IN THE SUPREME COURT OF FLORIDA
Case No. SC15-1441

LEONARDO FRANQUI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
398 E. Dania Beach Blvd. #300
Dania Beach, FL 33004
Tel: 754-263-2349
Fax: 754-263-4147

PRELIMINARY STATEMENT

This Supplemental Brief is being filed in accordance with the Court's Order for supplemental briefing by the parties to address the application of *Hurst v. Florida*, 136 S.Ct. 616 (2016), to Mr. Franqui's case. The following symbols will be used to designate references to the record in this appeal:

" V. R." – volume and page number of record on direct appeal to this Court;

"V. PCR." – volume and page number of record on appeal to this Court following the rule 3.851 motion;

All other references will be self-explanatory.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Following the joint penalty phase in Mr. Franqui's case,[1] the jury recommended a sentence of death by a vote of 9-3 for the murder of Raul Lopez. Prior to deliberating at the penalty phase, the jury was instructed by the trial judge that it was its "duty to *advise* the court as to what punishment should be imposed" on Mr. Franqui and the judge reminded the jury that "the final decision as to what punishment shall be imposed is the responsibility of the judge" (Vol. 27, T3474). The jury was also instructed that had a "duty to follow the law" and "render to the court an *advisory* sentence based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" (Vol. 27, T 3474-75). The jury was repeatedly reminded that its role was merely advisory and that it was merely returning a recommendation (*Id*. at 3475, 3477, 3478, 3479, 3480, 3481, 3482, 3485).

A generous reading of the record indicates that the jurors "deliberated" for less then 90 minutes before arriving at their non-unanimous 9-3 "recommendation" to the court. The jury retired to deliberate at 5:47 PM (Vol. 27, T3485). Eight minutes later the jury returned with a question requesting to review a great deal of

[1] Mr. Franqui was tried jointly (at both the guilt and penalty phase) with co-defendant Pablo San Martin.

evidence including Mr. Franqui's testimony, police reports from the officer that interviewd San Martin, all mental health reports and depositions, all school reports, the weapon, and pictures of the Blazer with the locations of the bullets and/or casings (*Id*. at 3485-86). The note was accompanied by a request for coffee "and happy face" (*Id*.). After considerable argument between the parties as to how to answer the question, the jury was brought back into the courtroom (*Id.* at 3491), and the court explained what it was able to provide the jurors in response to their request; thereafter, at 6:10 PM the jury went again to deliberate (*Id*. at 3492). The requested documents were then given to the jurors, and a second question was then delivered to the court; this time the jurors wanted to know if they would be receiving letters that they had been serving on a jury for the last three days (*Id*. at 3493). The court provided a written response in the affirmative and sent it back to the jurors (*Id*.). At 6:45 PM, the jurors returned with another question, this time asking if the sentences "run consecutive or currently" (*Id*.). The defense argued that the jurors should be told that the sentences run consecutively because "[a]pparently they have decided that this is an important factor and we have always wanted to argue this as a mitigating circumstance and that it is obvious that this jury believes that this is important to them" (*Id*. at 3493-94). The state argued that the jurors should be told that they should not concern themselves with any possible sentence because that "is solely [the judge's] function" (*Id*. at 3494). After further

considerable argument, the judge answered the jury's question by informing it that "You should not concern yourself with the possible sentences on counts 2 thourhgh7. As concerns those counts, sentencing is exclusively my function" (*Id*. at 3500). At 7:15 PM, the jury returned with its recommendation of 9-3 for the death penalty as to both Mr. Franqui and Pablo San Martin (*Id*.).

