IN THE SUPREME COURT OF FLORIDA

CASE NO. SC151276
LOWER TRIBUNAL NO. 16-2003-CF-010182

PAUL DUROUSSEAU,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

Honorable Judge Jack Schemer Judge of the Circuit Court, Division CR-G

APPELLANT'S SUPPLEMENTAL BRIEF ON THE APPLICATION OF THE U.S. SUPREME COURT'S DECISION IN HURST V. FLORIDA TO THE INSTANT CASE

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INTRODUCTION

This Court granted Durousseau's request to file this supplemental brief addressing the application, if any, of Hurst v. Florida, No. 14-7505, 2016 WL 112683,2016 U.S. LEXIS 619 (Jan. 12, 2016), upon Durousseau's case. It is now well established that Hurst is a landmark case revamping the constitutional landscape as to what the Sixth Amendment demands before a defendant is eligible to be sentenced to death, with profound ramifications on every case where a defendant was sentenced to death in Florida, including Durousseau's case.[1]

Durousseau is aware that numerous briefs have already been filed by the parties and *amici curiae* relating to the legal consequences of Hurst

[1] Undersigned attorney petitioned this Court to take the opportunity, upon the Hurst decision, to consider again whether the penalty of death now violates the Eighth Amendment, as was urged by Justice Breyer in his dissent to the order denying a petition for certiorari for Alabama death row inmate Christopher Brooks several days ago. Brooks v. Alabama, Nos. 15-7786, 15A755, 2016 U.S. LEXIS 852, at *2 (Jan. 21, 2016) ("Moreover, we have recognized that Alabama's sentencing scheme is 'much like' and 'based on Florida's sentencing scheme.' *Harris v. Alabama*, 513 U. S. 504, 508, 115 S.Ct. 1031, 130 L. Ed. 2d 1004 (1995). Florida's scheme is unconstitutional. *See Hurst*, *ante*, at 1, 577 U.S. , 2016 U.S. LEXIS 619 (BREYER, J.,concurring in judgment). The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures ***only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment***. *See Glossip v. Gross*, 576 U. S. , , 135 S. Ct. 2726, 192 L. Ed. 2d 761, 815-816 (2015) (BREYER, J.,dissenting). I respectfully dissent.") (emphasis added).

upon a pending postconviction capital case in Lambrix v. Jones, Case No. SC16-56. Given the limited number of pages allotted for this supplemental brief, Durousseau will attempt to highlight the distinctions of his procedural history and provide a general analysis of Hurst, and will also cite to the Lambrix briefs for additional arguments as to Hurst's various ramifications.

RELEVANT PROCEDURAL HISTORY

Durousseau was charged with premeditated murder for the 1999 killing of Tyresa Mack. Prior to his 2007 trial, Durousseau filed a "Motion to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional," in which he cited multiple constitutional flaws in Florida's system that were later validated in Hurst, such as:

- It requires the trial judge to make findings necessary to impose the sentence of death
- The jury's recommendation is merely advisory

Exhibit 1 (Durousseau's Record on Appeal from Appeal SC08-68, Volume IV pages 731-745, relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002) and Durousseau's Initial Brief Durosseau v. State, 55 So.3d 543(Fla. 2010).

The trial court denied this motion without analysis. Exhibit 2 (trial court order denying Durousseau's pre-trial Ring motion as found in

Durousseau's Record on Appeal from Appeal SC08-68, Volume IV pages 731-745 from Appeal SC08-68).

At his trial Durousseau was found guilty of premeditated murder. The trial court proceeded to the penalty phase according to F.S. 921.141, which Hurst has now found to be unconstitutional. A penalty phase under that flawed statutory scheme was held before the trial jury, during which the jury was instructed that its advisory verdict could be based on one of the following four potential aggravators for the victim: (1) Durousseau had previously been convicted of a felony involving the use or threat of violence (the 2001 probation for aggravated assault[2]); (2) the crime was committed while the defendant was engaged in a robbery and sexual battery; (3) the murder was especially heinous, atrocious, or cruel ("HAC"). Exhibit 3 (penalty jury instructions); and (4) the murder was committed for pecuniary gain. The jury recommended that Durousseau be sentenced to death by a vote of ten to two.

The trial court followed the jury's recommendation and sentenced Durousseau to death on both counts, finding all of the aggravating factors

[2] "During the penalty phase, the State of Florida produced evidence that Mr. Durousseau admitted a violation of probation for the above crime, but did not produce any underlying facts.

that were submitted to the jury in the penalty phase. Durosseau v. State, 55 So.2d (Fla. 2010).

On direct appeal, Durousseau again challenged Florida's death penalty arguing that Florida's death penalty statute violates Ring in a number of areas extended from Apprendi v. New Jersey, 530 U.S. 446 (2000).

This Court denied Durousseau's Ring claim stating that Durousseau lacked standing because the jury unanimously found that the murder was committed during the course of committing felonies of robbery and sexual battery. (SC08-69 Book 15541 at 922).

ARGUMENT

I. Introduction

The ruling in the Hurst case by the United State's Supreme Court has placed this Court in an unenviable position. The undersigned has observed the oral arguments since Hurst and has observed this Court grappling with the following issues: Retroactivity; Unanimity; Ex Post Facto; Harmless Error; The concept that the death penalty is not unconstitutional, it is Florida's "scheme" that is unconstitutional; Discussions about HAC or about any one aggravator; The new Florida Death Penalty Statute; and The United States Supreme Court accepting Cert. in Johnson v. Alabama wherein the "judgement [was] vacated, and the case remanded to the Court of Criminal Appeals of

Alabama for further consideration in light of Hurst v. Florida".

Never before has the undersigned seen such a large number of complex issues raised as a result of a ten (10) page majority opinion. However, respectfully, counsel submits that the issue is not as complicated as it appears. The second paragraph of the opinion states:

> **We hold this sentencing scheme unconstitutional.** 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**.

Later in the decision at pages 4 & 5, the Justice Sotomayor begins to interchange the term "**fact**" with "**element".** The Court then states that 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..... this Court held that any **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." In page 5 the opinion states that "Ring's death sentence therefore violated his right to have a jury find the **facts** behind his punishment."

Durousseau submits that based on Hurst, there is no basis to even discuss the "jury recommendation" because the United State's Supreme Court has clearly stated that "a **jury's *mere recommendation is not enough***". Whether the "recommendation" was 7-5 or 12-0 is irrelevant.

Discussion about a finding of an aggravator of Heinous Atrocious and Cruel (HAC) or any other aggravator is equally irrelevant because the jury did not actually find the aggravator beyond a reasonable doubt, under the unconstitutional scheme, it was the trial judge who made the ultimate finding.

Regarding unanimity and the new statute, counsel submits those issues are equally irrelevant in light of Certiorari being granted in Alabama v. Johnson. That acceptance is a clear shot across the bow telling Alabama, and this Court, that Hurst requires unanimity and thus, the new Florida Statute will eventually be shot down like the past scheme.

The issue as to whether a new sentencing hearing will run afoul of our Ex Post Facto jurisprudence is not ripe at this time and not applicable to this appeal. Circuit courts have already begun to strike the new statute down (See Attached).

Therefore, the only issue left is retroactivity. As the main issue in this appeal prior to Hurst was ineffective assistance of counsel in jury selection. The focus must be on what the jury was told and what questions were asked of the jury so that counsel could effectively select a jury in this capital case.

