IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES
Appellant,

v.

CASE NO. SC14-878
Lower ct. 2003-CF-005683

STATE OF FLORIDA
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF THE APPELLANT

ROBERT A. NORGARD
Counsel for Appellant

For the Firm
Norgard, Norgard & Chastang
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax (863)533-1334
Norgardlaw@verizon.net

Fla. Bar No. 322059

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PRELIMINARY STATEMENT

This Supplemental Brief is filed in response to the Court's Order dated March 1, 2016, granting Mr. Hodges' request for supplemental briefing addressing *Hurst v. Florida*. Mr. Hodges will be referred to by his proper name. The prosecuting authority, the State of Florida, will be referred to as the State. Mr. Hodges will utilize the same references to the appellate record as contained in the Initial Brief. References to the record on direct appeal will be referenced as "DA", followed by the volume number, and the page number. Mr. Hodges' will rely on the comprehensive statement of the case and facts contained in the Initial Brief, but offers these supplemental facts:

STATEMENT OF THE CASE AND FACTS

On December 17, 2003, Mr. Hodges was indicted for a murder occurring on December 19, 2001. [I,R63] Mr. Hodges' filed pre-trial motions seeking to bar the imposition of the death penalty on the basis it was unconstitutional under *Ring*.[DA-VII,1269-1302;DA-VIII,1436-1473;1490-1493;XI,1650-1657; *Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010). Mr. Hodges' further challenged the jury's sentencing role under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[DA-IX,1707-1710] These motions were denied. Mr. Hodges' proceeded to trial and was convicted of first-degree murder.[I,R63-63] The jury returned a recommendation of death

by a vote of 10-2 on March 20, 2008.[I,R64;DA-XIII,2411] The jury was read the standard Florida Jury Instructions on the jury's role in penalty phase.[DA-XIII,2412-17] The jury was repeatedly instructed their role was "advisory" and the judge would determine sentence.[DA-XIII,2412,214,24162417] The jury "verdict" form required no findings by the jury as to aggravators or mitigators.[DA-XIII,2411] The trial judge, in independent proceedings, conducted a *Spencer* hearing, made factual findings that Mr. Hodges was eligible for death and sentenced Mr. Hodges to death on February 12, 2009.

Mr. Hodges' raised the constitutionality of Florida's death penalty statute in his direct appeal, specifically arguing this Court had wrongly decided *Bottoson v. Moore*, 833 So.2d 695 (Fla. 2002), *cert. denied*, 123 S.Ct. 662 (2002).[Initial Brief of Appellant, *Hodges v. State*, SC09-468, Issue VI, p.92-103] The State's one page response in the Answer Brief affirmed reliance on *Bottoson*.[Answer Brief, *Hodges v. State*, SC09-468, Issue VI, p.94] This Court rejected Mr. Hodges' claims, finding that *Ring* did not apply to his case in *Hodges v. State*, 55 So.3d 515, 540-41 (Fla. 2010).

Mr. Hodges' continued to pursue his *Ring* claims in his Motion for Postconviction Relief. In Claim XII of his motion Mr. Hodges' argued Florida's death penalty statute violated *Ring*, citing to the ruling in *Evans v. McNeil*, No. 08-14402,

slip op.(S.D. Fla. June 2011), which held that *Ring* applied in Florida and found Florida's death penalty statute was unconstitutional. *Evans* was appealed to the 11th Circuit. The 11th Circuit reversed the ruling of the Southern District and certiorari was not granted. *Evans v. Sec'y, Florida Department of Corrections*, 699 F.3d 1249 (11th Cir. 2012),*rehearing denied*, December 18, 2012); *Evans v. Crews*, 133 S.Ct. 2393 (2013). This claim was denied by the trial court based upon the ruling of the 11th Circuit.[I,R139]

On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S.Ct. 616 (January 12, 2016), striking down Florida's death penalty statute as unconstitutional based on *Ring*.

Mr. Hodges Motion to Permit Supplemental Briefing, filed February 22, 2016, was granted by this Court on March 1, 2016, over the State's objection.