The trial court followed the jury's recommendation and imposed a death sentence on Mr. Franqui with respect to the first-degree murder conviction. According to the Court's direct appeal opinion, the trial court found four aggravating circumstances: prior violent felony convictions, *see* Fla. Stat. 921.141(5)(b) (1995); that the murder was committed during the course of an attempted robbery, Fla. Stat. 921.141(5)(d) (1995); that the murder was committed for pecuniary gain, Fla. Stat. 921.141(5)(f); and that the murder was committed in a cold, calculated, and premeditated manner. Fla. Stat. 921.141(5)(i). *See Franqui v. State*, 699 So. 2d 1312, 1316 (Fla. 1997). However, in actuality, the court found ***three*** aggravating circumstances because it merged the "during the course of an attempted robbery" circumstance with the "pecuniary gain" circumstance (Vol. 27, T2563) ("The court recognizes that this aggravator merges with the aggravator which addresses the fact that the capital felony was committed during the course of an attempted robbery. Accordingly these two aggravators will be considered as one").

This Court also found that significant error occurred at Mr. Franqui's trial and penalty phase. First, on direct appeal, the Court found that the admission of co-defendant San Martin's initial confession as evidence against Mr. Franqui was error "because it contained statements which were incriminating as to Franqui." *Franqui*, 699 So.2d at 1320. However, the Court found the error harmless "as it relates to Franqui's conviction of first-degree felony murder." *Id*. at 1322. Second, the Court determined that Mr. Franqui's two convictions for attempted first-degree murder were required to be vacated under *State v. Gray*, 654 So.2d 552 (Fla. 1995). *Franqui,* 699 So.2d at 1323. In terms of the effect of these reversals on the penalty phase, the Court found, however, that the error was harmless "because the trial court also found that Franqui has been previously convicted or the crimes of aggravated assault and attempted armed robbery in one case and armed robbery and armed kidnapping in another." *Id*. at 1328.

The Court also found that error had occurred at Mr. Franqui's penalty phase in its opinion on his first Rule 3.851 motion. For example, the Court determined that the prosecutor had improperly argued that the jury had the "lawful legal duty" to recommend the death penalty; however, it found the legal issue procedurally barred because it was not raised on direct appeal. *Franqui v. State*, 59 So.3d 82, 96 n.14 (Fla. 2011). The Court also noted that some of the prosecutor's arguments at the penalty phase closing arguments were "unnecessarily inflammatory" but that

the outcome of the penalty phase was not undermined by counsel's failure to object. *Id*. at 98. The Court also determined that the prosecutor made improper arguments that were "an attempt to impugn the integrity and credibility of defense counsel" and that denigrated the mental mitigation offered by Mr. Franqui. *Id*. However, the Court concluded that no prejudice had been established because the State had presented "extensive evidence" of aggravation. *Id*.

SUMMARY OF THE ARGUMENT

The death sentence in Mr. Franqui's case, resulting from the 9-3 jury recommendation, unquestionably violates the Sixth Amendment, as *Hurst v. Florida* has made clear. The jury never made the requisite findings necessary to render Mr. Franqui eligible for the death penalty nor did it make any findings of each fact necessary to sentence him to death. *Hurst* is a decision warranting retroactive application and because the error is not amenable to harmless-error analysis, Mr. Franqui is entitled to relief in the form of a life sentence or a resentencing proceeding that comports with the Sixth Amendment.

ARGUMENTS AND AUTHORITIES

I. Introduction.

The 8-1 decision in *Hurst v. Florida,* 136 S.Ct. 616 (2016), establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong and can only be described as a development of fundamental significance

and jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005) (Lewis, J., concurring in result only) (describing his initial impression of *Apprendi* and *Ring* as being that they "implicate constitutional interests of the highest order and seem[] to go to the very heart of the Sixth Amendment."). *Hurst* establishes that Florida's capital sentencing scheme at the time of Mr. Franqui's trial was unconstitutional under the Sixth Amendment and that he should be sentenced to life imprisonment. At a minimum, he is entitled to relief in the form of a resentencing that comports with the Sixth and Eighth Amendments. In light of the foregoing arguments and authorities, Mr. Franqui submits that he must be given the benefit of *Hurst* and be resentenced to life imprisonment under the mandatory language of §775.082(2), Fla. Stat. (2015).

