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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1256

WILLIAM M. KOPSHO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND PRELIMINARY STATEMENT

William Michael Kopsho was sentenced to death on July 2, 2009. Mr. Kopsho'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 September 25, 2015. William M. Kopsho is referred to as Mr. Kopsho throughout this brief. The case is calendared for oral argument before this Court on March 10, 2016.

On January 12, 2016, the United States Supreme Court [hereinafter U.S. Supreme Court] in Hurst v. Florida, 136 S.Ct. 616, No. 14-7505, 2016 WL 112683 (January 12, 2016), held that Florida's Capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). On January 29, 2016, this Court directed the parties to file supplemental briefs addressing the applicability of Hurst to the instant case. References to the postconviction record on appeal are in the form (Vol. I PCR. 123.)

SUMMARY OF ARGUMENT

Mr. Kopsho's death sentence under review rests on a statute now held to be unconstitutional by the US Supreme Court in Hurst, 2016 WL 112683. Under Fla. Stat. § 775.082(2), this Court should automatically sentence Mr. Kopsho to life

imprisonment. In the alternative, Hurst must be retroactively applied to Mr. Kopsho's sentence. The application of Florida's death penalty scheme to Mr. Kopsho created a structural error, infecting the entirety of Mr. Kopsho's sentencing, which can never be harmless. Hurst requires that Mr. Kopsho's death sentence be vacated.

ARGUMENT

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).

Mr. Kopsho was sentenced to death after a non-unanimous jury verdict of ten to two. (Vol. XXIII R. 3839.) Under the aforementioned statutory provision, Mr. Kopsho is entitled to an automatic life sentence. This statute was enacted in anticipation of the ruling in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), which ultimately determined that the death penalty as imposed and carried out at the time violated the Eighth and Fourteenth

Amendments. See Donaldson v. Sack, 265 So. 2d 499, 505 n. 10 (Fla. 1972). All individuals under sentence of death at the time Furman was decided were ultimately resentenced to terms not exceeding life imprisonment. See Anderson v. State, 267 So. 2d 8 (Fla. 1972); In re Baker, 267 So. 2d 331 (Fla. 1972).

In State v. Whalen, 269 So. 2d 678, 679 (Fla. 1972), during the time between Furman and the legislature's enactment of new capital sentencing statutes, this Court, citing Donaldson, held that "at the present time capital punishment may not be imposed" and therefore "there are currently no capital offenses in the State of Florida." Like Furman, Hurst, pursuant to United States Constitutional principles, invalidated 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. Kopsho, "a person previously sentenced to death for a capital felony," is this Court. Therefore it is this Court's statutory duty to sentence Mr. Kopsho 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." Fla. Stat. § 775.082(2) mandates a life sentence for each person sentenced under it, including Mr. Kopsho.

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

If this Court determines that Fla. Stat. § 775.082(2) does not provide a remedy for Mr. Kopsho in light of Hurst, it should either relinquish jurisdiction to the circuit court so that Mr. Kopsho may raise and develop a Hurst claim[1] or pass on the issue as it applies to Mr. Kopsho's case in its current procedural posture. The retroactivity and harmless error questions raised by Hurst are complex and require fact-finding. It would be appropriate to address these issues, particularly those of harmless error, first in the trial court, to be appealed to this Court as

[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 decision before this Court. That pleading, although filed pursuant an extremely truncated time frame due to Mr. Lambrix's active death warrant, touches upon many of the considerations at issue in the cases in which the defendant was sentenced under the unconstitutional scheme denounced in Hurst, and Mr. Kopsho requests that this Court consider those arguments as they apply to his case.

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. Kopsho, is complying with this Court's order, 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

If this Court finds that Fla. Stat. § 775.082(2) does not mandate a life sentence for Mr. Kopsho, it must apply the Hurst decision retroactively to Mr. Kopsho's case. The standard for applying retroactivity to cases of Mr. Kopsho's nature is Witt v. State, 387 So.2d 922 (1980). See also, Falcon v. State, 162 So.3d 954, 960 (Fla. 2015)(applying the Witt test and holding that Miller v. Alabama, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), which "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" applies

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

Under Witt, a change in law will be considered for purposes of retroactivity in a capital case when "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.

Hurst emanated from the US Supreme Court on Sixth Amendment Constitutional grounds, therefore the first two prongs of Witt are met. To meet the third prong, Witt employed a three-fold test, noting that "the essential considerations in determining whether a new rule of law should be applied are essentially three:

> (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."