This was a topic of great concern to the late Justice Scalia and the other Justices as illustrated by the questioning and should be considered by this Court as evidenced by the oral argument as outlined below:

JUSTICE SOTOMAYOR: I'm sorry. How -- how is that, when

Florida law says that the judge has to find an aggravator to make someone eligibility for the death penalty?
JUSTICE SOTOMAYOR: So how do we know which one they picked?
MR. WINSOR: I'm sorry?
JUSTICE SOTOMAYOR: Which -- how do we know which one they picked? Which makes them eligible for the death penalty?
MR. WINSOR: Well, our position is that they -- that he became eligible at the -- at the sentencing phase when the jury made its advisory decision, because the jury at that phase was instructed, that if you determine that no aggravating circumstances are found to exist, you must recommend life.
JUSTICE SOTOMAYOR: But you do agree that that -- it doesn't require a unanimous jury?
MR. WINSOR: It does not require a unanimous jury.
JUSTICE SOTOMAYOR: It -- and -- a simple majority is all you need?
MR. WINSOR: That's right.
JUSTICE SOTOMAYOR: So we don't have --
MR. WINSOR: That's right, but that's -- that's a jury finding.
JUSTICE SOTOMAYOR: -- a unanimous jury,
even a functionally equivalent unanimous jury, finding those aggravators.
MR. WINSOR:I'm sorry?
JUSTICE SOTOMAYOR: We don't have a unanimous or functionally unanimous jury finding those aggravators.
MR. WINSOR: Our reliance for the -- the final eligibility determination is that seven to five.
But I would make this point: The seven to five -- there are two things that go on when the -- when the jury determines whether someone should be sentenced to death or not:
First, the jury looks and determines whether the State has proven beyond a reasonable doubt an aggravating circumstance. That's the eligibility piece of it.
Then they get into the sentence selection process where they weigh the aggravators that they do find, assuming they find some, against the mitigating circumstances. And of course the defendant under this Court's precedent is allowed to put in any evidence that he wishes.
JUSTICE SOTOMAYOR:I'm sorry. The jury is not asked to find an aggravator.
MR. WINSOR: I'm sorry?

JUSTICE SOTOMAYOR: It's not asked to find an aggravator.
MR. WINSOR: It is, Your Honor. It is instructed that it may not return a death recommendation without --
JUSTICE SOTOMAYOR: I know. But that's not found at the jury verdict.
MR. WINSOR: I'm sorry?
JUSTICE SOTOMAYOR: It's not found at the trial -- after --
MR. WINSOR: At the sentencing phase.
JUSTICE SOTOMAYOR: You're -- only at the sentencing phase.
MR. WINSOR: I'm talking about the sentencing phase right --
JUSTICE BREYER: Suppose that the jury comes back at the sentencing phase and says, we recommend life.
MR. WINSOR: Yes.
JUSTICE BREYER: And the reason, though I guess no one would know it, is because they -- no -- nobody found an aggravating.
MR. WINSOR: Uh-huh.
MR. WINSOR: But at that point the judge's determination is separate from the -- the selection point. The judge is exercising the discretion to sentence within -- a person who is determined by a jury to be eligible for the death penalty.
JUSTICE SCALIA: That didn't happen here,did it?
MR. WINSOR: No, your Honor.
JUSTICE SCALIA: Good, I thought so --
JUSTICE KAGAN: But the thing is you can't really tell whether that happens in a wide variety of cases. And this is actually -- this goes to this question of because the jury doesn't actually have to find specific things, only the judge has to find specific things, you often are not going to be able to tell whether the judge's sentence is based on the same aggravating facts that the jury has found.
MR. WINSOR: But it doesn't need to be under Ring, because once the jury has determined that there is an aggravating factor or if it's been admitted, then the person is death eligible and Ring is completely finished. There's nothing more to do under Ring.
And then we move --
JUSTICE GINSBURG: Even though the jury is told, now, whatever you say, it's advisory. It's not binding. So you have made a finding of an aggravator, but it's not a binding finder of an aggravator. The jury is told that whatever they say is advisory.
Doesn't that make a difference?
MR. WINSOR: No. What the jury is told is that its ultimate recommendation is -- is not binding on the Court

And that's true. And that's one of the great benefits of Florida's system. I mean, Florida's system was developed in response to this Court's decision in Ferment, and this Court has said that the Florida's system provides additional benefits to the defendant.
So you have a judicial backstop. The matter --
JUSTICE GINSBURG: That was -- that was before Ring.
MR. WINSOR: That was before Ring.
And we're not contesting that Ring would require a jury finding or an admission of those elements.
But once the jury makes its recommendation, even if it recommends death, the judge can override that by -- for any reason, just based on disagreement alone, which makes it unlike, you know, in a usual capital -- or the -- excuse me -- a usual criminal proceeding where the judge could not overcome --
JUSTICE SOTOMAYOR: I'm sorry. I just want -- I'm -- I'm sorry. Justice Scalia.
JUSTICE SCALIA: Is it clear to the jury that they are the last word on whether an aggravator exists or not?
MR. WINSOR: What it -- what the jury is told is that they cannot return a death recommendation without finding a -- an aggravating circumstance. That's --
JUSTICE SCALIA: But then they're also told that the judge is ultimately going to decide whether your recommendation stands or not.
MR. WINSOR: The judge is going to ultimately impose the sentence, and that's true. And that's both true under Caldwell, but it's not --
JUSTICE SCALIA: But shouldn't it be clear to the jury that -- that their determination of whether an aggravator exists or not is final? Shouldn't that be clear?
MR. WINSOR: ll, I -- I don't think so, Your Honor, because the determination of the aggravator doesn't yield a death sentence unless the judge, in his or her own opinion, believes the death is appropriate. That's a benefit.
JUSTICE SCALIA: But I'm -- I'm talking -- I'm talking about what responsibility the jury feels. If the jury knows that if -- if -- if we don't -- if -- if we don't find it an aggravator, it can't be found; or if we do find an aggravator, it must be accepted. That's a lot more responsibility than just, you know, well, you know, if you find an aggravator and you -- you weigh it and provide for the death penalty, the judge is going to review it anyway.
MR. WINSOR: I'm not sure that's an accurate characterization of what goes on because it's not that the judge must accept -- the aggravator

determination has no purpose or no point other than determining eligibility and then the weighing.
And if the judge determines that the death sentence is not appropriate for whatever reason, then the fact that the jury found an aggravating circumstance makes no difference.
JUSTICE KENNEDY: Suppose then in your earlier hypothetical, the judge -- the jury finds an aggravator occurred in the course of the robbery, and, therefore, there is death eligibility. Then it goes to the judge. And the judge says, there is simply no evidence to support that aggravating factor, but I find another aggravating factor. Under your view, the judge could go ahead and impose the death penalty?
MR. WINSOR: Well, in that instance, that's a little bit different, as I understand it, than Justice Kagan's hypothetical
First of all, the -- the recommendation doesn't specify what -- which of the aggravating factors --
JUSTICE KENNEDY: But this is my hypothetical
MR. WINSOR: Okay. So to make sure I understand –
JUSTICE KENNEDY: I mean, a death case, which is not funny.

The issue is that the jury in this case was wrongfully instructed, and it cannot be said beyond a reasonable doubt that the error was harmless, especially in a death penalty case.

The rule and the analysis set forward is in James v. State 615 So.2d 669 (1993), wherein this Court was faced with the United States Supreme Court's decision ruling that Florida's jury instruction that HAC was unconstitutionally vague. This Court held a Harmless Error Analysis and ruled that we "...cannot say beyond a reasonable doubt , however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same..." Id.