II. The *Hurst* Decision.

In *Hurst,* the Supreme held that Florida's capital sentencing statute is unconstitutional: "We hold this sentencing scheme unconstitutional." *Hurst,* 136 S.Ct. at 619. Specifically, the Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact* necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id*. (emphasis added). The *Hurst* Court identified what those critical fact-findings are, leaving no doubt as to how Florida's capital sentencing statute must be read:

> The State fails to appreciate the central and singular role the judge plays under Florida law. 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). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted).

Under Florida's statute, death eligibility is dependent upon the presence of certain statutorily-defined facts *in addition to* the verdict unanimously finding the defendant guilty of first-degree murder. In unmistakably clear language, *Hurst* explained that the requisite additional statutorily-defined facts required to render the defendant death eligible are that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 S.Ct. at 622. *Hurst* identified these findings (set forth in the statute itself) as the operable findings that must be made by a jury. Neither of these factual determinations was made by Mr. Franqui's jury.

Hurst's holding is girded on the principle that findings of fact statutorily required to render a Florida defendant death eligible are elements of the offense, separating first-degree murder from capital murder under Florida law, and thereby forming part of the definition of the crime of capital murder in Florida. *See*

Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); *Jones v. United States*, 526 U.S. 227 (1999). In *Ring v. Arizona,* 536 U.S. 584 (2002), the Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found it violated the Sixth Amendment.[2] The Supreme Court in *Hurst* found that this Court's consideration in *Bottoson v. Moore,* 833 So.2d 693 (Fla.), *cert. denied,* 537 U.S. 1070 (2002), of the potential impact of *Ring* on Florida's capital sentencing scheme had wrongly failed to recognize that the decisions in *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida,* 490 U.S. 638 (1989), which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*, as the *Hurst* Court determined. *Hurst*, 136 S.Ct. at 623 (emphasis added).

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[2] In Arizona, the factual determination required by Arizona law before a death sentence was authorized was the presence of at least *one* aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination that **"sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3) (emphasis added).

Mr. Franqui's jury was repeatedly told that its role in determining the sentence to be imposed was merely advisory and that it was only required to provide the court with an "advisory opinion" or "recommendation." The jury made no findings as to the eligibility facts necessary to make Mr. Franqui death eligible and the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *See Caldwell v. Mississippi,* 472 U.S. 320(1985). Mr. Franqui's death sentence unquestionably violates the Sixth and Eighth Amendments.

III. *Hurst* Applies to Mr. Franqui.

Hurst is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So.2d 922, 931 (Fla. 1980), and fairness dictates that *Hurst* be given retroactive effect in this case. *See Falcon v. State*, 162 So.3d 954, 962 (Fla. 2015). *See also James v. State*, 615 So.2d 668 (Fla. 1993). Only a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval" will qualify under *Witt*, *see Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citation omitted), and *Hurst*, perhaps more so than virtually any other case decided since *Furman v. Georgia*, 408 U.S. 238 (1972), satisfies this standard. On the basis of *Furman*, this Court ordered life sentences imposed on all capital defendants who had been under a sentence of

death. *Anderson v. State*, 267 So. 2d 8, 9-10 (Fla. 1972).[3] There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with undeniably unconstitutional executions. Under §775.082(2), Fla. Stat., a life sentence *must* be imposed on Mr. Franqui, as this Court has no discretion to do otherwise. *Anderson*, 267 So.2d at 9 (finding that §775.082(2) requires "an automatic sentence and a reduction from the sentence previously imposed," because "[t]he Court has no discretion").

However, if §775.082(2) is not applied here when the capital sentencing scheme has been held to be unconstitutional and a retroactivity analysis is deemed necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst*, unlike *Furman*, states unequivocally that "[w]e hold [Florida's] sentencing scheme unconstitutional." *Hurst v. Florida*, 136 S.Ct. at 619. *Hurst*, unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman*, did not fragment the United States Supreme Court at all. On the contrary, *Hurst* was an 8-1, resoundingly unified pronouncement from the Supreme Court that Florida's sentencing of capital defendants has long been unconstitutional. In

[3] In *Anderson*, this Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of *Furman v. Georgia*, . . . the death sentence imposed in these cases is illegal.").

