IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC15-1630

LEONARDO FRANQUI,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

INTRODUCTION

On November 23, 2015, Franqui filed his Initial Brief in his pending appeal from the denial of his Rule 3.851 motion. The issues raised arose from the circuit court's summary denial of his claim based on Hall v. Florida, 134 S.Ct. 1986 (2014). The State's Answer Brief was filed on December 14, 2015. Before Franqui's Reply Brief was written and filed, the United States Supreme Court issued Hurst v. Florida, 136 S.Ct. 616 (2015) on January 12, 2016. In the opinion, the Supreme Court wrote: "We hold this sentencing scheme unconstitutional." Hurst, 136 S.Ct. at 619. Subsequently, Franqui's Reply Brief was filed with this Court on February 25, 2016. It continued to address the circuit's summary denial of Franqui's claim premised upon Hall.

On March 18, 2016, Franqui filed a motion in this Court seeking an opportunity to raise and brief the impact of Hurst on the constitutionality of his death sentence in above-entitled appeal. Franqui acknowledged in his motion that in the Rule 3.851 motion that is the subject of this appeal, he had not raised a claim based upon Hurst because his Rule 3.851 motion was filed in May of 2015, long before the decision in Hurst was rendered.

Later on March 18, 2016, this Court granted Franqui's motion and ordered the submission of supplemental briefs addressing the impact of Hurst on his death sentence.

BRIEF RECITATION OF THE RELEVANT FACTS

In 1992, Franqui, and his 4 co-defendants, were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a

firearm while engaged in a criminal offense, third degree grand theft and burglary (R. 1-5). In May of 1994, Franqui was tried jointly with 2 of his co-defendants, Gonzalez and San Martin (R. 24). Franqui was convicted of all charges (T. 2324-25). The jury recommended a death sentence by a vote of 9-3; obviously three jurors voted in favor of a life sentence for Franqui. Thereafter, the sentencing judge imposed a death sentence for the first degree murder conviction (R. 480, 588-601).

On direct appeal, this Court found that the introduction of a co-defendant's statement was error. Franqui v. State, 699 So. 2d 1332, 1335-36 (Fla. 1997). A majority of this Court concluded that this error was harmless as to the guilt phase of the trial. However, the error was not found harmless as to the penalty phase. The death sentence was vacated and Franqui's case was remanded for a new sentencing proceeding before a newly impaneled jury. Id. at 1336.

The new penalty phase was held in August, 1998 (R2. 1). At the 1998 resentencing, the State presented Franqui's conviction of first degree murder in a separate homicide case from Hialeah as establishing that Franqui had been previously convicted of a crime of violence. In the course of the 1998 proceedings, the presiding judge instructed the jury: "If you believe that the aggravating factors outweigh the mitigating factors, then the law requires that you recommend a sentence of death." (T. 17). Over Franqui's objection, the judge and the prosecutor repeatedly told the jury that it was required to recommend a death sentence if the aggravators outweighed the mitigators (T. 31, 39, 42, 301,

367, 380, 387, 484).

As the presiding judge later found, during the resentencing proceedings, "The evidence [wa]s uncontroverted that Franqui did not fire the fatal bullet. This fact, then, has been reasonably established." (R. 170). While the jury was given an instruction regarding Edmund/Tison, the culpability determination was not submitted to the jury for fact finding in a special verdict. It is unknown whether the jury unanimously found Franqui eligible for a death sentence under Edmund/Tison. Otherwise, the jury was given the standard jury instructions regarding the need to find sufficient aggravating circumstances which outweighed the mitigating circumstances.[1]

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[1]Justice Wells, in his opinion concurring in result only in the subsequent direct appeal affirmance of Franqui's death sentence, wrote:

> **Section 921.141, Florida Statutes, sets out the jury's role, and we should follow the statute.** That statute states:
>
> > (2) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> >
> > (a) **Whether sufficient aggravating circumstances exist** as enumerated in subsection (5);
> >
> > (b) **Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist**; and
> >
> > (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> This is what the jury should be instructed to do, and

After the case was submitted to the jury, it returned a 10-2 death recommendation (R2. 155). The judge followed the recommendation and imposed a sentence of death (R2. 158-75). In his findings, the judge found three aggravating circumstances:

> (1) Franqui had a prior conviction for a capital or violent felony (great weight); (2) the murder was committed during the course of a robbery and for pecuniary gain, merged (great weight); and (3) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer, merged (great weight).

