

IN THE SUPREME COURT OF FLORIDA

CASE NOs. SC 14-2278 & CASE NO. SC 14-787

CHARLES GROVER BRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
HILLSBOROUGH COUNTY, FLORIDA**

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

**MARIE-LOUISE SAMUELS PARMER
SAMUELS PARMER LAW FIRM, PA
P.O. Box 19899
Tampa, Florida 33679
marie@samuelsparmerlaw.com**

COUNSEL FOR MR. BRANT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND PRELIMINARY STATEMENT	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. Section 775.082, Florida Statutes, Mandates a Life Sentence Following <i>Hurst</i>	5
II. Where Fact-Finding is Necessary, <i>Hurst</i> Claims Should First Be Brought in Trial Courts.	7
III. <i>Hurst</i> is Retroactive Under <i>Witt</i>	8
IV. <i>Hurst</i> 's Rejection of Reasoning Based on <i>Stare Decisis</i> Strongly Favors its Retroactive Application	19
V. A Harmless Error Analysis is Not Necessary Because the Error Can Never Be Harmless Under <i>Hurst</i>	20
CONCLUSION.....	24
CERTIFICATE OF SERVICE	25
CERTIFICATE OF COMPLIANCE.....	26

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Alleyne v. United States</i> , 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013).....	3
<i>Anderson v. State</i> , 267 So. 2d 8 (Fla. 1972)	5
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000)	2, 3, 4, 20
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991)	20, 23
<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002)	
<i>Blair v. State</i> , 698 So. 2d 1210 (Fla. 1997).....	11, 12
<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993)	22
<i>Brant v. State</i> , (Fla.),	passim
<i>Donaldson v. Sack</i> , 265 So. 2d 499 (Fla. 1972)	5
<i>Falcon v. State</i> , 162 So. 3d 954 (Fla. 2015)	8, 14, 15
<i>Furman v. Georgia</i> , 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)	passim
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).....	21
<i>Harris v. Alabama</i> , 513 U.S. 504, 521-22 n.8, 115 S.Ct. 1031, 130 L.Ed. 2d 1004 (1995)	17
<i>Hildwin v. Florida</i> , 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed. 2d 728 (1989)	19
<i>Hitchcock v. Dugger</i> , 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed. 2d 347 (1987)	7, 8
<i>Hughes v. State</i> , 901 So. 2d 837 (Fla. 2005)	18

<i>Hurst v. Florida</i> , No. 14-7505, 2016 WL 112683 (Jan. 12, 2016).....	passim
<i>Hurst v. State</i> , 147 So. 3d 435 (Fla. 2014)	19
<i>In re Baker</i> , 267 So. 2d 331 (Fla. 1972)	5, 18
<i>Johnson v. United States</i> , 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)	21
<i>Johnson v. State</i> , 904 So. 2d 400 (Fla. 2005)	13, 14, 16
<i>Lamadline v. State</i> , 303 So. 2d 17, 20 (Fla. 1974)	
<i>Linkletter v. Walker</i> , 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 6010	10, 15, 16
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed. 2d 122 (1984)	21
<i>Miller v. Alabama</i> , 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012).....	8, 9
<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)	21
<i>Ring v. Arizona</i> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002).....	passim
<i>Roy v. Wainwright</i> , 151 So. 2d 825 (Fla. 1963).....	7
<i>Spaziano v. Florida</i> , 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed. 2d 340 (1984)	19
<i>State v. Whalen</i> , 269 So. 2d 678 (Fla. 1972)	5, 6
<i>Stovall v. Denno</i> , 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)	10
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)	21
<i>Taylor v. State</i> , 937 So. 2d 590 (Fla. 2006)	3
<i>Tumey v. Ohio</i> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).....	21

<i>Vasquez v. Hillery</i> , 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)	21
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	21
<i>Williams v. State</i> , 967 So. 2d 735 (Fla. 2007)	3
<i>Witt v. State</i> , 387 So. 2d 922 (Fla. 1980)	passim

Statutes

Fla. Stat. § 27.701	17
Fla. Stat. § 27.702	17
Fla. Stat. §§ 921.141	passim
Fla. Stat. § 775.082	passim
U.S. Const. Art. III	11
U.S. Const. Amend. VI	passim
U.S. Const. Amend. VII	11

STATEMENT OF THE CASE AND PRELIMINARY STATEMENT

Charles Brant was sentenced to death in 2007 following a guilty plea and waiver of a sentencing jury's recommendation. Mr. Brant'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 November 20, 2014. This Court conducted oral argument on September 3, 2015.

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 February 8, 2016, Mr. Brant filed a motion with this Court requesting supplemental briefing in light of *Hurst*. On February 15, 2016, this Court granted Mr. Brant's motion to file a supplemental brief addressing the applicability of *Hurst* to Mr. Brant's case.