Id. at 926; citing Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 82 L.Ed. 2d 340 (1967) and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 6010 (1965).

The purpose of Hurst is to strike down Florida's constitutionally infirm death penalty scheme and require that the very decision maker of

critical issues of fact and sufficiency be a jury, not a judge. See Hurst, 2016 WL at 1, 6-7, 10. This is a "fundamental and constitutional law change[ ] which casts[s] serious doubt on the veracity and integrity of the original trial proceeding." Witt., 387 So.2d at 929; Cf. Thompson, 515 So.2d at 175. Hurst's ruling strikes down a "'structural defect[ ] in the constitution of the trial mechanism.'" Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 1967, 18 L.Ed.2d 1199 (1993).

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

The legislature enacted a new statute following Furman, requiring a separate penalty phase hearing during which a judge and jury would weigh aggravating and mitigating evidence specific to the defendant. Fla. Stat. § 921.141 (1973). Ch. 72-724, Laws of Florida (1972). However, the legislature chose to make the jury's

verdict only advisory. As Hurst now clarifies, in order to satisfy the Sixth Amendment's guarantee to a jury trial, "a jury's mere recommendation is not enough." Hurst, 2016 WL at 3. The jury must find every fact necessary to expose the defendant to a greater punishment than that authorized by a guilty verdict. Id. at 3-4.

> "The right to trial by jury has been held sacred since the nation's founding.
>
> Trial by jury, as instituted in England, was to the Founders an integral part of a judicial system aimed at achieving justice." Accordingly, the Founders, mindful of "royal encroachments on jury trial" and fearful of leaving this precious right to the whims of legislative prerogative, included protection of the right in the Declaration of Independence and included three separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments."

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

Justice is served when decisions are evenly applied and free from bias. A statutory capital sentencing scheme vesting the power to determine whether a person can be sentenced to death in one judge, versus twelve of that person's peers, cannot be trusted to produce results lacking in arbitrariness and bias. Florida's death penalty system's constitutional infirmity has been known at least since Ring. Hurst unequivocally establishes the importance and need for the jury in reaching a constitutionally sound and just verdict, not recommendation, in a criminal trial.

This holding is "of sufficient magnitude to necessitate retroactive application." Witt, 387 So.2d at 931. The purpose of Hurst's rule weighs heavily in favor of retroactive application.

Under the second consideration from Witt's three-fold test, Florida relied on its now unconstitutional death penalty scheme for approximately forty years. However, since Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), and Ring, that reliance was misguided. See Hurst, 2016 WL at 8-9. Generally sensing the infirmity present in Florida's death penalty scheme, Justice Wells, in State v. Steele, 921 So.2d 538, 550-52 (Fla. 2005), authored a concurring opinion that was joined by Justice's Cantero and Bell, in which he urged Florida's legislative branch to undertake an assessment and revision of Florida's statute. In his reasoning, he pointed to the extensive body of law forming around the Federal Death Penalty Act, such as the requirement "that a death sentence be made by a unanimous jury," and noted that then recent decisions in Apprendi and Ring, amongst other US Supreme Court decisions, "brought about a need for the Legislature to undertake an assessment and revision of Florida's statute." Id. Justice Wells noted that his opinion in Bottoson v. Moore, 824 So.2d 115, 122 (Fla. 2002)(Wells, J., dissenting) stood on the belief that the Florida Supreme Court was bound by the then existing Florida capital sentencing statute since it was upheld in light of prior constitutional challenges prior to Ring and Ring did not

specifically recede from the cases containing those challenges. Id. Florida's reliance over the past thirteen on its now unconstitutional death penalty scheme was misguided by its' belief that Ring did not overrule cases such as 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.2d 340 (1984). Hurst corrects Florida's mistake and expressly overrules Hildwin and Spaziano while specifically noting that Ring overruled Walton v. Arizona, 497 U.S. 639 (1990), a case that "was a mere application of Hildwin's holding to Arizona's capital sentencing scheme." Hurst, 2016 WL at 8-9. Florida's reliance on its old rule was clearly misplaced for, at a minimum, the past thirteen years and provides little reason to deny a retroactive approach to Hurst.