Based on Hurst, the jury was wrongfully instructed from the

very beginning of jury selection all the way through the penalty phase. Just as in James this case should be remanded for a new penalty phase or imposition of a life sentence at a minimum. Durousseau argues this case should be sent back for a new trial because the jury selection was ineffective and that the jury instructions utilized during the jury selection were flawed.

II. Hurst and Constitutional Scope

The United States Supreme Court "granted certiorari [in Hurst] to determine whether Florida's capital sentencing scheme violates the Sixth Amendment in light of Ring. [] We hold that it does." Hurst at 4. Such a definitive rejection of Florida's "capital sentencing scheme" has not occurred since 1972 in Furman, and even then it was not Florida's own sentencing scheme that was directly considered.

Following the Supreme Court decision in Furman v. Ga., 408 U.S. 238 (1972), that the death penalty violated the Eighth Amendment due to an arbitrariness and lack of procedural safeguards in practice,[3] the Florida legislature adopted its current "hybrid" capital sentencing scheme under F.S.

[3] In Furman, the Supreme Court ruled 5-4 in a one-paragraph opinion that the imposition of the death penalty in the cases before it violated the Eighth Amendment, but none of the majority justices joined the opinion of any other. Three majority justices (Stewart, White, Douglas) articulated concerns related to arbitrariness related inadequate laws in place to assure some rational basis to determine when the death penalty was applied, and when it was not. The other two majority justices (Brennan, Marshall) found that the death penalty *in itself* violated the Eight Amendment.

921.141 in which the jury considers aggravating and mitigating circumstances and renders an advisory verdict by a majority vote, but the trial judge must make additional specific findings before a defendant becomes eligible to be sentenced to death. See Proffitt v. Florida, 428 U.S. 242, 247-50 (1976).

Although Florida's hybrid system was approved by the U.S. Supreme Court multiple times following Furman (e.g., Proffitt (1976); Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989)), its Constitutionality came into serious doubt after the Supreme Court's Apprendi and Ring decisions.

In Ring, the Supreme Court was faced with evaluating the constitutionality of Arizona's capital sentencing scheme, which it had once before found constitutional in the post-Furman era in Walton v. Arizona, 497 U.S. 639 (1990). In the Arizona scheme, the jury played no role in the penalty phase once it announced its verdict of guilt, and it was up to the trial court to decide whether at least one aggravating factor justified the imposition of the death penalty, as was required by the Arizona statute. In announcing its holding that Arizona's statute was unconstitutional, the Supreme Court quickly surveyed the development of its Sixth Amendment jurisprudence over the preceding twelve years:

> In *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." *Id.*, at 649. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), which held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492.
>
> *Apprendi*'s reasoning is irreconcilable with *Walton*'s holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring, 536 U.S at 588-89.

Clearly, this caused constitutional concerns for Florida's statute, which this Court recognized immediately. See Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002). However, this Court felt constrained in Bottoson to affirm the constitutionality of Florida's capital scheme after Ring, until and unless the U.S. Supreme Court explicitly overruled its pre-Ring decisions of Hildwin and Spaziano, which approved of Florida's post-Furman capital sentencing scheme. Id. at 695 (citing Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S.Ct. 1917 (1989), for the proposition that it was bound to follow U.S.

Supreme Court precedent directly on point until it was overruled by the Supreme Court itself)

In Hurst, the U.S. Supreme Court did just that, explicitly overruling Hildwin and Spaziano, and, in a decisive vote of 8-1, holding that Florida's sentencing scheme is unconstitutional.[4] The Supreme Court found three distinct aspects of Florida's statutory scheme to be unconstitutional: (1) that the judge rather than the jury had to make the "critical findings" that the aggravators were **sufficient** to outweigh the mitigators,[5] (2) that the jury was not required to make **specific** findings as to the aggravators and mitigators,[6]

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[4] Justice Breyer concurred in the judgment, finding that the Eighth rather than Sixth Amendment dictated that Florida's scheme was unconstitutional. 2016 U.S. LEXIS 619, at *16. Justice Alito was the lone dissenter, based on his skepticism as to the validity of Ring's central holding and his belief that at the very least it should not be extended to Florida's statute. 2016 U.S. LEXIS 619, at *17-22; see also the textual distinctions between F.S. 921.141(2), related to the jury's role, and F.S. 921.141(3), related to the judge's role.

[5] E.g., 2016 U.S. LEXIS 619, at *12 (Jan. 12, 2016) ("The trial court alone must find 'the facts . . . [t]hat ***sufficient*** aggravating circumstances exist' and '[t]hat there are ***insufficient*** mitigating circumstances to outweigh the aggravating circumstances.' §921.141(3); see Steele, 921 So. 2d, at 546. '[T]he jury's function under the Florida death penalty statute is advisory only.' *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." (emphasis added)).

[6] E.g., 2016 U.S. LEXIS 619, at *15 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge ***to find an aggravating circumstance***, independent of ***a jury's factfinding***, that is necessary for imposition of the death penalty.") (emphasis added).

and (3) that the jury's decision was not **binding** upon the trial court.[7, 8] See generally Lambrix Habeas Reply at 18-54; Lambrix ACLU Amicus.

Hurst's wholesale repudiation of Florida's statutory scheme leaves the Florida capital landscape uprooted in a manner similar to what Furman did for the whole nation. This supplemental brief will proceed to consider Hurst and its applicability to Durousseau in light of (1) the issues of retroactivity, (2) the applicability of harmless error analysis, and (3) the potential remedies for the constitutional violations suffered.

III. Hurst and Retroactivity

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

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[7] E.g., 2016 U.S. LEXIS 619, at *11 ("Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not ***binding*** on the trial judge."). Therefore, if there was any doubt left after Ring, it is now clear that it would be unconstitutional for a judge to sentence to death in the face of a jury's finding that any aggravators were insufficient to outweigh the mitigators.

[8] Although not explicitly found by the opinion in Hurst, the conclusion seems unavoidable from its explicit holdings, in conjunction with Florida law that all elements of a crime must be found unanimously by a jury, that the jury's verdict must be unanimous as to the requisite capital findings in the penalty phase. Florida's bare majority requirement is clearly a violation of the Sixth Amendment as well. See generally Lambrix Habeas Reply at 35-43.

application of a newly-found principle of constitutional law. See Danforth v. Minnesota, 552 U.S. 264 (2008) (holding that states are not bound to adopt the more restrictive federal retroactivity standard). Florida's three-prong retroactivity analysis was established in the case of Witt v. State, 387 So. 2d 922, 928 (Fla. 1980). Given that the Hurst decision (1) "emanate[d] from . . . the United States Supreme Court" and (2) is undeniably "constitutional in nature," the sole question facing this Court now as to the retroactive application of Hurst is whether it (3) "constitutes a [constitutional] development of fundamental significance." Witt at 931.