SUMMARY OF THE ARGUMENT

Mr. Brant's trial counsel rendered ineffective assistance in violation of Mr. Brant's Sixth Amendment right to the effective assistance of counsel to such a degree

that this Court should set aside his guilty plea and sentence of death. Nevertheless, Mr. Brant 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. Brant should be automatically sentenced to life imprisonment. In the alternative, *Hurst* should apply retroactively to all individuals – including Mr. Brant- who were 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. Brant’s sentence of death and either impose a sentence of life imprisonment or allow him a new penalty phase proceeding.

ARGUMENT

As Mr. Brant established below, trial counsel rendered deficient performance in several significant respects – including failing to discover Mr. Brant was himself conceived in a rape and advising Brant to plead guilty in order to avoid the jury’s “ire.” This Court should set aside his guilty plea and/or sentence of death and grant Mr. Brant a new trial on those grounds alone. If he is granted relief on his Motion to Vacate Judgment and Sentence, which is the only just result in this case, the application of *Hurst* to his case becomes moot. Nevertheless, Mr. Brant is still entitled to relief because he was sentenced under the capital sentencing scheme the U.S. Supreme Court held was 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, Brant 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 find each fact necessary 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.").

Mr. Brant pled guilty and waived the jury's advisory recommendation. This Court found that "Brant knowingly, intelligently, and voluntarily entered his plea to first-degree murder, and the trial court properly accepted it." *Brant v. State*, 21 So. 3d 1276, 1289 (Fla. 2009). This Court did not address on direct appeal whether Brant's waiver of an advisory jury was knowing and voluntary, but only that Brant waived his right: "On August 22, 2007, Brant waived his right to a penalty-phase jury." *Id.* at 1277. The trial court conducted a bench trial August 22 to 24, 2007. *Id.*

In order for a defendant's waiver of a sentencing jury to be valid, the record must "affirmatively show that the defendant voluntarily and intelligently waived

the right to have a sentencing jury render its opinion on the appropriateness of the death penalty”. *Lamadline v. State*, 303 So. 2d 17, 20 (Fla. 1974). The trial court’s colloquy with Mr. Brant, in part, read as follows:

THE COURT: As you saw in the last two days the efforts that everybody went through to try to seat a jury of 12 people to hear evidence in aggravation that the State would present and evidence in mitigation that your lawyers would present. And, as I know, your lawyers have told you under the law, what would happen is those 12 jurors after they hear that evidence would get some instructions from me. Then they’d go back to deliberate then they would come back with *some recommendation*. If it turns out that recommendation were life imprisonment . . . it’s highly unlikely that I could or would [impose death.

* * *

But, if we do empanel a jury . . . if they came back with a death recommendation, then it would fall upon me to really reweigh and reconsider all the evidence; that is, the aggravation and mitigation. And one of the factors I would have to consider is their recommendation that is the jury’s recommendation. And the law provides that I would have to give that great weight. And of course I would.

Trial ROA V. 7, p. T6-7. The State also described the waiver as one of “waiving a jury recommendation.” *Id.* at p. 8-9. Mr. Brant also told the trial court he had been diagnosed with depression but had stopped taking his medication two months prior to the waiver of the jury recommendation. *Id.* at 11-12.

In the currently pending appeal of the denial of his 3.851 motion, Mr. Brant argued that his jury waiver was not knowing and voluntary and that but for counsel’s deficient performance, he would not have waived his right to a jury. In fact, what

Mr. Brant waived was the right to be sentenced under a statute that was found unconstitutional in *Hurst*. Mr. Brant was advised that he was waiving a recommendation by an advisory jury. He was not advised that he was entitled to the Sixth Amendment right to have a jury find each fact necessary to impose a sentence of death, as *Hurst* requires. *Hurst*, 2016 WL at 3. Therefore, any waiver by Mr. Brant to be sentenced under an unconstitutional capital sentencing scheme does not impute a waiver of his Sixth Amendment right to be sentenced under a constitutional statute. Additionally, any argument that Mr. Brant's waiver constituted a strategic decision that precludes relief under *Hurst* is invalid, as counsel stated at the post-conviction hearing and as found by the post-conviction court, counsel didn't advise Brant at all. Counsel essentially abandoned Mr. Brant at the point of the proceedings where he waived an advisory jury. Indeed, Brant has met both the *Strickland* standard as to the claim and that of *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

And, should this Court find trial counsel used a reasonable strategy, any strategic decisions that Mr. Brant's attorneys made at the time of trial were made in light of the unconstitutional sentencing statute. Finally, any consideration of whether Mr. Brant's waiver of an advisory jury was knowing, intelligent, and voluntary must take into account his profound depression. As was explained in post-

conviction proceedings, trial counsel should use caution when representing a client with a history of depression. Although Mr. Brant agreed with the trial court during the colloquy, his answer was that he wanted the trial court's "recommendation." *Id.* at 8. Mr. Brant's understanding was clearly that he was giving up a right to a mere jury recommendation. Mr. Brant is entitled to relief under *Hurst* and respectfully requests that this Court consider the following:

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. Brant is entitled to an automatic life sentence. The Florida Legislature enacted this law in anticipation of *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 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. Brant, "a person previously sentenced to death for a capital felony," is this Court. Therefore it is this Court's statutory duty to sentence Mr. Brant 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. Brant.