Under the third consideration, "the effect on the administration of justice of a retroactive application of the new rule," also favors retroactive application. The number of individuals who would be affected by retroactive application of Hurst is limited to the individuals currently on death row whose cases are in the postconviction posture. There are currently 389 people on death row, so, accounting for individuals still pending direct appeal, it is clear that the number of people who are in the postconviction phase is less than 389.[2]

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

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.[3] The death row population therefore represents less than half of one percent of the Florida prison population. Such a small percentage would be easily absorbed by the general population facilities.[4]

Conducting new penalty phase trials for those affected also would not be a staggering undertaking. This Court indicated in Johnson v. State, 904 So.2d 400 (Fla. 2005) 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. Johnson, 904 So. 2d at 411-12. Of the 389 people on death row, nearly half were sentenced after the year 2000.[5] 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. The concern about the effect on the administration of justice should be

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

[4] 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.

[5] Seventy-seven (20%) were sentenced in the 2010's and 113 (29%) were sentenced in the 2000's. See Death Row Roster, supra, n.10.

given far less weight against retroactive application than provided for in Johnson. Furthermore, new penalty phase proceedings would be spread out amongst every county with prisoners sentenced to death under the unconstitutional statute and would not be unduly burdensome on the courts' resources when weighed against the constitutional rights being protected.

Finally, "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. Though the State possesses an interest in maintaining the finality of a conviction,

> "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 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 (emphasis added), 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 interest at stake is not just liberty, but *life itself*, surely the interests of fairness and uniformity trump the State's interest in finality.

The most equitable solution to the retroactivity question presented by Hurst would be resentencing those individuals impacted to life imprisonment without parole, a sentence without mandatory review by this Court and without the complicated postconviction review process set forth by Fla. R. Crim. P. 3.851 and 3.852. The State's reliance on this unconstitutional sentencing scheme, in light of Ring's language and analysis of case law applying Hildwin's logic, 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. The first two considerations of Witt's three-fold test weigh in favor of making Hurst's rule retroactive.

The third consideration's minimal weight, in light of the amount of people affected by retroactive application of Hurst, is overcome by the first two considerations in addition to the interest in fairness and uniformity. It must be noted that Timothy Lee Hurst was originally sentenced to death on April 26, 2000 for the murder of Cynthia Harrison, which occurred on May 2, 1998. Mr. Kopsho was sentenced to death on July 2, 2009 for the murder of Lynne Kopsho, which occurred on October 27, 2000.

IV. The Violation of Mr. Kopsho's Sixth Amendment Right Cannot be Harmless.

The infirmity of Florida's death penalty scheme is structural in nature. Mr. Kopsho's Hurst claims are not subject to harmless error analysis. The violation of

Mr. Kopsho's Sixth Amendment right, as delineated in Hurst, is a violation of a necessary component that Mr. Kopsho was entitled to in his previous trial process.

The US Supreme Court properly noted that Florida's death penalty statute requires a fact-finder to determine whether "'sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances'" before a defendant may be sentenced to death. Hurst, 2016 WL at 7, citing Fla. Stat. § 921.141(3). Each of these determinations are elements, i.e. facts, that must be found to exist by the fact-finder before a death sentence may be imposed. 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. This did not take place in Mr. Kopsho's sentencing. Mr. Kopsho's jury was never instructed to find beyond a reasonable doubt that aggravating circumstances existed in Mr. Kopsho's case and that those circumstances outweighed Mr. Kopsho's mitigating circumstances. Instead the jury was merely asked to return a non-unanimous recommendation, which was only advisory in nature, as to whether Mr. Kopsho's sentence was to be death. The right to conviction by jury was taken from Mr. Kopsho on all elements relating to the death penalty.

Harmless error analysis is an inquiry to determine whether a guilty verdict that was actually rendered in a trial was unattributable to the error in question. Neder v. U.S., 527 U.S. 1, 37-38, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (Scalia,

J., dissenting), citing Sullivan, 508 U.S. at 279. As noted in Hurst, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Id., 2016 WL at 6. Understanding that Arizona's pre-Ring death penalty scheme did not even contain a jury component as to death penalty sentencing, Hurst's comparison of Florida's advisory jury in death penalty sentencing to a non-existent entity in Arizona's scheme indicates that Florida's advisory jury may as well not have existed. Such an entity devoid of any real power could never provide for a verdict as understood in Sullivan. As noted by Justice Scalia in Sullivan, "harmless-error review applies only when the jury actually renders a verdict—that is, when it has found the defendant guilty of all the elements of the crime." The advisory provided by Mr. Kopsho's sentencing jury was superfluous, did not carry the weight of a verdict as envisioned in Sullivan, and was akin to a jury verdict over sentencing in pre-Ring Arizona (nonexistent). With no real jury verdict, this Court cannot apply harmless-error analysis.