Given the fact that Hurst shatters Florida's capital sentencing scheme in a way unmatched since Furman, it is abundantly clear that this is a constitutional development of "fundamental significance." See generally Lambrix Habeas Reply at 54-83; Lambrix CHU Amicus at 2-17. Further, finding Hurst to be retroactive would be consistent with extensive Florida caselaw applying Witt's more generous retroactivity standard, as noted in Justice Anstead's dissent in Bottoson:

> See, e.g., James v. State, 615 So. 2d 668 (Fla. 1993) (applying retroactively Espinosa v. Florida, 505 U.S. 1079, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992), wherein Florida's jury instruction on the "heinous, atrocious, or cruel" aggravating circumstance was held to be impermissibly vague under the Eighth Amendment); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (applying retroactively Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), wherein the use of victim

> impact evidence in a capital trial was held to be irrelevant and impermissibly inflammatory in violation of the Eighth Amendment . . . ; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (applying retroactively Hitchcock v. Dugger, 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987), wherein Florida's jury instructions in capital cases were held to impermissibly limit the sentencer's consideration of nonstatutory mitigating circumstances in violation of the Eighth Amendment).

833 So. 2d at 717 n.50 (Fla. 2002). Other important examples of cases that have been found to be retroactive under Florida law are Gideon v. Wainwright, 372 U.S. 335 (1963) (its holding that all felony defendants are entitled to public defenders was noted to be retroactive in Witt, 387 So. 2d at 927), and Miller v. Alabama, 132 S. Ct. 2455 (2012) (its holding that mandatory life sentences without the possibility of parole was found to be retroactive in Falcon v. State, 162 So. 3d 954 (Fla. 2015)).[10]

In its Habeas Response in the Lambrix brief, the State primarily focuses its argument that Hurst is not of "fundamental significance" upon the fact that this Court found that Apprendi and Ring should not be applied retroactively in the cases of Hughes v. State, 901 So. 2d 837, 843-44 (Fla. 2005), and Johnson v. State, 904 So. 2d 400 (Fla. 2005), respectively.

[10]Recently the U.S. Supreme Court issued another decision related to Miller and analyzing the distinction between federal and state retroactivity, now holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Montgomery v. La., No. 14-280, 2016 U.S. LEXIS 862, at *16 (Jan. 25, 2016).

(Lambrix State Response at 6-16.) There are two crucial problems with this argument.

First, as was argued by the dissent in both Hughes and Johnson, the majority in those opinions relied too heavily upon the federal standard for retroactivity, which is more restrictive than Florida's standard, as noted in Witt. E.g., Johnson, 904 So. 2d at 418 n.13 (Fla. 2005) (Anstead, dissenting). This distinction between the federal and state standards is grounded upon the need for comity in federal collateral review of final state decisions. Id. Secondly, and even more importantly, the U.S. Supreme Court has made it clear that this Court—bound by the Hildwin holding—underestimated and misunderstood the fundamental constitutional significance of Ring in its decision in Bottoson (Hurst, 2016 U.S. LEXIS 619, at *8), which necessarily sabotaged its Witt analysis in Johnson. Given that the critical retroactivity analysis is grounded upon a proper understanding of the constitutional import of the new constitutional rule, this Court must now recognize that Johnson provides no reliable guidance as to whether Hurst, in light of the new understanding of Ring's significance, should be found to be retroactive.

Rather, Hurst ushers in a new Furman-like era of constitutional upheaval, and this necessitates a finding that its holding should be applied

retroactively to all defendants who were sentenced to death under Florida's current statutory scheme.

As this Court noted in conducting its retroactivity analysis in James v. State as to Espinoza: "James, however, objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the Espinosa ruling." 615 So. 2d 688, 669 (Fla. 1993). The same applies to Durousseau. For Durousseau, to have persevered in asserting this constitutional violation in light of Ring, and then for him to be prevented from having his claims re-heard after they were vindicated by the Supreme Court of the United States, would be strikingly arbitrary, a violation of equal protection, and unconscionable under basic standards of fairness.

IV. Hurst and Harmless Error

In Hurst, the U.S. Supreme Court left harmless error analysis to the Florida courts, but it should be noted at the outset that the high court did not find that this particular type of error necessarily *would* be harmless in any cases; it only noted that *some* types of constitutional error related to the elements of a crimes have been found to be harmless in particular cases. Hurst, 2016 U.S. LEXIS 619, at *15-16 (citing Neder v. United States, 527

U.S. 1, 18-19 (1999)).

Given the fundamental and sweeping nature of the constitutional deficiencies that the Supreme Court found in Hurst as to Florida's entire capital sentencing procedure, this Court should find that Hurst error is structural error in all cases, not subject to harmless error review. E.g., Arizona v. Fulminante, 499 U.S. 279, 291, 308-09 (1991). Further, given the fact that Florida's statute (unconstitutionally) does not require that specific findings as to which aggravators and mitigators that the jury found, Hurst claims present complicated and fact-sensitive analysis of each particular case that would result in too much speculation to be able to find harmless error beyond a reasonable doubt. See Combs v. State, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the sentencing judge can only speculate as to what factors the jury found in making its recommendation. . . ."). Finally, the fact that the juries in every single Florida death penalty case were (unconstitutionally) told that their verdict was merely advisory rather than essential for a sentence of death, it is now apparent that the jury instructions also violated the Eighth Amendment, as set forth in Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case,

the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). See generally Lambrix FACDL Amicus at 13-21 (This *amicus* also cites to several scholarly articles that provide a compelling analysis of the negative psychological impact of a jury being told that its decision is only advisory.) Thus, if the State cannot show that there is no reasonable possibility that Hurst's problems with Florida's statutory scheme did not contribute to the finding of HAC, then the error cannot be deemed harmless. The State cannot rely on either of the prior violent felony convictions to survive harmless error analysis in this case. And we have ***no idea*** whether or not a majority or even a single member of the jury found HAC beyond a reasonable doubt, as is constitutionally required before the trial judge could have even considered that factor, given the mysteries of the jury's finding in Florida's current statutory scheme.

Without a specific jury finding that an aggravator had been proven beyond a reasonable doubt, the trial court had no authority under Hurst to enter a sentence of death on that aggravator, which is one of the central problems Hurst with the current Florida scheme:

Florida does not require the jury to make the ***critical findings***

> necessary to impose the death penalty. Rather, Florida requires a judge to find these ***facts***. Fla. Stat. §921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, ***but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances*** and its recommendation is not binding on the trial judge. 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." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *accord*, *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make ***detailed findings*** about the ***existence*** and ***weight*** of aggravating circumstances; it has no jury findings on which to rely").
>
> . . .
>
> As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "***findings*** by the court that such person shall be punished by death." Fla. Stat. §775.082(1) (emphasis added). The trial court alone ***must find "the facts*** . . . [t]hat sufficient aggravating circumstances ***exist***" and "[t]hat there are insufficient mitigating circumstances to ***outweigh*** the aggravating circumstances." §921.141(3); see Steele, 921 So. 2d, at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary ***factual finding*** that Ring requires.

Hurst, 2016 U.S. LEXIS 619, at *10-12 (emphasis added).

This was precisely the mistake made by the Supreme Court in Walton, Spaziano, and Hildwin, i.e., in finding that the jury did not have to make "specific findings" as to whether "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating

circumstances to outweigh the aggravating circumstances." Id. at *14-15 (Jan. 12, 2016) (rejecting the state's *stare decisis* argument); F.S. 921.141. Any constitutional argument by the State that, although the Sixth Amendment requires that the jury make findings as to existence and sufficiency of the specific aggravating circumstances, the trial court could base a sentence of death upon a specific aggravating factor that the jury found was not proved beyond a reasonable doubt, would be ludicrous.

V. Hurst and Potential Remedies

A. F.S. 775.082(2)

However, in responding to Hurst this Court would not need to consider retroactivity or harmless error if it follows the clear path set forth by the Florida legislature, which it passed in 1972 in anticipation of Furman:

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

Fla. Stat. § 775.082(2).