Franqui v. State, 804 So. 2d 1185, 1191 n. 2 (Fla. 2002). The judge found no statutory mitigating circumstances, while he found four nonstatutory mitigating circumstances were present:

> (1) Franqui's relationship with his children (little weight); (2) cooperation with authorities (little weight); (3) life sentences imposed on codefendants San Martin and Abreu (little weight); and (4) self-improvement and faith while in custody (some weight). The trial court rejected Franqui's family history and the fact that he did not fire the fatal bullet as nonstatutory mitigating circumstances.

Id. at 1191 n. 4.[2]

In Franqui's second direct appeal, this Court affirmed the imposition of a death sentence. This Court did find that the trial judge erred when he "comment[ed] that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated

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> it is covered by the Standard Jury Instructions.

Franqui v. State, 804 So. 2d at 1199 (emphasis added).

[2]Though the judge found as a matter of fact that Franqui did not fire the fatal bullet, he concluded that the established fact was not a mitigating circumstance.

the law." Franqui v. State, 804 So. 2d at 1193.[3] However over the objection of three dissenters, a majority of this Court concluded that "Franqui was not prejudiced by this error." Id.[4]

As to the Enmund/Tison culpability determination, this Court concluded that the requisite factual determination for the imposition of a death sentence had been made by the sentencing judge: "the trial court expressly found that Franqui was prepared to use lethal force to eliminate any impediment to his robbery plan and did not hesitate to actually use such force during the bank robbery." Id. at 1197.

After the of issuance of this Court's opinion affirming

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[3]This Court also found a comment by the prosecuting attorney constituted error: "On the other hand, we find the State's comment pertaining to the subsequent robbery of Van Ness was improper since it implied that Franqui and his accomplices would have murdered Van Ness had the police not stopped the van and arrested the occupants." Franqui, 804 So. 2d at 1195. However, this error was found insufficient by itself to warrant a reversal.

[4]Justice Shaw writing for the three dissenters explained their reasoning as to why they believed that Mr. Franqui's sentence of death should be vacated and remanded:

> I dissent from the majority's application of a harmless error analysis to the trial court's opening remarks to the initial venire wherein the trial judge stated:
>
> > If you believe that the aggravating factors outweigh the mitigating factors, then the law *requires* that you recommend a death sentence.
>
> This was a serious misstatement of the law and guaranteed a death sentence if in the jury's opinion the aggravators outweighed the mitigators and the jurors, in obedience to their oath, followed the judge's advice.

Franqui v. State, 804 So. 2d at 1199.

Franqui's death sentence, a motion for rehearing was filed. It was denied on January 8, 2002. The ninety day period for a filing a petition for certiorari review with the United States Supreme Court expired on April 8, 2002, and certiorari review was not sought by Franqui's appellate counsel.

In collateral proceedings, Franqui challenged his death sentence on the basis of Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). In his initial brief on appeal from the denial of Rule 3.851 relief, Franqui asserted that Florida's capital sentencing scheme "not only permit[ted] or encourage[d] the denigration of the role of a jury, but actually t[ook] from the jury the role of trier of fact." Initial Brief at 85, Franqui v. State, Case No. SC04-2380.

Citing Johnson v. State, 904 So. 2d 400 (Fla. 2005), this Court ruled that "Franqui cannot rely on Ring to find his death sentence unconstitutional." Franqui v. State, 965 So. 2d 22, 36 (Fla. 2007).

On January 12, 2016, Hurst v. Florida issued. On March 7, 2016, House Bill 7101 became effective when it was signed by the Governor. It substantially revised Florida's capital scheme and provides that when three or more jurors favor a life sentence, the capital defendant cannot receive a death sentence.

ARGUMENT I

THE CAPITAL SENTENCING STATUTE UNDER WHICH FRANQUI WAS TRIED, CONVICTED AND SENTENCED TO DEATH IS UNCONSTITUTIONAL, AND AS A RESULT, HIS DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT.

A. HURST V. FLORIDA

The United States Supreme Court's 8-1 decision in Hurst v. Florida, 136 S.Ct. 616 (2016), found Florida's capital sentencing statute unconstitutional: "We hold this sentencing scheme unconstitutional." Id. at 619. The Court 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. The Hurst opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

> 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).

