No. SC15-1449
Lower Tribunal No. 461987CF000856XXXAXX

IN THE

Supreme Court of Florida

FRANK A. WALLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**BRIEF OF AMICUS CURIAE,
THE CAPITAL HABEAS UNIT OF THE
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE NORTHERN DISTRICT OF FLORIDA,
IN SUPPORT OF APPELLANT FRANK A. WALLS**

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REQUEST FOR LEAVE TO FILE UNDER RULE 9.370

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida, as amicus curiae, respectfully requests leave to file the accompanying brief in support of Appellant Frank A. Walls.

The Statement of Interest describes the interest of the CHU and its belief that the arguments presented in the amicus curiae brief will be helpful to the Court.

Counsel for Appellant consents to the filing of this amicus brief. Counsel for the State objects to the filing of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender (FDO) for the Northern District of Florida was established with the concurrence of the Chief Judge of the United States Court of Appeals for the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court for the Northern District of Florida (the Honorable M. Casey Rogers), and the Administrative Office of the United States Courts. The Capital Habeas Unit was established because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concerns for the bench and bar. As the Eleventh Circuit commented:

> Establishing a CHU in one of [Florida's] . . . federal districts would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, . . . but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings.

Lugo v. Secretary, 750 F.3d 1198, 1215 (11th Cir. 2014). The office advises, assists, and trains counsel in capital cases. The office also represents a number of Florida death-sentenced individuals in federal habeas cases, and was appointed by the United States District Court for the Northern District of Florida to serve as counsel for Mr. Walls. This brief is being filed within 15 days of that appointment.

As the institutional federal capital defender in Florida, our office, as a friend of the Court, hopes that the Court will find helpful our perspective on how Mr. Walls's case is impacted by the constitutional decisions of the United States Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), and by this Court's decisions in *Oats v. State*, 181 So. 3d 457 (Fla. 2016), and *Cardona v. State*, 2016 WL 636048 (Fla. Feb. 18, 2016), which issued after the filing of the appellate brief. In particular, this amicus brief explains that (1) a remand for a meaningful post-*Hall* hearing is appropriate because the trial court's analysis of Mr. Walls's intellectual disability claim cannot be squared with *Hall*, *Brumfield*, and this Court's decisions applying those cases, and (2) a remand is also appropriate in light of *Hurst* because Mr. Walls's death sentence was imposed pursuant to Florida's unconstitutional death penalty statute, and Mr. Walls should be given the opportunity to plead a claim under *Hurst* in the first instance in the trial court.

We hope the Court will find our perspective helpful.

SUMMARY OF ARGUMENT

For two primary reasons, the judgment of the trial court should be reversed and the matter remanded for further proceedings, including a proper hearing in light of *Hall*, *Brumfield*, and this Court's decisions in *Oats* and *Cardona*.

First, the trial court's denial of Appellant's intellectual disability claim is both contrary to the record and in direct conflict with the Supreme Court's decisions in *Hall* and *Brumfield*. Under this Court's interpretation of those cases in *Oats*, the trial court was required to consider all three prongs of the intellectual disability analysis, but only considered one. The trial court was also required to consider all prior evidence of intellectual disability and hold a *Hall* hearing, but considered limited evidence and summarily denied relief without allowing Appellant any opportunity to submit evidence at a hearing in light of *Hall*. The one factor the trial court did consider—whether Appellant's intellectually disability manifested before age 18—was misapplied as a matter of fact and law. There is ample evidence that Appellant's intellectual disability originated and manifested itself prior to age 18, but the trial court, without a hearing where the matter could be developed, relied solely upon two IQ scores that Appellant received years before turning 18. Presented with similar circumstances in *Oats*, this Court reversed and remanded.

Second, Appellant should be permitted to return to the trial court to seek relief under *Hurst*, consistent with his preservation of the claim and this Court's retroactivity precedents. His *Hurst* claim should not be subjected to harmless error analysis because the Sixth Amendment error identified in *Hurst* is structural. However, if the Court concludes that his *Hurst* claim should be subjected to harmlessness review, this Court should not perform that review in the first instance.

The trial court that reviews the claim should evaluate harmlessness following fact-finding proceedings to determine the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome.

Accordingly, for the reasons described below, this Court should reverse and remand for further proceedings and a hearing consistent with *Hall*, *Brumfield*, *Hurst*, *Oats*, and *Cardona*.

ARGUMENT

I. The Trial Court's Summary Denial of Intellectual Disability Relief is Both Contrary to Prior Expert Testimony in This Case and in Direct Conflict with *Hall, Brumfield,* and Recent Decisions of This Court

The three-part test established by *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), asks an "intellectual disability" claimant to show: (1) subaverage intellectual functioning; (2) adaptive deficits; and (3) manifestation of deficits before age 18 ("the pre-18 factor"). *Id.* In 2007, before *Hall*, Dr. Jethro Toomer examined Walls and stated that, for all practical purposes, Walls is intellectually disabled, given his significant limitations in adaptive skills, which Dr. Toomer found manifested before age 18. However, in that pre-*Hall* era, Dr. Toomer was unable to testify that Walls was intellectually disabled because Florida law required an IQ score of 70 or below to establish the first prong of the test (Walls's score was 72 in 1991 and 74 in 2007).