Florida, *Hurst* is just as much a sweeping jurisprudential upheaval of fundamental significance as was *Furman*. In Florida, *Hurst*, just as *Furman* was, must be retroactively applied.

In other scenarios, when less-momentous decisions have been handed down by the Supreme Court, this Court has applied those decisions retroactively. For example, after the decision was handed down in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this Court, applying *Witt*, ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So.2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987). This Court also recognized that it had been previously misapplying *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)).

The upheaval caused by the *Lockett/Hitchcock* scenario is less momentous than the ramifications of the *Apprendi/Ring/Hurst* scenario. In *Lockett/Hitchcock*, at no time was there a determination that Florida's capital sentencing scheme was unconstitutional. In *Lockett/Hitchcock*, no Supreme Court decision upholding

Florida's capital sentencing scheme was declared overruled by the Supreme Court, and no legislative fix was required. This Court's determination that *Hitchcock* warranted retroactive application means that under *Witt* the substantially greater upheaval in Florida law created by *Hurst* certainly must be applied retroactively. Moreover, the error identified in *Hurst* is structural and not amendable to any harmless-error analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991); Amicus Brief of the CHU, filed in *Lambrix v. Jones*, No. SC16-56 (arguing that *Hurst* error is structural because it "infect[s] the entire trial process"). *See also Riley v. Wainwright,* 517 So.2d 656, 659 (Fla. 1988) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure").

This Court recently reaffirmed the continuing validity of the *Witt* test to determine whether new decisions of the United States Supreme Court that are favorable to criminal defendants are to be applied to cases on collateral review in Florida's state courts. *Falcon*, 162 So. 3d at 954. This Court applies decisions retroactively provided that they (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* at 960.

This Court's *Witt* test is distinct from, and not impacted by, the federal

retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 307 (1989). *See Falcon*, 162 So. 3d at 955-56 (recognizing that determining retroactivity under *Witt* and *Teague* requires separate inquiries); *see also Witt*, 387 So. 2d at 928 ("We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which 'changes of law' will be cognizable under this state's post-conviction relief machinery."). After all, the federal retroactivity test was designed with "[c]omity interests and respect for state autonomy" in mind. *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004). The federal test was never intended to prohibit a state from granting broader retrospective relief when reviewing its own state convictions. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). States may grant more expansive retroactive effect to new rules than is required by federal law, *id.* at 277, 282, and Florida traditionally has done so. The critical question, therefore, is whether *Hurst* meets Florida's *Witt* test.

Hurst satisfies the first two *Witt* retroactivity factors because (1) it is a decision of the United States Supreme Court, and (2) its holding—that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-findings that subject a defendant to a death sentence. *See Witt*, 387 So. 2d at 931; *Falcon*, 162 So. 2d at 960. The determinative question

therefore is whether the third factor is established, i.e., whether *Hurst* "constitutes a development of fundamental significance." *See Witt*, 387 So. 2d at 931.

In determining whether a Supreme Court decision "constitutes a development of fundamental significance," this Court has explained that, "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories." *Witt*, 387 So. 3d at 929. The first category of fundamentally significant decisions includes "those changes in law 'which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties.'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929). The second category includes "'those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965).'" *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted). "The three-fold analysis under *Stovall* and *Linkletter* includes an analysis of '(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.* (quoting *Witt*, 387 So. 2d at 926). While *Stovall* and *Linkletter* pre-date the comity-based *Teague*

retroactivity test now used by federal courts, this Court has indicated as recently as 2015 that Florida approves the *Stovall* and *Linkletter* factors, and that it is these factors that guide its analysis under *Witt* of whether a new Supreme Court rule "constitutes a development of fundamental significance." *See Falcon*, 162 So. 3d at 961. This is appropriate given Florida's right to give retroactive effect to a broader range of new Supreme Court rules than would be mandated for federal courts under the comity-based *Teague* approach.