The decision in Hurst relied upon Ring v. Arizona, 536 U.S. 584 (2002). There, the United States Supreme Court held: "Capital defendants, no less than noncapital defendants ... **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 589 (emphasis added). This holding in Ring tied the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment.

Under Florida's statute, a death sentence is not authorized unless two statutorily defined facts are found. A unanimous verdict finding the defendant guilty of first degree murder by itself does not authorize a death sentence. The two statutorily defined facts required to authorize the imposition of a death sentence on an individual convicted of first degree murder are 1) the existence of "sufficient aggravating circumstances"[5] and 2)

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[5]It is worth noting that the statutory requirement that "sufficient aggravating circumstances" be found to exist was adopted to insure compliance with Furman v. Georgia, 408 U.S. 238 (1972), and the narrowing principle adopted therein. The United States Supreme Court has recently explained this purposes of the narrowing requirement as follows:

> Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Atkins, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Godfrey v. Georgia, 446 U.S. 420, 428–429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 568 (2005). When Florida's capital scheme was adopted after Furman, there were 8 aggravator identified. See State v. Dixon, 283 So. 2d 1, 5-6 (Fla. 1973). In the years since, the list of aggravators has doubled. But even with the 8 that existed at the time, this Court in Dixon stated:

> [Jurors] must consider from the facts presented to them-facts in addition to those necessary to prove the commission of the **crime-whether the crime was**

the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances." See § 921.141(3); Hurst, 136 S.Ct. at 622. These two statutorily defined facts constitute elements of capital first degree murder, i.e. first degree murder plus the statutorily defined elements that authorize the imposition of a greater punishment than that authorized solely on the basis of a first degree murder conviction.

Because Florida's statute did not require a jury to return a verdict finding that these two statutorily defined facts have been proven by the State beyond a reasonable doubt, Florida's capital sentencing statute violated the Sixth Amendment. Hurst v. Florida, 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.").

B. RETROACTIVITY OF HURST V. FLORIDA

In Hurst, the United States Supreme Court concluded that "[t]he analysis the Ring Court applied to Arizona's sentencing

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> **accompanied by aggravating circumstances sufficient to require death**, or whether there were mitigating circumstances which require a lesser penalty.

Id. at 8 (emphasis added). This requirement was specifically noted in Proffitt v. Florida, 428 U.S. 242, 248 (1976), when the Supreme Court found the statute to facially comply with Furman:

> At the conclusion of the hearing the jury is directed to consider "(w)hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . (b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." ss 921.141(2)(b) and (c)(Supp.1976-1977).

scheme applies equally to Florida's." Hurst, 136 S.Ct at 621-22. The US Supreme Court specifically addressed this Court's ruling in Bottoson writing:

> As the Florida Supreme Court observed, this Court "repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Bottoson v. Moore, 833 So.2d 693, 695 (2002) (per curiam) (citing Hildwin, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728; Spaziano, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340). "In a comparable situation," the Florida court reasoned, "the United States Supreme Court held:
>
> > 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " Bottoson, 833 So.2d, at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); see also 147 So.3d, at 446-447 (case below).
>
> We now expressly overrule Spaziano and Hildwin in relevant part.
>
> Spaziano and Hildwin summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin, 490 U.S., at 640-641, 109 S.Ct. 2055. **Their conclusion was wrong, and irreconcilable with Apprendi**. Indeed, today is not the first time we have recognized as much. In Ring, we held that another pre-Apprendi decision—Walton, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of Apprendi." 536 U.S., at 603, 122 S.Ct. 2428. Walton, for its part, was a mere application of Hildwin's holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.

Hurst, 136 S.Ct. at 623 (emphasis added).

At issue in Hurst v. Florida was this Court's decision in Hurst v. State, 147 So. 3d 435 (Fla. 2014). There, this Court had been presented with Hurst's Sixth Amendment challenge to his

death sentence on the basis of Ring, and this Court rejected Hurst's argument relying on its decision in Bottoson v. Moore:

> Hurst recognizes that our precedent has repeatedly held that Ring does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that Ring applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

Hurst, 147 So. 3d at 445-46.[6]

This Court's retroactivity analysis was set forth in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)(emphasis added) (quotations omitted), where this Court wrote:

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[6]It is also worth noting that Hurst was convicted of a 1998 murder. He was tried and sentenced to death in 2000. His death sentence was affirmed by this Court in 2002. Hurst v. State, 819 So. 2d 689 (Fla. 2002). In his 2002 direct appeal, Hurst argued that his death sentence stood in violation of the Sixth Amendment principles enunciated in Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court rejected the claim saying:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the Apprendi case applies to Florida's capital sentencing scheme. See Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); Mann v. Moore, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the Mills decision and find that Apprendi does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the Mills decision, and thus we reject Hurst's final claim.