SUMMARY OF THE ARGUMENT

The decision in *Hurst* should apply retroactively to Mr. Hodges. Mr. Hodges' has continuously raised these issues at trial, direct appeal, and throughout postconviction. Principles of fairness and uniformity compel retroactive application.

Mr. Hodges should be sentenced to life in prison in accord with controlling Florida statutes.

Harmless error analysis is inapplicable to this case because the error is structural in nature. Even if harmless error analysis was employed, the error in this case is not harmless because of the lack of jury findings.

A unanimous recommendation should be required. The lack of unanimity by the jury is unconstitutional.

ARGUMENT

ISSUE I

THE DEATH SENTENCE IN THIS CASE IS UNCONSITUTIONAL AND REQUIRES THE IMPOSTION OF A LIFE SENTENCE

Mr. Hodges was denied his Sixth Amendment right to a jury trial and is entitled to a life sentence. Mr. Hodges contends the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), which found Florida's capital sentencing statute to be unconstitutional because "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.*, at 619. *Hurst* recognized that *Ring v. Arizona*, 536 U.S. 584 (2002), applied in Florida and in doing so specifically rejected this Court's contrary conclusion in *Bottoson v. Moore,* which had relied on *Hildwin v. Florida*, 490 U.S. 638, 640-1(1989).

Hurst is a monumental shift in Florida death penalty law. *Hurst* compels a complete overhaul of Florida's death penalty statute and law. It is a development of fundamental

significance and jurisprudential upheaval. *See, Hughes v. State*, 901 So.2d 837, 848 (Fla. 2005)(Lewis, J. concurring in result only)[describing his initial impression of *Apprendi* and *Ring* as being decision which "implicate constitutional interests of the highest order and seem[s] to go to the very heart of the Sixth Amendment."] Not since *Furman v. Georgia*, 408 U.S. 238 (1972) has the Florida capital sentencing scheme been found to be unconstitutional. One hundred and ten decisions from this Court have cited to *Bottonson v. Moore*, 833 So.2d 693 (Fla. 2002), to reject *Ring* or *Apprendi* claims, including this Court's opinion in this case. Twelve cases cited to *Hildwin v. Florida*, 490 U.S. 628 (1989), eighteen cited to *Spaziano v. Florida*, 468 U.S. 447 (1984), and eleven cited to *Mills v. Moore*, 786 So.2d 532 (Fla. 2001) to reject *Ring* or *Apprendi*. In each instance, this Court was wrong.

The proceedings that resulted in Mr. Hodges' death sentence were utilized a capital sentencing scheme that violates the Sixth Amendment and also the Eighth Amendment if the jury's recommendation were now to be used to try to cure the Sixth Amendment violation. Mr. Hodge's jury did not return a verdict finding the factual element or elements necessary to render Mr. Hodges' guilty of capital, death-eligible murder. The jury's verdict, reached after repeated instruction that it was advisory only, cannot be used to support a sentence of death.

A. <u>Retroactivity of *Hurst* to this case</u>

Mr. Hodges has challenged the constitutionality of Florida's capital sentencing scheme at every stage of his proceedings since his Indictment in 2003. This Court has stated "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.**" *Witt v. State,* 387 So.2d 922, 925 (Fla. 1980)[emphasis supplied] Undeniably, every defendant whose case is in the trial court or on direct appeal will benefit from *Hurst,* irrespective of what stage of proceedings they are in. For example, those whose crimes pre-dated *Ring*, but who had sentences vacated in collateral proceedings will benefit. Mr. Hodges contends *Hurst* should be applied retroactively to at least June 24, 2002, the date *Ring* was issued. In support of his position he relies on *Witt*:

> The doctrine of finality should be abridged only 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 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.**[emphasis supplied]

The *Witt* standard for retroactive application is the benchmark for determining when "considerations of fairness and uniformity" trumps "[t]he doctrine of finality." *See, Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987).