Hurst is well-within the second category of fundamentally significant decisions described in *Witt*. With respect to the first *Stovall* and *Linkletter* consideration, the primary purpose of *Hurst* is to protect capital defendants' inaliable Sixth Amendment right to have any fact that exposes them to a death sentence, a punishment which is not authorized by their conviction alone, be found by a jury. As to the second *Stovall* and *Linkletter* consideration, although Florida relied on the now-invalidated capital sentencing scheme in penalty phase proceedings, the number of affected cases is finite, easily determinable, and certainly *as manageable, if not more manageable, than the cases at issue in Falcon.*

The first two *Stovall* and *Linkletter* considerations indicate that *Hurst*'s "purpose would be advanced by making the rule retroactive," *Linkletter*, 381 U.S. at 637, by ensuring that all capital defendants' Sixth Amendment rights are

protected, regardless of whether their sentences became final after *Hurst*'s publication. In that respect, *Hurst* is different from *Linkletter* itself, where the issue was whether the purpose of the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961)—deterring police from committing Fourth Amendment violations—would be advanced if applied retroactively. *Id.* at 636-37. The *Linkletter* Court held that *Mapp*'s purpose would not be advanced by retroactive application because the police could no longer be deterred from activity that had already occurred, and judicial chaos would result from "the wholesale release of guilty victims." *Id.* at 637.

In contrast, retroactive application of *Hurst* would not be futile or produce undesirable results. *Hurst*'s purpose is to ensure that death sentences are reached as the result of a constitutional proceeding, a purpose that would be advanced by extending the protection to all capital prisoners. And unlike retroactive application of the exclusionary rule, applying *Hurst*'s Sixth Amendment imperative is in accord with the core idea that "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

With respect to the remaining *Stovall* and *Linkletter* consideration, retroactive application of *Hurst* would not have any injurious effect on the

administration of justice, but rather would promote "the integrity of the judicial process." *Id.* In *Linkletter*, the Court found that retroactive application of *Mapp* would "tax the administration of justice to the utmost" because it would require applying the exclusionary rule to innumerable cases and pieces of evidence. Here, by contrast, the retroactive application of *Hurst* would be finite in scope, limited to a specific number of current Florida death row inmates. The most that would be required would be a new sentencing placing the authority in the jury's hands to find the elements necessary for the court to decide whether to impose a sentence of death. The convictions of those inmates are not affected at all.

This Court has recognized in the retroactivity context that "[c]onsiderations of fairness and uniformity make it very 'difficult to justifying depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929). Retroactive application of *Hurst* is the only just result.

This Court has determined that decisions similar to *Hurst* have constituted "development[s] of fundamental significance" that warranted retroactive application under the *Witt* test. *Hurst* is a Sixth Amendment decision. In *Witt* itself, this Court recognized the retroactivity of the Sixth Amendment ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which first announced that each state must provide counsel to every indigent defendant charged with a felony at all

critical stages of the proceeding. *See Witt*, 387 So. 2d at 927. This Court's retroactive application of *Gideon* asked whether an individual had a lawyer during a criminal proceeding. Surely as significant, *Hurst* asks *who* made the critical factual findings authorizing a death sentence. The question of who decides whether a death sentence can be imposed—whether a judge, in contravention of the Sixth Amendment, or a jury, in comportment with the Sixth Amendment—is fundamentally significant within the meaning of *Witt*.

Hurst is also a death penalty decision. This Court found retroactive the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that in death penalty cases, trial courts are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *Hitchcock* followed the Supreme Court's prior decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), which held that the Eighth Amendment prohibits the sentencer from refusing to consider or being precluded from considering any relevant mitigating evidence. Before *Hitchcock*, this Court interpreted *Lockett* to require that a capital defendant merely have had the opportunity to present any mitigation evidence, not to require an instruction that the jury must consider non-statutory mitigation. *See, e.g.*, *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). Shortly after the Supreme Court issued *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was

entitled to benefit from *Hitchcock* retroactively because his jury did not receive a proper instruction. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a fundamental change in the law that must be retroactively applied. *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court thereafter continued to apply *Hitchcock* retroactively. *See, e.g.*, *Hall*, 941 So. at 1125; *Meeks*, 576 So. 2d at 713. Surely as significant is *Hurst*, which deals with who makes the findings determinative of death eligibility: jury or judge.