Hurst v. State, 819 So. 2d at 703. Only because this Court ordered a new penalty phase proceeding, was Hurst able to present his Sixth Amendment challenge to Florida's capital sentencing scheme a second time in his second direct appeal.

> Considerations of fairness and uniformity make it very "**difficult to justify depriving a person of** his liberty or **his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**"

Accordingly, this Court in Witt v. State concluded that:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications.** Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief **is necessary** to **avoid individual instances of obvious injustice.**

Witt, 387 So. 2d at 925 (emphasis added). Thus, the Witt standard for retroactive application is a yardstick for determining when "[c]onsiderations of fairness and uniformity" trump "[t]he doctrine of finality." See Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.").

This Court's holding in Johnson v. State that Ring was not retroactive was premised upon this Court's misunderstanding of Ring's holding. In Johnson, this Court read Ring to hold that the Sixth Amendment only required that one aggravator had to be found be a jury.[7] But, Ring actually held that the Sixth Amendment jury

[7]In Ring, the Supreme Court wrote: "in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703)." Ring, 536 U.S. at 597. But, this was only due to Arizona's statutory law which the Supreme Court in Ring noted: "**Arizona's enumerated**

trial right was tied to the legislatively defined facts. This was the core holding in Ring:

> The dispositive question, we said, "is one not of form, but of effect." Id. at 494. **If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.**

Ring, 536 U.S. at 602 (emphasis added).[8] Thus, Ring was much more significant and much broader than this Court understood in Johnson v. State, and as Hurst has now demonstrated. Florida's statute, which governed Franqui's case, provided that a death sentence could not be imposed unless sufficient aggravators were found to exist and insufficient mitigators were found to outweigh the aggravators.[9] This Court's Witt analysis in Johnson simply

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aggravating factors operate as 'the functional equivalent of an element of a greater offense,' [citation], the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 509 (emphasis added).

[8]The citation within this quote was to Apprendi v. New Jersey, 530 U.S. 466 (2000). There, the Supreme Court explained: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of **effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict**?" Apprendi, 530 U.S. at 494 (emphasis added). In his concurrence, Justice Scalia wrote: "And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,' has no intelligible content unless it means that **all the facts which must exist** in order to subject the defendant to a legally prescribed punishment **must be found by the jury**." Apprendi. 530 U.S. at 498 (emphasis added).

[9]The recent enactment of House Bill 7101, which inserts a provision for the jury to return a verdict unanimously finding at least one aggravator, simply underscores that prior to March 7, 2016, Florida's capital scheme did not include such a provision.

misread Ring and its intersection with Florida law.[10]

When the proper Witt analysis is employed, both Hurst and Ring must be applied retroactively. Hurst is undoubtedly a "development of fundamental significance" within the meaning of Witt v. State, and thus principals of fairness dictate that Hurst be given retroactive effect. Absent full retroactivity, there is no question but that indistinguishable cases will receive the benefit of Hurst simply because those cases are pending on direct appeal or are pending for a retrial or a resentencing. Whether relief is granted to those individuals or not, they will receive the benefit of the decision simply because of when Hurst issued. Those receiving the benefit of Hurst include capital defendants who received death sentences long ago even before Franqui, but who have received collateral relief and are awaiting a new trial or a resentencing. Arbitrarily depriving Franqui of the benefit of Hurst's determination that the capital sentencing scheme under which he received a sentence of death is unconstitutional cannot be justified. Certainly, such arbitrariness would violate the Eighth Amendment principles set forth in Furman v. Georgia.

C. HURST ERROR AT FRANQUI'S TRIAL

Franqui's jury was repeatedly told and instructed that its

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[10]In Johnson, this Court said that "the question is whether Ring is of 'sufficient magnitude' to require retroactive application." Johnson, 904 So. 2d at 409. Because it did not perceive the true scope of Ring and the magnitude of the jurisprudential upheaval it engendered, this Court's opinion in Johnson simply does not control as to the retroactivity of Hurst, which was of such magnitude that Hildwin v. Florida and Spaziano v. Florida were formally and expressly overruled.

penalty phase verdict was advisory. Though it was told that it was to consider whether sufficient aggravating circumstances existed to justify the imposition of a death sentence and whether the mitigating circumstances outweighed the aggravation, the jury did not return a verdict setting forth its findings. Further, the jury was instructed that its recommendation was to be by a majority vote, and it returned a death recommendation by a vote of 10-2.[11] Because the jury did not return a unanimous verdict finding the presence of the facts necessary under Florida law to authorize the imposition of a death sentence, Franqui's death sentence stands in violation of the Sixth Amendment under Hurst.