Hurst specifically overruled this Court's prior decisions in *Bottoson* and *King v. Moore*, 831 So.2d 143 (Fla. 2002), both of which controlled the rejections of Mr. Hodges' challenges to the death penalty sentencing scheme in the trial court and on direct appeal. Since the United States Supreme Court specifically addressed and disapproved of this Court's decision in *Bottoson,* the fairness principle of *Witt* warrants treating *Hurst* retroactive to the issuance of *Ring*. Had *Bottoson* be decided correctly and found Florida's death penalty sentencing scheme unconstitutional, every capital defendant whose death sentence was not final on June 24, 2002 would have had benefit of *Ring*. Simple fairness demands that those who would have received benefit of *Ring* should receive benefit of *Hurst*.

Hurst should also be applied to those cases arising since this issuance of *Apprendi v. New Jersey*, 530 U.S. 466(2000). Limiting *Hurst* to sentences who became final after *Ring* ignores *Hurst's* holding that *Hildwin v. Florida,* 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984) were "irreconcilable with *Apprendi. Hurst*, at 623. *Hildwin* and *Spaziano* formed the footings for *Bottoson* and *King*, whom this Court gave merits

review to in their *Apprendi* claims. If *Hildwin* and *Spaziano* are overruled, then certainly *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), is likewise overturned.

In *Mills* this Court rejected an *Apprendi* claim on the merits, and did so in other cases leading up to *Ring*. This Court's rejection of *Apprendi* principles in cases such as *Mills* was equally erroneous. The fairness principles of *Witt* would require retroactivity to the issuance of *Apprendi*. Had *Mills* and its progeny been properly decided and recognized that *Apprendi* applied, Florida's capital sentencing scheme would be been rendered unconstitutional and every defendant whose death sentence was not final on June 26, 2000, the date *Apprendi* issued, would have received benefit of *Apprendi* and *Ring*.

Witt is not just premised on fairness, it is also grounded in uniformity. "**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.**'". *Witt v. State*, 387 So. 2d at 925 [emphasis added]. This Court has applied the principle of uniformity as being critical to curing what would otherwise amount to a great injustice.

For example, in *Meeks v. Dugger*, 576 So. 2d 713,717 (Fla. 1991), this Court addressed a *Hitchcock/Lockett* claim in a case that became final two years before *Lockett* issued. Meeks was

granted relief because this Court recognized *Hitchcock* represented a change in the law sufficient to defeat a claim of procedural bar. Justice Kogan, in his special concurrence, noted to do so was necessary due to previous inconsistent pronouncements by the Court in the past and "because of our own erroneous interpretation of federal law, this Court barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975)." The Court was confronted with "a serious injustice that now must be corrected." *Meeks*, 576 So.2d at 718. An even greater injustice would result if here if Mr. Hodges is denied benefit of *Hurst*.

There is no principled way to grant partial retroactivity under *Witt* and maintain "considerations of fairness and uniformity". This Court's continued adherence to *Witt* deserves to continue. *See*, *Falcon v. State*, 162 So.3d 954, 962 (Fla. 2015).

This Court should apply *Witt*, which address retroactivity in Florida, as opposed to the federal retroactivity test in *Schiriro v. Summerlin*, 542 U.S. 348 (2004), which has been rejected by this Court and differs greatly from *Witt*. In *Witt* this Court specifically held it was not bound by a federal standard. *Witt v. State*, 387 So.2d at 926. Federal retroactivity law was too restrictive and *Witt* was specifically

crafted to provide greater and more expansive and inclusive protection. *See Johnson v. State*, 904 So.2d 400,409 (Fla. 2005)[reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards that those adopted in *Teague*].

Earlier decisions from this Court addressing *Ring* did not address the retroactivity question because they found *Ring* inapplicable. Because *Witt* analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the *Witt* analysis. Since *Hurst* has overruled *Hildwin* and *Spaziano* and we know *Apprendi* applies in Florida, a new assessment must be done under *Witt* of *Hurst*. Under *Witt*, *Hurst* is retroactive.

Mr. Hodges' trial, direct appeal, and trial court postconviction evidentiary hearing all took place after the issuance of *Ring*. Mr. Hodges at every opportunity argued *Ring* applied in Florida and that Florida's capital sentencing scheme was unconstitutional. Mr. Hodges was correct. *Hurst* applies to him.