Hurst does nothing short of declaring Florida's death penalty scheme unconstitutional, placing this Court in a similar position to the position it was placed in after the Supreme Court found inadequate

safeguards in place in the state statutory schemes in Furman. See Donaldson v. Sack, 265 So. 2d

499, 505 (Fla. 1972) ("We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. 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.").

Thus, this Court should find that Hurst triggers the provision of 775.082(2), which requires that all existing death sentences be commuted to life sentences, as was done after Furman in every murder case at every stage of the litigation process. See Donaldson, 265 So. 2d 499; Anderson v. State, 267 So. 2d 8 (Fla. 1972); Adderly v. Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972); In re Baker, 267 So. 2d 331 (Fla. 1972). There is no legal or prudential reason to do otherwise after Hurst. See generally Lambrix Habeas Reply at 67-70 (discussion of the prudential reasons and the interests of judicial economy in automatically commuting 390 death sentences to life sentences, rather than holding a new sentencing hearing in each case); see also Anderson, 267 So. 2d at 10-11 ("Because of the great risk involved and the fact that the absence of a death penalty may be an incentive to a

convicted murderer to escape or cause bodily harm to a guard while in transit, we hold that under our inherent jurisdiction the automatic life sentence may be imposed by this Court rather than proceed through the ministerial formality of imposition of such an automatic sentence by the trial court.").

CONCLUSION

The foregoing sets forth Durousseau's analysis as to how Hurst would apply to his case. We request this case be remanded for a new trial, or at minimum the imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the instant brief has been served to the Carlene Emplit, Office of the Attorney General via e-mail this 24th day of May, 2016.

/s/Richard Kuritz
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in Compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14 point font.

/s/Richard Kuritz
Attorney for Appellant

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA, **CASE NO. F01-128535**

Plaintiff,

v.

KARON GAITER,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION
TO DECLARE FLORIDA STATUTE § 921.141 UNCONSTITUTIONAL

Defendant Karon Gaiter is charged with one count of first-degree murder. The prosecution has given notice of its intent to seek the death penalty. By virtue of recent statutory changes, a penalty-phase jury's non-unanimous verdict of death is a sufficient basis in law for the imposition of the death penalty. Mr. Gaiter challenges these statutory changes, claiming that he cannot be put to death upon a less-than-unanimous verdict.

Introduction

It is a core principle of American constitutional jurisprudence generally, and of Florida constitutional jurisprudence specifically, that, "When called upon to decide matters of fundamental rights, ... state courts are bound under ... principles [of federalism] to give primacy to [the] state constitution." *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992). If a Florida court can decide a question as a matter of Florida constitutional law, it must do so; it must do so without relying upon federal law. The Florida court is not to look to federal constitutional law unless the question before it is not susceptible of resolution by reference to Florida law. *See, e.g., State v. Owen*, 696 So.2d

715, 719 (Fla. 1997); *Soca v. State*, 673 So.2d 24, 26-27 (Fla. 1996); *Allred v. State*, 622 So.2d 984, 986-87 (Fla. 1993); *Peoples v. State*, 612 So.2d 555, 556 (Fla. 1992); *State v. Jones*, 849 So.2d 438, 443 n. 1 (Fla. 3d DCA 2003). This expression of federalism is the mirror image of the principle that federal courts will not adjudicate a question of constitutional law emanating from a state-court system if the question has been resolved on the basis of adequate and independent state-law grounds. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *see gen'ly Ashwander v. TVA*, 297 U.S. 288, 347 *et. seq.* (1936) (Brandeis, J., concurring).

The narrow question before me can and must be resolved exclusively as a matter of Florida law. Ample and more than ample Florida jurisprudence, constitutional and common-law, determine the outcome here.[1]

The law of Florida as to the requirement of jury unanimity

Trial by jury, said Winston Churchill, is "the supreme protection invented by the English people for ordinary individuals against the state." And he added:

> The power of the Executive to cast a man into prison without formulating any charge known to the law, *and particularly to deny him the judgment of his peers*, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.

A. W. Brian Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain 391 (Oxford Univ. Press 1992) (emphasis added).[2]

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[1] I therefore do not adjudicate, or even consider, Mr. Gaiter's claims made under the Sixth or Eighth Amendments to the United States Constitution.

[2] A fascinating and scholarly discussion of wartime detention in England, and the triumph of the right to trial by jury, appears in Lord Bingham of Cornhill, "The Case of *Liversidge v. Anderson*: The Rule of Law Amid the Clash of Arms," 43 The International Lawyer 33 (Spring 2009).

This sense of reverence for trial by jury is one that Americans have shared since, and even before, the birth of our republic. If we ask the source of this reverence – if we ask lawyers or laymen, it matters not which – the answer will be found in the requirement of jury unanimity. We recognize that the guilty man must be pointed out and condemned. But we recognize too that the power of government to point and to condemn is so great that it may reach even the innocent man. We therefore insist that only when a jury of the accused's peers concurs in his guilt – only when each and all of them concur in his guilt – will we mark him down as guilty. In this sense, the requirement of a unanimous jury verdict is a compromise between a free society's need to protect itself from crime and a free society's need to protect itself from injustice. It is a compromise that an unfree society need never make.

Decisions consigned to the political branches of government are customarily made by majority rule. For such purposes, majority rule is sufficient. We do not ask that the decisions of the school board, or the city commission, or the state legislature, be, in any sense, perfect. We ask only that such decisions reflect the will of the many rather than the will of the few. But for the ultimate decisions made within the judicial branch of government – guilty or not guilty, life or death – majority rule is insufficient. We do ask, indeed we insist, that the decisions of capital juries be, in some sense, perfect; for they are, in some sense, final. We ask, indeed we insist, that they reflect the will of all rather than the will of the few or even of the many. Only when the jury agrees to its verdict unanimously can we demand that society accept that verdict unanimously. However outrageous a crime, however controversial a case, as Floridians and Americans we will accede to an outcome as to which it can be said that the jury has spoken. We cannot accede, we will not accede, we have never acceded, to outcomes as to which no more can be said than that *some* jurors have

spoken.

The common law

"For over six hundred years, the unanimous verdict has stood as a distinctive and defining feature of jury trials." Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 179 (Harvard Univ. Press 1994). At common law, trial by jury required a unanimous verdict. William Blackstone, 4 Commentaries on the Laws of England 343 (Univ. of Chicago Press 1979) (1765) (verdict must be result of "unanimous suffrage of twelve of [the defendant's] equals and neighbors"). *See, e.g., People v. Cooks*, 521 N.W. 2d 275, 278 (Mich. 1994) ("At common law ... criminal defendants were entitled to unanimous jury verdicts") (citing *McRae v. Grand Rapids, L & DR Co.*, 53 N.W. 561 (Mich. 1892)); *Williams v. James*, 552 A.2d 153, 156 (N.J. 1989) (referring to "the historic common-law requirement of unanimity of jury verdicts"); *Pitcher v. Lakes Amusement Co.*, 236 N.W. 2d 333, 335 (Iowa 1975) (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930)); *People v. Hall*, 60 P.3d 728, 734 (Colo. App. 2002) (citing *George v. People*, 47 N.E. 741, 743-44 (Ill. 1897)); *People v. Sanabria*, 42 Misc. 2d 464, 470 (N.Y. App. 1964). By operation of the "common-law savings clause," Fla. Stat. § 2.01, every Floridian is entitled to rights secured by the common law unless those rights have been expressly abrogated by positive law.