The jury did not return a verdict in compliance with the Sixth Amendment finding sufficient aggravating circumstances existed to justify a death sentence and finding insufficient mitigating circumstances existed to outweigh the aggravating circumstances. As Hurst noted, a jury's advisory recommendation does not satisfy the Sixth Amendment. Hurst, 136 S.Ct. at 619 ("[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.").

The statute expressly precluded the imposition of a death sentence absent findings of fact that sufficient aggravators existed and that insufficient mitigators existed to outweigh the aggravators. As noted in Hurst, a defendant was not "eligible"

[11]The jury at Franqui's first penalty phase returned a 9-3 death recommendation.

for a death sentence until those facts had been found. Hurst, 136 S. Ct. at 622. Unless those facts were found, a death sentence could not be imposed. Thus as explained in Hurst, those facts had to be found by a jury. Since that did not happen here, Franqui's death sentence stands in violation of the Sixth Amendment.

D. ENMUND/TISON FINDING WAS NOT MADE BY THE JURY

Beyond the statutorily defined facts, the Sixth Amendment analysis set forth in Hurst must also apply to Eighth Amendment eligibility issue under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). This Court has stated:

> In Enmund the United States Supreme Court reversed our affirmance of Enmund's sentence of death because we had affirmed "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Id. at 801, 102 S.Ct. at 3378. Under Enmund it is a violation of the eighth and fourteenth amendments to impose the death penalty on a defendant in the absence of such proof.

Jackson v. State, 502 So. 2d 409, 412 (Fla. 1986). This Court held that under Florida's capital scheme, the Enmund/Tison culpability finding was for the sentencing judge to make:

> Appellant's argument must fail because Enmund does not constitutionally require the jury to expressly make the finding of culpability requested. Ross v. Kemp, 756 F.2d 1483 (11th Cir.1985). Rather, under Florida's bifurcated capital sentencing scheme, the sentencing judge and the reviewing court determine whether the defendant was convicted under circumstances which would prohibit imposition of the death sentence. Brown, 473 So.2d at 1265.

Buford v. State, 492 So. 2d 355, 358 (Fla. 1986). For this conclusion, this Court expressly relied upon Spaziano v. Florida, 468 U.S. 447 (1984). Buford, 492 So. 2d at 358. But, Hurst expressly overruled Spaziano, indicating that its logic could not

survive Apprendi and Ring.

Here, the Enmund/Tison culpability finding was not made by the jury in conformity with Hurst and the Sixth Amendment. Accordingly, Franqui's death sentence stands in violation of the Sixth and Eighth Amendments.

E. A LIFE SENTENCE SHOULD BE IMPOSED

Section 921.141, Fla. Stat., sets forth Florida's death penalty scheme. Prior to March 7, 2016, upon the conviction of first degree murder alone, the only sentence permitted pursuant to Hurst v. Florida is a life sentence. As it relates to his death sentences, all that Franqui stands convicted of now is first degree murder. He was not convicted of first degree murder along with a finding of the statutorily defined facts which must be found in order for a death sentence to be authorized, i.e. the element or elements necessary to authorize an increase in the punishment above that authorized just a conviction of first degree murder. The only possible punishment authorized by the conviction of first degree murder alone was life imprisonment without the possibility of parole. Pursuant to the statutory scheme in place at the time, the Sixth Amendment requires that Franqui be sentenced to life because his jury did not convict him of first degree and the additional elements needed to authorize a death sentence.

F. AVAILABILITY OF HARMLESS ERROR ANALYSIS

As noted previously, Hurst v. Florida 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. Hurst cited the statutorily defined facts that Florida law required to be found for a death sentence to be authorized: "**'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'**" Hurst v. Florida, 136 S.Ct. at 622 (emphasis added). Under Florida's then governing statute and under Hurst, there had to be a finding of fact by a jury that sufficient aggravating circumstances existed to justify a death sentence, and insufficient mitigating circumstances existed to outweigh the aggravating circumstances.