In sum, under the *Witt* test, *Hurst* is no less fundamentally significant than *Hitchcock*, which addressed a jury instruction on the scope of mitigating evidence that could be considered during a penalty phase. *Hurst* is also no less fundamentally significant than *Espinosa*, which concerned a limiting instruction required for the consideration of one statutory aggravator. Indeed, *Hurst*'s reach is much broader than either *Hitchcock*'s or *Espinosa*'s. *Hurst* changes the nature of the penalty proceeding by shifting the authority to the jury to engage in fact-finding as to death eligibility. Not only does such a fundamental shift implicate the differences between judge and jury decision-making, but it also impacts the strategy and manner by which capital defense lawyers approach the penalty phase. Prior to *Hurst*, the focus of the penalty proceeding was on the scope and presentation of mitigating evidence to the jury. Under *Hurst*, the focus shifts towards combating aggravation.

This Court's decision in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), is also not a barrier to this Court's *Witt* analysis of *Hurst*. *Johnson* is no longer good law.

In *Johnson*, the Court considered the retroactivity of *Ring* in circumstances entirely different from those presented by *Hurst*. The *Johnson* Court ruled that *Ring*-—which arose from a challenge to Arizona's death penalty statute—was not retroactive under Florida law because *Ring* had no applicability to Florida's capital sentencing scheme. *Johnson*, 904 So. 2d at 406. However, contrary to *Johnson*, the Supreme Court not only made clear in *Hurst* that *Ring*'s holding was applicable to Florida's capital sentencing scheme, but also directly addressed the underlying ideas that led to *Johnson* and ruled that they were violative of the Sixth Amendment.

In light of *Hurst*, the retroactivity perspective of *Johnson* no longer carries any weight, not only because *Johnson* espoused a view of *Ring* that has now been repudiated by the Supreme Court, but also because there is no longer any need to analogize the law at issue in *Ring* to Florida's law; *Hurst* addressed Florida's law directly. Moreover, *Johnson* cited this Court's previous decisions in *Bottoson* and *King* for the proposition that Florida's capital sentencing scheme had been approved by the Supreme Court despite *Ring*. *Bottoson* and *King* relied on the Supreme Court's decisions in *Hildwin* and *Spaziano*. *Hurst* **explicitly overruled** *Hildwin* and *Spaziano*, leaving *Johnson* no remaining legs to stand on. *See Hurst*,

136 S.Ct. at 623-24 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . .").

IV. *Hurst* Error Not Amenable to Harmless Error Review.

The *Hurst* Court declined to reach the State's argument that the Sixth Amendment error arising from the jury's diminished fact-finding role at the penalty phase was harmless. *Hurst*, 136 S.Ct. at 624 ("[W]e do not reach the State's assertion that any error was harmless."). The Supreme Court observed that it "normally leaves it to state courts to consider whether an error is harmless." *Id.* (citing *Neder v. United States*, 527 U.S. 1, 25 (1999) (explaining that it is ordinarily left to lower courts to pass on harmlessness in the first instance). This Court is therefore the appropriate forum to resolve whether *Hurst* claims are subject to harmless error review and, if so, the standards by which such analysis should be conducted.

Hurst claims are not subject to harmless error analysis at all because they present claims of "structural" error that defy specific harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing between "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and trial errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented."). In determining whether *Hurst* errors are structural or instead

subject to harmless error review, this Court must decide whether the Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role at the penalty phase—represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Measured against that standard, *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" or whether the elements necessary for a death sentence exist. *See Neder*, 527 U.S. 1 at 8.