B. Statutory bar to the imposition of a death sentence

Mr. Hodges asserts the State may no longer impose a sentence of death because Section 775.082(2) prohibits such a sentence. Section 775.082(2) provides:

> In the event the death penalty in a capital felony

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

Hurst held Florida's capital sentencing scheme is unconstitutional. Thus, Mr. Hodges' sentence must be commuted to life in prison. Prior precedent from this Court supports such a result.

After the United States Supreme Court found Florida's sentencing scheme unconstitutional under *Furman v. Georgia*, 408 U.S. 308 (1972), but while a petition for rehearing was pending, this Court addressed the application of Section 775.082(2) in *Donaldson v. Sack*, 265 So.2d 499,505 (Fla. 1972). This Court found "The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death." When *Furman* took effect, this Court determined life sentences had to be imposed on all the cases in which a death sentence had been imposed under the scheme determined to be unconstitutional under *Furman*. *See*, *Anderson v. State*, 267 So.2d 8,10(Fla. 1974); *Craig v. State*, 290 So.2d 502, 503 (Fla. 4th DCA 1974). The Attorney General did

not oppose the imposition of life sentences in 40 capital cases. *Anderson*, at 9.

Any argument that Section 775.082(2) does not apply to Florida's current and unconstitutional scheme is without merit. The rules of statutory construction would compel the result urged by Mr. Hodges.

The "polestar" of statutory construction is legislative intent. *See*, *Reynolds v. State*, 842 So.2d 46, 49 (Fla. 2002). Courts are to endeavor to construe statutes to effectuate the intent of the legislature. Statutes are to be construed under the plain meaning of their words. "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels v. Fla. Dep't of Health,* 898 So.2d 61, 64 (Fla. 2005).

There is no ambiguity in Section 775.082(2). The language is plain and clear- if Florida's death penalty, which includes the death penalty sentencing scheme, is found unconstitutional, anyone sentenced under it will receive a sentence of life in prison. There is no question of legislative intent.

Any argument that the legislature intended this section to apply only to *Furman* cases ignores subsequent legislative action. In 1998 the legislature re-examined Section 775.082(2). The legislature **added** language addressing the event a *method* of

execution was found to be unconstitutional to be an exception to the preceding language, but the legislature did not amend the statute to undo what this Court had done in *Donaldson* or *Anderson*. The legislature could have changed, altered, or overrode the statute or modified it such a way to make it applicable to only the *Furman* era **but it did not do so**. The legislature left the original language intact. "The legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute." *Seagrave v. State*, 802 So.2d 281, 290 (Fla. 2001). If the legislature had intended Section 775.082(2) to be limited or if the legislature intended to abrogate the effect of *Donaldson* it would have done so. The legislature did not repeal Section 775.082(2) and it cannot be presumed to have done so. *See*, *Knowles v. Beverly Enters-Fal., Inc.*, 898 So. 2d 1, 9 (Fla. 2004). Thus, Section 772.082(2) applies to this case.

It is not this Court's right to amend or re-write Florida law. The prerogative to enact law belongs to the legislature. *State v. Egan*, 287 So.2d 1,6-7 (Fla. 1973). A limitation by this Court on the application of Section 775.082(2) to *Furman* era cases would be an impermissible amendment to Florida law.

C. **Harmless error analysis**

The first question to answer is whether harmless error applies to *Hurst* or whether the error is structural, in which case harmless error does not apply. *See, Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991)[distinguishing "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence present."). Mr. Hodges' position is the error is structural, and *Hurst* supports this conclusion. Like *Hurst*, Mr. Hodges' was denied his Sixth Amendment right to a jury trial because the trial judge, not the jury, made crucial findings of fact to justify the imposition of the death sentence. Denial of the right to a jury trial is a structural defect and is always harmful. Justice Anstead, in his dissent in *Johnson v. State*, 994 So.2d 960, 968-73 (Fla. 2008), wrote " The denial of the right to trial by jury is one type of error that has always been recognized as always harmful." Further, the deprivation of the right to a jury verdict beyond a reasonable doubt has been deemed structural error by the United States Supreme Court. *See*, *Sullivan v. Louisiana*, 508 U.S. 275, 277, 280-82 (1993)[noting the "illogic of harmless-error review" in the context of the Sixth Amendment.] As such, the harmless error test is inapplicable; such errors are always reversible and never

harmless. Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence] actually rendered in the [original] trial was surely attributable to the error." *Id*,. Since there are no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the *Hurst* error.