The issue of the availability of harmless error was noted in Hurst, but the Supreme Court did not resolve its availability:

> **Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18–19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless**). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring, 536 U.S., at 609, n.7, 122 S. Ct. 2428.

Hurst v. Florida, 136 S.Ct. at 624 (emphasis added). The Supreme Court in Hurst left the State's assertion that any error was harmless for this Court to address in the first instance. In so doing though, the Supreme Court directed this Court to Neder v. United States, 527 U.S. 1 (1999), noting parenthetically that there the failure to instruct on an **uncontested element** in that

case had been found harmless.[12]

The citation to Neder was not a finding that Hurst error is subject to harmless error analysis. Within Neder, there is an extended discussion of when harmless error is available as to constitutional error and when constitutional error should not be subject to harmless error analysis. Under that analysis, Hurst error should be found to be structural error that can never be harmless.[13]

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[12]Here, Franqui contested the presence of the statutorily defined facts. This on its face takes Franqui's case outside the scope of Neder.

[13]Unlike the circumstances in Neder, the element at issue under Hurst is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in Neder where the presence of the element was not contested, Franqui did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover a reversal in Franqui's case on the basis of Hurst would not by itself require a retrial of his guilt of first degree murder. It would either require the imposition of a life sentence or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Franqui would contest the existence of those facts. This distinguishes Neder and demonstrates that the error should be found structural and not subject to harmless error.

Further, Franqui did not have notice that the statutorily defined facts were elements that under the Sixth Amendment a jury was required to find proven beyond a reasonable doubt. Due process demands reasonable notice which was not given here. This Court cannot rely on counsel's actions or inactions to find errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions as to the importance of its role as to the sentence that would be imposed would have to comply with Caldwell v. Mississippi, 472 U.S. 320 (1985). The full ramifications of Hurst on Florida capital trials at the moment can only be guessed.

Assuming arguendo that Hurst error is subject to harmless error analysis, the Hurst error present on the face of the record here shows that the State cannot prove that the error was harmless beyond a reasonable doubt. Certainly not in Franqui's case where two jurors voted in favor of a life sentence, presumably because those jurors did not find the statutorily defined facts.[14] Since Florida law requires unanimity, there is no way to find beyond a reasonable doubt that Franqui's jury, if properly instructed that its findings would be binding on the judge, would have unanimously found the statutorily defined facts necessary to authorize a death sentence.[15] Accordingly, Franqui's death sentence must be vacated.

G. IF A RESENTENCING IS ORDERED, WHAT LAW GOVERNS

House Bill 7101 became effective March 7, 2016, when it was signed into law. The final Staff Analysis of the Criminal Justice Subcommittee accompanying the bill explained its purpose as "amend[ing] Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling" in Hurst. Whether House

[14]This is without regard to the relevant non-record evidence regarding how the pre-Hurst law impacted and changed strategic decisions made in the course of the trial which should also be considered before constitutional error is determined to be harmless. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991).

[15]Florida law requires elements to be found unanimously by the jury. Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." Bottoson v. Moore, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." Id. at 714.

Bill 7101 would govern at a resentencing turns on whether it has made substantive as opposed to procedural changes in Florida's capital sentencing scheme. There is also the question of whether House Bill 7101 creates an Eighth Amendment violation.

First, House Bill 7101 provides that eligibility for a death sentence exists if the jury unanimously finds one aggravator from at list of sixteen. However, the list of 16 aggravators includes aggravators that clearly do not sufficiently narrow under Furman. Construing the statute as rendering a defendant death eligible on the basis a finding of one of the non-narrowing aggravators would render the statute unconstitutional under the Eighth Amendment.

Further, the Court in Ring held that legislative labels do not necessarily govern as to what statutorily defined fact or facts must be found by the jury to render a defendant eligible for a death sentence:

> The dispositive question, we said, "is one not of form, but of effect." Id., at 494, 120 S.Ct. 2348. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602. Despite the language in House Bill 7101 tying eligibility to the finding of just one aggravator, a death sentence still cannot be imposed without a finding that "there are sufficient aggravating factors to warrant the death penalty," and a finding that "the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." See § 921.141(4), page 8 of House Bill 7101. In fact, if 3 jurors conclude that either there are insufficient aggravators or that

the aggravators do not outweigh the mitigators, a death sentence cannot be imposed. Since sufficient aggravators must be found as a matter of fact and they must also be found to outweigh the mitigators in order for a death sentence to be imposed, those are factual determinations that constitute elements to which the Sixth Amendment jury trial right attaches under Hurst and Ring.