The structural nature of *Hurst* claims is further underscored by what Justice Scalia, writing for the Court, called the "illogic of harmless-error review" in the context of the Sixth Amendment constitutional error at issue in *Hurst*. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Because *Hurst* made clear that Florida's statute did not allow for a jury verdict on the necessary elements for a death sentence that was compatible with the Sixth Amendment, "the entire premise of [harmless error] review is simply absent." *Id.* at 280. Harmless error analysis would require this Court to determine in the first instance "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would surely have been rendered, but whether the [death sentence]

actually rendered in [original] trial was surely unattributable to the error." *Id.* There being no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the *Hurst* error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of the aggravating circumstances] beyond a reasonable doubt—not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The 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. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* at 280.

The serious issues raised by the question of whether *Hurst* claims are subject to harmless error analysis at all underscores the practical problems the Court confronts at this juncture. A determination of whether an individual petitioner would have been sentenced to death, notwithstanding the Sixth Amendment infirmity baked into Florida's capital sentencing scheme that *Hurst* invalidated, would require courts to hypothesize whether—in an imaginary proceeding consistent with the *Hurst* and the Sixth Amendment—the jury (told that its function was to make fact findings and not merely render an advisory verdict by

way of a straw poll) would have nonetheless found sufficient aggravating circumstances for a death sentence. The jury having never made findings as to aggravating circumstances, there is no way to determine whether it would *still* have made those findings absent the Sixth Amendment error. This is particularly true in Mr. Franqui's case, where the jury returned a mere recommendation by 9-3 vote.

A further practical problem for harmless error analysis in *Hurst* cases is that penalty phase presentations do not occur in a vacuum. In a hypothetical proceeding where the jury's Sixth Amendment fact-finding role is respected as paramount, defense counsel's entire approach to the presentation of evidence will be different, given the inherent differences between judges and juries as fact-finders. *See Summerlin*, 542 U.S. at 356 (recognizing the differences between judge and jury fact finding). Appellate courts are ill-equipped to determine how much if any impact the relative fact-finding roles of the judge and jury impacted defense counsel's presentation of the penalty case. As this Court has recognized in the context of *Hitchcock* retroactivity, such determinations should be made in trial courts following evidentiary hearings. *See, e.g.*, *Meeks*, 576 So. 2d at 716; *Hall*, 541 So.2d at 1125. The filing of a new 3.851 motion might be the appropriate way to assess any "harm" resulting from the *Hurst* error that occurred in his case should the Court determine that the error is even subject to harmless-error analysis.

V. *Hurst*'s Impact on Mr. Franqui's Intellectual Disability Claim.

While the United States Supreme Court did not specifically address Hurst's intellectual disability claim and whether he was entitled to a jury's determination of his intellectual disability, the logic of the *Hurst* decision would suggest the Sixth Amendment right must attach to an intellectual disability claim.

The Court in *Hurst* ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id*. Section 921.137(2), Fla. Stat., provides: "A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled." Thus under Florida statutory law, a defendant convicted of first-degree murder who is intellectually disabled is not eligible to receive a death sentence.

The logic of *Hurst* means that the Sixth Amendment right to a jury attaches to the intellectual disability determination. Mr. Franqui is not eligible for a death sentence if he is intellectually disabled under § 921.137(2). Thus once there is evidence raising a question of fact as to a defendant's intellectual disability, there must be a factual finding that the defendant is not intellectually disabled. Such a fact finding under the Sixth Amendment is for a jury to make. *Hurst v. Florida.*

CONCLUSION

Based on the foregoing arguments and in light of *Hurst v. Florida*, Mr. Franqui submits that the Court should vacate his unconstitutional sentences of death.

Respectfully submitted,

/s/Todd G. Scher
TODD G. SCHER
Florida Bar No. 899641
Law Office of Todd G. Scher, P.L.
398 E. Dania Beach Blvd. #300
Dania Beach, FL 33004
Tel: 754-263-2349
Fax: 754-263-4147

CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 1st day of April, 2016, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

/s/ Todd G. Scher
TODD G. SCHER
Assistant CCRC-South