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. Brant in light of *Hurst*, it should either relinquish jurisdiction to the circuit court so that Mr. Brant can raise and develop a *Hurst* claim¹ or pass on the issue as it applies to Mr. Brant’s case in its current procedural posture. Neither *Hurst* nor *Ring* are the subject of Mr. Brant’s pending appeal. The retroactivity and harmless

¹ 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 to 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. Brant requests that this Court consider those arguments as they apply to his case.

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 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. Brant, through the filing of his motion and the filing of this brief raises this issue with this Court, 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. Brant, it should nevertheless apply the *Hurst* decision retroactively to Mr. Brant’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); *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). 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. Brant. 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 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 new – to ensure a constitutional death penalty scheme – is a need 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 Florida 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 merely advisory and a bare majority sufficient to condemn a man to death. 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 in one circuit judge subject to re-election to determine whether a person should be sentenced to death 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.

The statistics regarding Florida's death penalty have shown the arbitrary nature of the system. It has been evident for many years 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."² Furthermore, "63% of the new death sentences (31) came from the tiny 2% of counties responsible for more than half of 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

² Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, 3, available at <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

jury recommendations of death – a practice barred in all states but Florida, Alabama, and Delaware.”³ 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 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

³ *Id.* at 3-4.

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 91.⁴ 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 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

⁴ See Florida Department of Corrections, *Death Row*, available at www.dc.state.fl.us/oth/deathrow/#Statistics.

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 post-conviction 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 post-conviction 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 post-conviction phase is less than 389.⁵

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 100,563 prisoners housed in the Florida Department of Corrections.⁶ The death row population therefore represents less than half of one percent of the Florida prison

⁵ Florida Department of Corrections, *Death Row Roster*, available at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

⁶ Florida Department of Corrections, *Average Daily Population Fiscal Year 2014-2015*, available at <http://www.dc.state.fl.us/pub/pop/facility/avg1415.html>.

population. Such a small percentage would be easily absorbed by the general population facilities.⁷

Conducting new penalty phase trials for those affected also would 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. However, of the 389 people on Death Row, nearly half were sentenced after the year 2000.⁸ Attorney files in capital cases are well-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

⁷ 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.

⁸ 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.

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 developments 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. Mr. Brant asserts 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.⁹ In determining whether *Hurst* errors are

⁹ Examples of structural error, cited in *Neder v. United States*, 527 U.S. 1, 8, 119 S.

structural, this Court must determine whether the error identified in *Hurst* constitutes 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. Brant and 388 other defendants 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-

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)).

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. In the case at hand, the trial court’s findings regarding aggravating and mitigating circumstances were as follows:

The trial court found two aggravating circumstances applicable to the murder: (1) the murder was heinous, atrocious, or cruel (HAC); and (2) the capital felony was committed while engaged in the commission of a sexual battery. Each aggravating factor was given great weight. The trial court found three of the mitigating factors specifically enumerated in section 921.141(6), Florida Statutes (2007):(1) Brant had no significant history of prior criminal activity, given little weight; (2) Brant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, given moderate weight; and (3) Brant was thirty-nine years old at time of the offense, given little weight. The trial court also found numerous nonstatutory mitigating factors: (1) Brant is remorseful (little weight); (2) he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury (moderate weight); (3) he has borderline verbal intelligence (little weight); (4) he has a family history of mental illness (little weight); (5) he is not a sociopath or psychopath and does not have antisocial personality disorder (little weight); (6) he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder (moderate weight); (7) he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of

attention deficit disorder (moderate weight); (8) he is a good father (little weight); (9) he is a good worker and craftsman (little weight); and (10) he has a reputation of being a nonviolent person (little weight).

Brant v. State, 21 So. 3d 1276, 1283 (Fla. 2009). Because in this case a 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.

Hurst will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. 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 harmless 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 have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments. These concerns are magnified in a case such as Mr. Brant's, where the post-conviction court's prejudice analysis was in direct conflict with and ran afoul

of *Strickland v. Washington*, 466 U.S. 668 (1984). And, as argued in Mr. Brant's state habeas, where defendants in the same and other jurisdictions with worse prior records were sentenced to life having committed the same crimes as Mr. Brant, there exist legitimate concerns about the appropriateness of the death penalty in this case.

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 jury in capital cases and directly changes the dynamics of the trial and *voir dire*. For the reasons discussed above, Mr. Brant 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 and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court using the Florida courts e-filing portal, and a copy has been electronically delivered to Christina

Zuccaro, Assistant Attorney General, Christina.Zuccaro@myfloridalegal.com and CapApp@myfloridalegal.com, on this 1st day of March, 2016.

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar. No. 0005584
The Samuels Parmer Law Firm, P.A.
P.O. Box 18988
Tampa, FL 33679
813-732-3321
marie@samuelsparmerlaw.com
Counsel for Petitioner/Appellant

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).

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar. No. 0005584
The Samuels Parmer Law Firm, P.A.
P.O. Box 18988
Tampa, FL 33679
813-732-3321
marie@samuelsparmerlaw.com
Counsel for Petitioner/Appellant