To the extent that a factual finding that sufficient aggravators exist that outweigh the mitigators is still necessary to render a capital defendant death eligible, the Eighth Amendment challenge to the inadequate narrowing of the 16 aggravating circumstances dissipates. This is because, as under the old statute, a finding of sufficiency of the aggravators found to exist would in operation perform the narrowing function required by the Eighth Amendment.

Statutes should be construed to the extent possible in a way that insures that they are constitutional. Recognizing that even under House Bill 7101, death eligibility is still dependent on a factual determination that sufficient aggravators exist that outweigh the mitigators, comports with Hurst and Ring and insures that the statutory scheme complies with Furman.

Construing the statute in this fashion also means that the elements of what is, in essence, capital first degree murder would remain virtually unchanged. This in turn would mean that House Bill 7101 would only have made procedural changes, not substantive ones, and that it could be applied retrospectively.

It should be recognized that if House Bill 7101 actually changed the elements of capital first degree murder and did away

with the requirement that sufficient aggravators must be found to exist which outweigh the mitigators before a death sentence was authorized, the change would be substantive and could not apply in homicide cases that were committed before March 7, 2016.

H. CONCLUSION

Under Hurst, Franqui's death sentence cannot stand. He was not convicted by a jury of first degree murder plus the statutorily defined facts that constitute elements of capital first degree murder and which must be found before a death sentence is authorized.

ARGUMENT II

HOUSE BILL 7101 ESTABLISHES A CONSENSUS FOR EIGHTH AMENDMENT PURPOSES THAT A DEATH SENTENCE MAY NOT BE IMPOSED WHEN THREE JURORS DURING A PENALTY PHASE PROCEEDING HAVE VOTED IN FAVOR OF A LIFE SENTENCE.

At Franqui's first penalty phase proceeding in 1994, three jurors voted in favor of a life sentence. House Bill 7101 now provides that when three jurors vote in favor of a life sentence, a death sentence may not be imposed. This represents a consensus for Eighth Amendment purposes that a death sentence may not be imposed on a capital defendant when three or more jurors in one penalty phase proceeding voted in favor a life sentence.

This claim could not have been presented before the enactment of House Bill 7101 on March 7, 2016. Thus, it is timely presented herein.

The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the

progress of a maturing society." Roper v. Simmons, 543 U.S. 551, 561 (2005)(quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. at 100. "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation." Id. at 103. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. at 382 (Burger, C.J., dissenting)). "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy, 554 U.S. at 420. "Though the death penalty is not invariably unconstitutional [citation], the Court insists upon confining the instances in which the punishment can be imposed." Id. For example, the Eighth Amendment requires that: "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005). Further, "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Hall v. Florida, 134 S.Ct. 1986, 2001 (2014).

There is now a consensus that when three or more jurors vote for the imposition of a life sentence in a particular case,

neither the crime nor the defendant have been shown to be among the worst of the worst as the Eighth Amendment requires before a death sentence can be imposed. See Atkins v. Virginia, 536 U.S. 304, 319 (2002) (the death penalty must be reserved for those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."). When three or more jurors vote for a life sentence, there is not a strong enough basis for the imposition of a death sentence under the Eighth Amendment. Three or more jurors voting for a life sentence clearly is objective indicia of societal standards.

While Franqui received a resentencing after the 1994 penalty phase, the 1994 verdict in which three jurors voted for a life sentence is entitled to double jeopardy protection. In Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991), this Court held:

> Double jeopardy principles apply to the penalty phase of capital punishment trials in Florida under section 921.141 of the Florida Statutes (1985), because the Florida procedure is comparable to a trial for double jeopardy purposes. See Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); accord Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). Florida law also protects individuals facing the death penalty from being twice placed in jeopardy.

Under House Bill 7101, the 9-3 death recommendation in 1994 means that Franqui's death sentence stands in violation of the Eighth Amendment. Accordingly, Franqui's death sentence must be vacated and his case remanded for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Initial Brief has been furnished by electronic service to Sandra Jaggard, Assistant Attorney General, at Sandra.Jaggard@myfloridalegal.com, on this 4th day of April, 2016.

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This is to certify that this Supplemental Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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