Appellate courts are not to evaluate the Sixth Amendment with "speculation about a hypothetical jury's actions, or else directed verdicts for the State would be sustainable on appeal…" *Id*. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never, in fact, rendered, no matter how inescapable the findings to support the verdict might be- would violate the jury trial guarantee." *Id*. at 280.

Hurst errors are structural. Pre- *Hurst* the jury was stripped of its constitutional fact-finding role at the penalty phase and sentencing. This presents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. at 310. Measured against this standard, *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). The Sixth

Amendment error identified in *Hurst* "deprives[s] defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination on whether the elements necessary for a death sentence exist." *See*, *Neder v. United States*, 527 U.S. 1, 8 (1999). In this case Mr. Hodges was denied his fundamental right to trial by jury.

In Mr. Hodges' case the jury was selected based on an unconstitutional sentencing scheme. Potential jurors were told their vote in penalty phase was advisory only and sentencing responsibility rested with the trial court. The jury was repeatedly told throughout penalty phase their verdict was advisory and were so instructed prior to deliberations. The jury's advisory role was referenced in both opening and closing arguments of penalty phase. The jury was instructed in conformity with Florida law that the first fact question to be considered during the penalty phase was whether sufficient aggravating circumstances existed to justify the imposition of the death penalty, but the final decision as to what punishment shall be imposed was the responsibility of the judge. The jury was repeatedly instructed their sentence was **advisory**. The jury was told the verdict need not be unanimous. Thereafter, a separate *Spencer* hearing was held where information was presented only to the court that had not been presented to the jury. The trial court, in compliance with Florida law,

conducted an independent sentencing hearing where the judge alone made the findings of fact required under Florida law which made Mr. Hodges eligible for death. Ultimately, the trial court chose death for Mr. Hodges, not the jury. Mr. Hodges' trial was infused with procedures now recognized as unconstitutional.

The State has argued for years, in at least 110 cases, that the advisory jury finding made by a simple majority vote was the operable finding which satisfied the Sixth Amendment principle under *Apprendi*. The State was wrong. *Hurst* makes it clear the Sixth Amendment requires juries to make the factual findings for death.

The State has also argued under *Ring* that *Ring* required only the finding of a single aggravator to render a capital defendant death eligible. This led to the "automatic" aggravator of prior violent felony- it could automatically sustain a death sentence despite *Ring*. This argument ignored the requirement of sufficiency. The existence of a single aggravator is not enough- it must be sufficient to justify a death sentence. In Florida a death sentence cannot be imposed unless *sufficient* aggravating circumstances are found to exist and that sufficient mitigating circumstances that outweigh the aggravating circumstances do not exist to justify the imposition of a greater sentence- death. Fla. Stat. §921.141(3)(a). The sufficiency of the aggravating circumstances is what Florida juries are instructed to consider.

The sufficiency finding required by statute means that there must be a case specific assessment of the facts of the prior crime of violence and a determination as to whether the facts of the prior crime of violence in conjunction with the factual basis of any other aggravating circumstance present in the case are sufficient to justify imposition of the death sentence. The jury in this case did not make findings of sufficiency. The existence of a prior violent felony does not cure *Hurst* error. There must also be a finding that aggravator is **sufficient** to justify the death sentence. There was no finding of sufficiency in this case. Mr. Hodges' has not conceded the sufficiency of any aggravating circumstance or that the mitigating circumstances were sufficient to outweigh the aggravating circumstances.

Under *Hurst* the jury's determination of death eligibility cannot be advisory, but must be binding. The jury verdict in this case cannot be converted into some sort of binding determination that sufficient aggravating circumstances existed to justify death because to do so would violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The jury would have received misinformation regarding the binding nature of its verdict which diminished its sense of responsibility for the outcome.