At no time in Florida history, prior to the enactment of the statute challenged here, has the common-law requirement of a unanimous verdict ever been supplanted by legislative or judicial enactment. "Unanimity of verdicts has always been part of Florida's common law." *Butler v. State*, 842 So.2d 817, 837 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part) (citing *Motion to call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous")). Expressions of the requirement of unanimity have always

appeared and continue to appear throughout Florida criminal procedure. Rule 3.440, Fla. R. Crim. P., captioned, "Rendition of Verdict; Reception and Recording," provides:

> When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge. The court shall ask the foreperson if an agreement has been reached on a verdict. If the foreperson answers in the affirmative, the judge shall call on the foreperson to deliver the verdict in writing to the clerk. The court may then examine the verdict and correct it as to matters of form with the unanimous consent of the jurors. The clerk shall then read the verdict to the jurors and, unless disagreement is expressed by one or more of them or the jury is polled, the verdict shall be entered of record, and the jurors discharged from the cause. *No verdict may be rendered unless all of the trial jurors concur in it.*

(Emphasis added.) To the same effect, *see* Fla. Std. Jury Instr. (Crim) 3.10 ("Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict"); Fla. Std. Jury Instr. (Crim) 3.13 ("Your verdict finding the defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror, as well as of the jury as a whole.").[3]

The former provisions of Fla. Stat. § 921.141(2), even before they were found unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), were no precedent for the use of less-

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[3] So strictly has the requirement of unanimity as to criminal verdicts been treated by the law of Florida that a

> unanimous jury finding is also required in order to increase the authorized punishment for the use of a weapon or firearm during a felony under § 775.087(1) ... . Statutes governing several substantive crimes also raise the maximum potential sentence based on guilt-phase, unanimous jury findings of aggravating circumstances. *See* §§ 794.011 (sexual battery); 810.02 (burglary); 810.08 (trespass); 812.13 (robbery).

Butler v. State, 842 So.2d 817, 838 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part).

than-unanimous jury verdicts in Florida. A verdict is conclusive of the ultimate issue of fact. It is sufficient to support an order of judgment and sentence. The "advisory sentence by the jury" formerly called for by Fla. Stat. § 921.141(2) was conclusive of nothing. It was insufficient to support an order of judgment and sentence – indeed that was precisely why it was found unconstitutional. *Hurst*, 136 S. Ct. at 619 ("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"). It was not a verdict. It was, in effect, a straw poll, and the jurors were told as much; they were instructed that the reason their decision need not be unanimous was because it was not a decision. In substance, the trial judge said to the jury, "I'm going to decide whether to sentence the defendant to death, but I'm willing to consider your views on the matter." What ensued could be called – in the language of the statute, *was* called – "advisory," but it could not be called a verdict. *Hurst*, 136 S. Ct. at 622 ("Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts ... [a]lthough Florida incorporates an advisory jury verdict").

Consistent with the command of *Hurst*, § 921.141 as presently amended calls, not for a straw poll, but for an actual verdict. Fla. Stat. § 921.141(3)(a)2. The decision of the jury is conclusive of the ultimate issue. It is sufficient, without more, to support a sentence. If ten jurors vote for death, the law requires no more in order for the defendant to be put to death. True, the presiding judge can determine not to impose the sentence called for by the verdict, *id.*, but that is always the case. *See, e.g.*, Fla. R. Crim. P. 3.380(c) (judge may grant motion for judgment of acquittal after verdict); Fla. R. Crim. P. 3.580 (judge may grant new trial after verdict); Fla. R. Crim. P. 3.610 (judge may arrest judgment after verdict). Neither in the present nor in any other context does the exercise of this

judicial power render the jury's decision any less a verdict.

Using the word "verdict" in its proper sense – the sense in which it is *now* used in Fla. Stat. § 921.141 – the criminal law of Florida has never, in any instance, tolerated less than unanimous verdicts. Of course the legislature, upon a sufficiently specific expression of its will, can deracinate the common law. Here, however, the common law and the constitutional law of Florida speak with one voice.

The Florida constitutional law

So fixed in the jurisprudence of Florida is the requirement of a unanimous jury verdict in a criminal case that it is difficult to say where the common law as to this requirement ends and the constitutional law begins. Admittedly, there is relatively little decisional law that could be described as strictly and exclusively based in the state constitution and not at all in the state common law. But a "principle of [constitutional] law is not unimportant because we never hear of it; indeed we may say that the most efficient rules are those of which we hear least, they are so efficient that they are not broken." F. W. Maitland, The Constitutional History of England pp. 481-82 (Cambridge Univ. Press 1911).

Article I § 22 of the Florida Constitution guarantees the right to trial by jury. Those Florida courts that have construed it have without exception treated this constitutional guarantee as subsuming the right to a unanimous verdict. *See, e.g., Bottoson v. Moore*, 833 So.2d 693, 709-10 (Fla. 2002) (Shaw, J., concurring) (citing *Jones v. State*, 92 So.2d 261, 261 (Fla. 1956); *Grant v. State*, 14 So. 757, 758 (Fla. 1894); *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881)). There is no Florida constitutional jurisprudence that takes a contrary position. There is no Florida constitutional jurisprudence that even hints at a contrary position.

At common law, the right to trial by jury also subsumed the right to a jury of 12. To depart from that requirement, it was thought necessary to amend the Florida Constitution, *see* Art. I. § 22 (providing for juries of six). By a parity of reasoning, it would be necessary to amend the state constitution to eliminate or modify the requirement of unanimous verdicts in criminal cases. No such amendment has ever been made or offered. Absent such an amendment, both the constitutional and the common law of this state are clear: a jury verdict in a criminal case must be unanimous.

It is true that our 19th-century forebears -- the framers of the Florida Constitution of 1838, say, or the justices who wrote the opinions in *Grant, supra,* in 1894, or *Patrick v. Young, supra,* in 1881 -- never bothered to explain that the right to trial by jury to which they referred meant, as a matter of simple tautology, the right to a unanimous verdict. It was precisely because it was tautologous that they felt no need to mention it; they would have thought it redundant to the point of silliness to have done so. For centuries, throughout the English-speaking world and certainly in America, trial by jury was universally and without exception understood to include and require a unanimous jury verdict. It was that centuries-old, universally-established right that 19th century Floridians ensconced in their constitutions and their jurisprudence. Art. I § 22 does not provide that, "The right of trial by jury shall be preserved to all and remain inviolate, *and by the way, when we say the right to 'trial by jury,' we include the right to a unanimous jury verdict*" for the same reason that Art. I § 3 does not provide that, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof, *and by the way, when we say 'religion' we include going to church, and praying, and worshiping God.*" A 21st-century Floridian seeking to argue that the right purported to be protected by Art. I § 22 does *not* include the requirement of a unanimous verdict must be prepared to rebut the unequivocal expression of the common law, the received

wisdom of 19th-century Florida lawyers and judges, a handful of reported Florida opinions, and a century-and-a-half of shared understanding. And he must be prepared to do so without any ammunition at all, for he will find no Florida cases, no Florida law-review articles, and no Florida history to support his position.

Some words admit of no modification. A decedent cannot be more or less dead. An expectant mother cannot be more or less pregnant. And a jury cannot be more or less unanimous. Every verdict in every criminal case in Florida requires the concurrence, not of some, not of most, but of all jurors – every single one of them.

