3d at 518 n.9. Hurst has made it clear that the jury must make all of the critical findings under Florida's statute to make a defendant eligible for capital punishment, not merely the finding that a single aggravator exists. And we have ***no idea*** whether or not a unanimous jury or even a single member of the jury found pecuniary gain and CCP beyond a reasonable doubt, which is constitutionally required before the trial judge could have even considered those two factors. Clear error occurred and prejudiced Mosley here.

B. The judge rather than the jury was required to make the critical finding that the mitigators were insufficient to outweigh the aggravators

The failure of the jury to make specific findings as to which aggravators it found also compromised its finding as to whether the aggravators were "sufficient" to justify a death sentence and whether the mitigating factors were "insufficient" to outweigh the aggravating factors. Based on the jury instructions, the jury had to answer two questions prior to deciding on his/her vote as to life or death: (1) did sufficient aggravating circumstances exist to justify a death sentence, and (2) did insufficient mitigating circumstances exist to outweigh the aggravating circumstances. However, each juror performed those two analyses **individually**. Considering only the two aggravators that were truly subject to factual dispute

(pecuniary gain and CCP), there are still four different possible outcomes that each juror that voted to recommend death might have drawn as to which combination of them had been proven. This means that it is possible that no more than two jurors were in agreement on which of the aggravators had been proven, and which aggravators were or were not "sufficient" to warrant a death penalty. When it came to answering the question of whether the mitigating circumstances outweighed the aggravating circumstances, there is no reason to believe that each of the jurors were using the same aggravators as the others in that weighing process, which is constitutionally problematic under Hurst. In a case where the mitigation was not insignificant,[12] it is deeply troubling that some jurors may have been weighing that

[12] Mosley v. State, 46 So. 3d 510, 516-17 (Fla. 2009) ("In Mosley's penalty phase, . . . Mosley presented the following testimony from his mother, Barbara McKinney: Mosley's father physically abused Mosley and sexually abused Mosley's sisters; Mosley's step-grandfather murdered Mosley's grandmother, with whom Mosley was close; Mosley got good grades, played football in high school, and was in the Boy Scouts; Mosley supported his family and children; he attended police academy, completed fire academy, received an emergency medical technician certification, was a volunteer fireman at different fire stations, volunteered as a coach for young children, and served on a tenant association; Mosley mentored a child; he joined the Navy after September 11, 2001; Mosley became a certified nursing assistant; Mosley was active in his children's lives and was the vice president of the PTA; he brought his ninety-year-old aunt to family events so she did not have to spend holidays in a nursing home; and Mosley's children were gifted, in part due to his hard work with them. A United States Navy Reserve recruiter testified that Mosley joined the Navy Reserve and entered at a higher rank due to his experience; he was an asset in boot camp and showed leadership skills; and he wanted to advance in the ranks and become a corpsman in the U.S. Marine Corps.").

mitigation against aggravators that others jurors decided were not proven beyond a reasonable doubt or, even if proven, were insufficient to warrant death.

Further, this was an 8-4 vote recommending death. Had each juror been properly restricted to considering the aggravators found by all of the jurors in the weighing process, then there is more than a reasonable possibility that the recommendation would have been life rather than death.

C. The jury was told that its recommendation was only advisory

The final, weighty, consideration is that the jury was instructed that its recommendation would only be advisory, so it did not feel the full burden of its decision in recommending death for Mosley, which Hurst found to be a critical flaw in Florida's death penalty scheme. Thus, the jury instructions in this case 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.").

Had Mosley's jurors been aware that, without a recommendation of death,

the trial judge must sentence Mosley to life in prison, there is a reasonable likelihood that they would have been more hesitant to cast votes for death. 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.).

Thus, given that all three of the types of Hurst error distorted Mosley's sentencing proceedings, it would be impossible to conclude that the error was harmless beyond a reasonable doubt. Mosley's jury, which was told that its recommendation would be only advisory (an accurate statement of Florida's unconstitutional law at the time), failed to make specific findings as to which aggravators had been proven beyond a reasonable doubt, and that problem infected every further analysis that the jury and the judge conducted in this case.

IV. Remedy for the *Hurst* error in Mosley's case

A. F.S. 775.082(2)

This Court does not need to consider retroactivity or harmless error if it follows the clear path set forth by the Florida legislature, which was 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).

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.

B. Successive Rule 3.851 Motion

If this Court finds that F.S. 775.082(2) does not require Mosley's death sentence to automatically and permanently be converted to a life sentence, Mosley alternatively requests a finding that Hurst is retroactive in Mosley's case, and

relinquish jurisdiction to the trial court so Mosley can file a successive Rule 3.851(d)(2)(B) claim based upon Hurst. See Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005) (Anstead, concurring) (discussing the desirability of ruling on the retroactivity of Crawford v. Washington in a habeas corpus petition).

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 Mosley's analysis as to how Hurst would apply to his case. However, if this Court grants Mosley's well-founded appeal 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 crimapptlh@myfloridalegal.com and SAO4DuvalCriminal@coj.net this 22nd day of April, 2016.

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

CERTIFICATE OF COMPLIANCE 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