With no meaningful decision by a jury regarding Mr. Kopsho's death sentence, this Court cannot simply fill in this void by superficially constructing a theoretical jury, complete with theoretical findings and assessments of fact. As Justice Scalia noted in the majority opinion in Sullivan, "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else

directed verdicts for the State would be sustainable on appeal[.]" Id., 508 U.S. at 280. This Court, under the constraints of analysis imposed by Sullivan, is not free to imagine a jury's finding and then weighing of circumstances that never came to be at any stage of Mr. Kopsho's case. Doing so violates his Sixth Amendment right to a properly developed jury verdict.

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). Such errors "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome.[6] Neder, 527 U.S. at 8.

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

Other cases have held that there must be reversal if: the community in which defendant was tried has been exposed to so much damaging publicity that he cannot

For cases that defy harmless-error review, beyond those aforementioned requirements delineated by Justice Scalia in both Sullivan and Neder, a case must contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder, 527 U.S. at 8, citing Fulminante, 499 U.S. at 310, 111 S.Ct. 1246. "Such errors infect the entire trial process." Id., citing Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed. 353 (1993). To say Florida's now unconstitutional sentencing statute infected the entire sentencing process now under Hurst scrutiny is an understatement. Under Florida's statute, juries were provided constitutionally infirm instructions as to their ultimate role (advisory as opposed to binding), they were precluded from making specific findings on the existence of aggravating circumstances (necessary findings under Hurst), they were precluded from specifically weighing the aggravating circumstances against mitigating circumstances in any unified manner, and they were never required to provide the

get a fair trial there; there has been purposeful discrimination in the selection of grand or petit jurors; the defendant was denied the right to represent himself; part of the trial was conducted by a magistrate lacking jurisdiction; a juror was improperly excluded due to his beliefs about capital punishment; the constitutional error already required a showing of prejudice; the defendant was denied access to counsel during trial or denied the right to a public trial; there was a violation of the constitutional right to speedy trial; or in case of the appointment of an interested prosecutor. Lower courts have added to this list. 3B Charles Alan Wright et al., Federal Practice & Procedure, 855 (3d ed. 2004), cited in Nelson v. Quarterman, 472 F.3d 287, 333 (5th Cir. 2006).

basis their advisory verdict hinged on, leaving appellate courts in the dark as to what the jury's non-unanimous decision hinged on. Florida's very framework for obtaining death sentences was infirm prior to Hurst. Mr. Kopsho's case possesses a Sixth Amendment error that defies harmless-error analysis. Because Mr. Kopsho's jury was never required to find beyond a reasonable doubt sufficient aggravating circumstances not outweighed by the mitigating circumstances, there is no way to determine whether the error was harmless.

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

only require the imagining of a non-existent jury and its verdict. This Court would also need to imagine an entire procedure that never took place.

CONCLUSION

Hurst struck down Florida's constitutionally infirm sentencing scheme that ruled over a capital defendant's life. The US Supreme Court specifically declared that the role of a jury in a capital case is that of the finder of fact and that a death sentence hinge "on a jury's verdict, not a judge's factfinding." Id. 2016 WL at 10. For the reasons developed above, this Court must vacate Mr. Kopsho's death sentence and impose a sentence of life, or, in the alternative, provide Mr. Kopsho a new penalty phase consistent with Hurst.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2016, we electronically filed the foregoing **Supplemental Initial Brief of the Appellant** with the Clerk of the Florida Supreme Court by using the CM/ECF system which will send a notice of electronic filing to: Stacey Kircher, Assistant Attorney General stacey.kircher@myfloridalegal.com, capapp@myfloridalegal.com; William Gladson, Assistant State Attorney, bgladson@sao5.org eservicemarion@sao5.org, the Honorable Judge David Eddy, mksicki@circuit5.org and by U.S. Mail to William Kopsho, DOC# 122787, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Supplemental Initial Brief of Appellant, was generated in Times New Roman, 14-point fond, pursuant to Fla. R. App. P. 9.210.

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