* * *

That the requirement of jury unanimity was and is part of the common law of Florida; that the requirement of jury unanimity was and is part of the constitutional law of Florida; is not in doubt. Why this requirement should enjoy such a firmly-entrenched status in our jurisprudence was explained by a distinguished former justice of the Florida Supreme Court:

> [U]nlike majority rule, "[t]he unanimous verdict rule gives concrete expression to a different set of democratic aspirations – keyed to deliberation rather than voting and to consensus rather than division." Perhaps more important, a unanimous verdict provides symbolic importance. A unanimous jury verdict in a criminal trial "affixes a stamp of legitimacy to the outcome of the criminal process."
>
> The unanimity requirement also gives meaning to each juror's vote, thereby preventing a simple majority of the jury from ignoring an individual juror's voice when imposing a death sentence against a fellow citizen. Put another way, courts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups. Unanimous verdicts ensure that defendants are convicted on the merits and not merely on the whims of a majority.
>
> ... Unanimous verdicts are more likely to fulfill the jury's role as the

> voice of the community's conscience. When less than a unanimous jury is allowed to speak for the community, the likelihood increases that the jury will misrepresent community values.
>
> Perhaps most importantly, several scholars assert that unanimous juries tend to perform more thorough deliberations and therefore achieve the "correct" result more often than juries that render decisions by a majority. Empirical evidence suggests that majority-rule juries vote too soon and render verdicts too quickly. Specifically, majority-rule juries tend to adopt a verdict-driven deliberation style, in which jurors vote early and conduct discussions in an adversarial manner, rather than an evidence-driven style, in which jurors first discuss the evidence as one group and vote later.

Raoul G. Cantero and Robert M. Kline, Death is Different: The Need for Jury Unanimity in Death Penalty Cases, 22 St. Thomas L. Rev. 4, 31-32 (Fall 2009) (footnotes and internal citations omitted). Justice Cantero seems to identify two general categories of justifications for the unanimity requirement: those concerning the role and significance of the jury, and of the verdict, in our criminal-justice (and particularly our death-penalty) system; and those concerning the accuracy and integrity of the jury's fact-finding process.

Those concerning the role and significance of the jury and of the verdict

The centrality of the lay jury – a jury of the defendant's peers – to Anglo-American notions of criminal justice is the stuff of lore, legend, and literature. The jury is said to be the conscience of the community – not 12 separate consciences, but one collective conscience. The verdict is the jury's pronouncement – not 12 separate pronouncements, but one collective pronouncement. *Cf.* Fla. Std. Jury Instr. (Crim) 3.13 ("The verdict must be the verdict of each juror, as well as of the jury as a whole."). Because the verdict is unanimous it subsumes all disparate views, resolves all disparate doubts. A unanimous verdict bespeaks finality in a way that a mere majority verdict never can. A unanimous verdict commands respect and inspires confidence in a way that a mere majority verdict

never will.

> One of the key functions of the criminal justice system is to legitimize, in the eyes of the community, the state's use of its coercive powers. The jury gives legitimacy to an accused's imprisonment, even execution, because ordinary persons like ourselves give the verdict. But the jury's ability to maintain public confidence in the administration of justice is fragile. It depends in part on drawing the jury from the community at large so that all groups have a potential say in how justice is done. It depends also on public confidence that jury verdicts are just, accurate, and true. The strongest argument for retaining the unanimous verdict is that it is central to the legitimacy of jury verdicts.

Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 202-03 (Harvard Univ. Press 1994).[4] It is true that the requirement of unanimity empowers a single balky juror to frustrate the efforts of his fellow-jurors – and of the judge and lawyers – to bring the trial to a final conclusion. But this is no criticism of the unanimity requirement. On the contrary; it is entirely

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[4] *See also id.* at 200:

> [E]mpirical studies show[] that jurors returning nonunanimous verdicts felt far less certain of their conclusions than did their counterparts on unanimous verdict juries. ... [T]he holdouts left the trial feeling that the majority did not even listen to them seriously.
>
> ...
>
> These research findings suggest that the quality of jury deliberation is ... tied to the practice of unanimous verdicts ... . Moreover, because popular acceptance of the jury system is formulated, in part, by what former jurors say about it, jurors' satisfaction is not without its importance. All studies to date verify that juror satisfaction sours under nonunanimous verdict conditions. To this extent, the unanimous verdict rule must be seen as a core ingredient underwriting the jury's ability to legitimate justice in the eyes of the community.

(Quotations omitted.)

reflective of the proper role of the jurors, collectively and individually. In the words of a great English judge of the 19th century:

> If it be alleged that an obstinate juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape, from party or from personal bias, it must, on the other hand, be borne in mind, that this is a small price to pay for the perfect security which a jury affords to all men, even the humblest, against the ruin that power and its minions might bring upon them.

Henry, Lord Brougham, Works 127 (Adam & Charles eds.1873).

Those concerning the accuracy and integrity of the jury's fact-finding process

A majority or super-majority rule discourages a careful sifting of the evidence and of the arguments of counsel. "The dynamics of the jury process are such that often only one or two members express doubt as to views held by a majority at the outset of deliberations." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). Where unanimity is required, the majority or super-majority must win over those who doubt or dissent. In the process those in the majority must justify and defend their own analysis, both to their fellow jurors and to themselves. "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process." *Lopez*, 581 F.2d at 1341. Under a super-majority rule, arguments – however forcible, however logical – can be ignored entirely if ten members of the jury simply prefer to ignore them. Under a unanimity rule, no verdict can be returned till those arguments have been resolved and their proponents satisfied with the resolution.

Only hinted at in Justice Cantero's remarks *supra* is an uglier and more insidious feature of death-penalty verdicts reached by majority or super-majority. "The non-unanimous jury rule permits

prosecutors to allow unconstitutional racial disparity to slink back into jury selection. It enables them to put just enough minority jurors on a particular jury to avoid violations of the Supreme Court's rule in *Batson v. Kentucky*[,]" 476 U.S. 79 (1986), or its Florida congeners, *e.g.*, *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), "but not enough to prevent the possible conviction of the defendant by a juror or jurors who might – justifiably or not – be more skeptical of the state's evidence and witnesses or more willing to believe the defendant's story." Andrew Cohen, *Will the Supreme Court Address Louisiana's Flawed Jury System?* The Atlantic, April 23, 2014 p. *4. The customary disclaimer – that the overwhelming majority of Florida prosecutors are honorable lawyers who would never attempt to circumvent the limitations of the *State v. Neil*, 457 So.2d 481 (Fla. 1984)/*State v. Slappy*, 522 So.2d 18 (Fla. 1988)/*Melbourne v. State*, 679 So.2d 759 (Fla. 1996) line of cases by, for example, placing two, but not more than two, African-American jurors on an African-American defendant's jury, in confident reliance upon the ten other jurors to return a verdict of death – is entirely true, and entirely beside the point. There is support for the notion that the 19th-century adoption in Louisiana of non-unanimous jury verdicts – a sharp and stunning break with common law – was undertaken expressly to foster or facilitate these sorts of facinorous practices. The Atlantic article cited *supra* quotes Tulane University Professor Emeritus of History Lawrence Powell for that very proposition.[5] And Professor Abramson notes:

> The requirement of unanimity is indispensable to sending the right cue to jurors about what we expect of them. It surely contributes to an understanding among jurors that their function is to persuade, not to outvote, one another. When jurors behave in this way, they contribute knowledge to the ongoing discussion. And the jury

[5] At present, however, even Louisiana requires a unanimous death-penalty verdict. *See* LA Code Crim Pro 905.6 ("A sentence of death shall be imposed only upon a unanimous determination of the jury").