Hurst also creates a huge shift in how trials will be conducted and the strategies employed. Counsel will certainly

approach both a guilt and penalty phase differently, from the investigatory stage through verdict. For example, in this case trial counsel withheld sentencing information from the jury intentionally- and used it at a *Spencer* hearing. It would not stand to reason that will be done in the future.

The biggest difference wrought by *Hurst* is likely to occur in the jury room. Requiring jurors to return a unanimous verdict or a verdict above a simple majority will actually require deliberation as opposed to just voting. One would expect jurors will discuss, ponder, analyze, and think about what is right if they are required to address the sufficiency of the aggravating factors and cast a vote that will directly result in punishment. For the process to function reliably, the decision maker must know the importance of their vote.

D. Lack of unanimity results in cruel and unusual punishment

In this case the jury recommendation was 10-2. Of the 38 states that allowed capital punishment in 2005, only two did not require a finding by a unanimous jury finding of aggravators. *See, State v. Steele*, 921 So.2d 538,548-9 (Fla. 2005). Since then those two states, Virginia and Utah, have changed course and require a unanimous decision. *See*, *Prieto v. Commonwealth*, 278 Va. 366, 682 S.E.2d 910, 935 (2009); *Archuleta v. Galetka*, 267 F.3d 232, 259 (Utah 2011).

Florida, Alabama, and Delaware are the only states which still allow a non-unanimous recommendation of death. Since *Hurst*, Delaware is revisiting the lack of unanimity. Every state, except Florida, requires juries that unanimously vote for or recommend a death sentence to also unanimously agree on the reasons for doing so. *Hurst v. State*, 147 So.3d 435, 452 fnt. 8 (Fla. 2014) (Pariente, concurring and dissenting). *Hurst* proves the dangers of remaining an outlier.

Hurst has held that *Bottoson* erred in failing to find Florida's capital sentencing scheme constitutional under *Apprendi* and *Ring*. The factual determinations set for as pre-requisites for the imposition of a death sentence are now *Apprendi* elements. The opinion of Justices Anstead, Shaw, and Pariente in their separate opinions in *Bottoson* have been proved correct- " I share the concerns expressed by Justice Shaw… that *Ring* may render our sentencing statute invalid under state constitutional law to the extent that there is no requirement that the jury find the existence of aggravators by unanimous verdict." *Bottoson v. Moore*, 833 So.2d at 722.[Pariente, J., concurring). Indeed, the judges who disagreed over unanimity did so largely because of *Hildwin*. *Hurst* specifically concluded *Hildwin* has not survived *Apprendi* and *Ring* and can no longer serve as a basis for refusing to recognize that death eligibility in Florida must be found by a unanimous jury.

Florida's continued status as an outlier on the issue of unanimity renders Florida's death penalty sentencing scheme in violation of the Eighth Amendment. Evolving standards of decency, as evidence by a mere counting exercise, demonstrate the lack of unanimity cannot be said to lie within America's evolving standards of decency. It is up to this Court to exercise its judgment and determine whether the lack of unanimity represents the evolving standards of decency required to withstand Eighth Amendment scrutiny. Mr. Hodges urges this Court to find the lack of unanimity unconstitutional.

CONCLUSION

Based on the forging arguments and citations of authority, Mr. Hodges respectfully requests this Court determine the decision in *Hurst* to be retroactive to his case and to find the sentence of death imposed to be unconstitutional. Mr. Hodges' respectfully requests this case be remanded for the imposition of a life sentence, or in the alternative, a new trial and penalty phase.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a correct copy of this Supplemental Brief has been served on the Office of the Attorney General using the e-portal to capapp@myfloridalegal.com and AAG Charmaine Millsaps at Charmaine.millsaps@myfloridalegal.com this **16th** day of March, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Supplemental Initial Brief is Courier New-12 point, in compliance with Fla. R. App. P. 9.210.

/s/Robert A. Norgard
ROBERT A. NORGARD
For the Firm
Norgard, Norgard & Chastang
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax 863-533-1334
Norgardlaw@verizon.net

Fla. Bar No. 325509
Counsel for Appellant