> distinctively achieves collective wisdom through deliberation, rather than collapsing into a body where jurors behave as if their function were to represent the preconceptions and interests of their own kind.

Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 195-96 (Harvard Univ. Press 1994).

It is in memory yet green that peremptory challenges could be, and were, used in Florida trials to eliminate potential jurors on the basis of race, ethnicity, or gender. In reliance on the Art. I §16(a) guarantee in the Florida Constitution of the right of an accused person to trial before an impartial jury, Florida courts have gone to lengths exceeding even those of their federal counterparts to eliminate such shameful practices. It would be ironic if the Art. I § 22 promise of trial by jury were to be so interpreted as to undermine and hobble the justice done by the now-prevailing interpretation of Art. I § 16(a). No; it would be worse, much worse, than merely ironic. If the important reforms made in the law of jury selection are not to be reduced to empty promises and tokenism, Florida courts must be mindful of the crucial role played by jury unanimity in assuring fair and impartial jury deliberations and decisions.

The argument is made that many of the very worst criminals, those criminals well deserving of the death penalty, were sentenced to death on jury votes of no more than ten to two; and that, had unanimity been required, these malefactors would have received less punishment than they surely deserved. The short answer to this argument is that it bears not at all upon the constitutional question posed by the motion at bar: if a statutory procedure is unconstitutional, it is not rendered constitutional by its consequences. But even on its own terms, this argument is no better than surmise. The juries that returned ten-to-two (or nine-to-three, or eight-to-four) verdicts in the cases upon which this argument is based were expressly instructed that they need not return unanimous

verdicts, and that in any event the final decision as to penalty was in the hands of the judge. Whether those same juries, had they been instructed that their verdicts must be true verdicts and not merely recommendations – had they, in other words, been instructed that their verdicts must be unanimous and would be dispositive of the issue of life or death – would have returned the same split decisions, can be no more than a matter of speculation.

* * *

Although the foregoing rationales for the unanimity requirement are all very telling, perhaps the requirement is simply one of the *grundnormen* of our law, so axiomatic as to call for no rationale. *See, e.g., American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897) ("Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition."). "[A]s mathematicians do not demonstrate axioms, neither do judges or lawyers always deem it necessary to prove propositions, the truth of which is universally admitted." Chief Justice John Marshall, *A Friend of the Constitution No. II*, Alexandria Gazette, July 1, 1819, in John Marshall's Defense of McCulloch v. Maryland 162 (G. Gunther ed. 1969).

A number of courts have concluded that the unanimity rule, the presumption of innocence, and the reasonable doubt principle are "as [three] vials of [one] sacred blood/Or [three] fair branches springing from one root." William Shakespeare, Richard II Act I, sc. 2. *See, e.g., Rice v. Maryland*, 532 A.2d 1357, 1366 n. 5 (Md. Ct. App. 1987) (citing *Scarborough v. United States*, 522 A.2d 869, 872 (D.C. 1987)). *See also United States v. Gipson*, 553 F.2d 453, 457 n. 7 (5th Cir. 1977) (unanimity rule "helps effectuate the reasonable doubt standard"). "The rule that the jury of twelve must be unanimous in order to return a verdict helps to ensure that the case is proved beyond reasonable doubt." Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial

p. 248 (Stevens & Sons Ltd. 1955).

These three axioms of our law – the unanimity rule, the presumption of innocence, and the requirement of proof beyond reasonable doubt – are joined, not only in their origin and their development, but also in their purpose. They reflect the common law's admirable epistemological modesty – a recognition that a criminal justice system designed and operated by imperfect human beings can never be better than imperfect, and that we ought to act with restraint and discretion when we act upon the imperfect conclusions of that system. We will take no Floridian's liberty upon a less-than-unanimous verdict,[6] although the liberty taken today can be restored tomorrow. We dare take no Floridian's life upon a less-than-unanimous verdict. The life taken today can never be restored.

Perhaps nothing in all four volumes of Blackstone's oft-cited Commentaries is as well-remembered as the so-called "Blackstone ratio": "[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." William Blackstone, 4 Commentaries on the Laws of England 352 (Univ. of Chicago Press 1979) (1765). This principle is routinely traced to Genesis 18:20-32, in which God proposes to destroy the people of Sodom and Gomorrah for their wickedness, but concedes that if as few as ten righteous men are found in the cities, He will spare

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[6] A Floridian charged with the offense of building a bonfire, Fla. Stat. § 823.02 – a second-degree misdemeanor punishable by not more than 60 days in the county jail, Fla. Stat. §775.082(4)(b) – cannot be convicted except upon the unanimous verdict of a jury of his peers. A Floridian charged with "unlawful possession of a fifth wheel," Fla. Stat. § 812.0147; or with "dispos[ing] of the carcass of any domestic animal by dumping such carcass on any public road ... or in any place where such carcass can be devoured by beast or bird," Fla. Stat. § 823.041(2); or with "abandon[ing] or discard[ing] ... any icebox, refrigerator ... clothes washer [or] clothes dryer," Fla. Stat. § 823.09 – all second-degree misdemeanors, all punishable by not more than 60 days in the county jail – cannot be convicted except upon the unanimous verdict of a jury of his peers.

the cities for the sake of the ten. Thus the antecedents of the interlaced principles of juror unanimity, the presumption of innocence, and proof beyond reasonable doubt are ancient and honorable.

These hallowed and inseparable principles are preached with ease and practiced with difficulty. Capital murder is the most horrible of crimes. It evokes our rage and our desire for righteous vengeance. But our commitment to the principle that no Floridian shall be sentenced to the maximum penalty provided by law unless his guilt is made manifest beyond reasonable doubt to a unanimous jury of his peers is not to be measured in cases involving charges of dumping a dead cat by the side of a dirt road, Fla. Stat. § 823.041(2), or in cases involving charges of abandoning a used washing machine, Fla. Stat. § 823.09. It is to be measured in cases involving the most horrible of crimes. It is to be measured in cases that most evoke our rage and our desire for vengeance.

I am well aware that, subject to constitutional limitations – always subject to constitutional limitations – the legislature is free to enact its will as law. I am well aware, too, that, stripped of all historical and conceptual context, the notion that the assent of ten jurors rather than twelve should be sufficient to support a verdict and sentence seems inoffensive. Arithmetically the difference between twelve and ten is slight; so, for that matter, is the difference between twelve and nine, or twelve and eight. But the question before me is not a question of arithmetic. It is a question of constitutional law. It is a question of justice.

Alone in a wilderness, the prophet Elijah stood on a barren hilltop.

> [A]nd a great and strong wind rent the mountains, and broke in pieces the rocks before the Lord; but the Lord was not in the wind. And after the wind an earthquake; but the Lord was not in the earthquake.
>
> And after the earthquake a fire; but the Lord was not in the fire.
>
> And after the fire, a still small voice.

I Kings 19:11-12.

For us as Floridians and Americans – for each and all of us – the voice of the jurors – *each* and *all* of the jurors – is the still small voice of justice.

Conclusion

Defendant's motion to declare Florida Statute § 921.141 unconstitutional is respectfully GRANTED.

SO ORDERED in chambers in Miami, Miami-Dade County, Florida, this 9th day of May, 2016.

MILTON HIRSCH
CIRCUIT COURT JUDGE

Copies to:
All counsel of record