In 2014, the Supreme Court in *Hall* struck down Florida's rigid 70-IQ-score cutoff as violative of *Atkins*, and Walls filed a new claim for relief, in light of *Hall*,

based on his intellectual disability. However, the trial court summarily denied relief, based solely on its conclusion that Walls did not establish the pre-18 factor, citing Dr. Toomer in support of that conclusion. *See* Order at 4-5. The trial court's order is not only contrary to Dr. Toomer's opinion, but is also in direct conflict with *Hall*, *Brumfield,* and the recent intellectual disability decisions of this Court, including *Oats*. The proper remedy, as this recognized in *Oats*, is to reverse the decision below and permit an evidentiary hearing.

A. This Court's *Oats* Decision Informs This Appeal

Oats is highly instructive of the trial court's errors in Walls's case. (*Oats* was issued after the briefing of this appeal). In *Oats*, this Court applied *Hall* and *Brumfield* and reversed the denial of a death-sentenced prisoner's intellectual disability claim on three grounds, each of which is relevant here. First, *Oats* held that *Hall* and *Brumfield* require trial courts to "address[] all three prongs of the intellectual disability test, rather than denying the claim solely because [the claimant] did not present sufficient evidence to establish that his intellectual disability manifested before the age of 18." *Oats*, 181 So. 3d at 459, 471. Second, *Oats* held that trial courts err when they interpret the pre-18 factor to require evidence supporting a *diagnosis,* rather than a *manifestation*, of intellectual disability prior to age 18. *Id.* at 459-60, 468. Third, *Oats* held that trial courts cannot deny an intellectual disability claim "without even considering or weighing *all* of the

testimony that [the individual] presented, including the evidence submitted in prior postconviction proceedings . . . ." *Id.* at 459 (emphasis added).

In light of *Oats*, the denial of Walls's claim should be reversed and the matter remanded for intellectual disability proceedings consistent with *Hall* and *Brumfield*.

B. The Trial Court Failed to Address All Three Prongs of the Test

The trial court's summary denial of Walls's intellectual disability claim was based solely on the court's conclusion that Walls failed to establish the pre-18 factor. Order at 4-5. The court did not consider or discuss whether Walls had satisfied the remaining prongs of the intellectual disability test. The court's failure to analyze all three prongs of the test contravened what this Court said in *Oats*. In *Oats*, this Court held that a trial court's failure to consider all three prongs when analyzing an intellectual disability claim violates *Hall*. *Oats*, 181 So. 3d at 467 ("[C]ourts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive. *Hall*, 134 S. Ct. at 2001. We conclude that the circuit court erred in relying solely on the third prong . . . .").

This Court was correct. *Hall* recognized that the intellectual disability factors are interdependent, and that if one of the prongs is relatively less strong with respect to a particular individual, a finding of intellectual disability may nonetheless be warranted based on the strength of the other prongs. *See Hall*, 134 S. Ct. at 2001 (explaining that "it is not sound to view a single factor as dispositive of a conjunctive

and interrelated assessment."). Without considering all three prongs of the test, a trial court is unable to adequately assess each particular factor in its proper context. *Id.* This Court recognized that principle not only in *Oats*, but most recently in *Cardona*. In *Cardona*, the trial court denied an intellectual disability claim, solely based on the individual's perceived failure to establish sub-average intellectual functioning, without considering the remaining two factors. This Court, citing *Oats*, found that analysis deficient in light of *Hall* and remanded for a hearing. *Cardona*, 2016 WL 636048, at *11.

Here, the trial court declined to hold a hearing or even consider the strength of the remaining intellectual disability factors, leaving itself with no context for evaluating the pre-18 factor. In both *Oats* and *Cardona*, this Court described the appropriate remedy for the trial court's error here: remand for a new intellectual disability hearing consistent with *Hall*.

To the extent that the trial court in some way "considered" the remaining factors in stating, "[m]oreover, Defendant has already received a hearing at which he presented evidence regarding each prong of the relevant test for intellectual disability," *see* Order at 4, such a reference to Walls's 2007 proceeding is insufficient under *Hall* and *Oats*. In Walls's prior proceeding, this Court ruled that he was not intellectually disabled, under *Cherry v.* State, 959 So. 2d 702 (Fla. 2007), because he could not satisfy the subaverage intellectual functioning prong, given his lack of

an IQ score below 70. That analysis is no longer valid after *Hall*, which overruled *Cherry*. *Oats*, 181 So. 3d at 470 ("*Cherry* has now been overturned by the United States Supreme Court in *Hall*."). In Walls's present proceeding, the trial court was required to consider all three prongs, including the subaverage intellectual functioning prong, in light of the post-*Hall* standard that allows for IQ scores above 70. A mere reference to Walls's prior, pre-*Hall* litigation is not enough under *Oats*.

C. The Trial Court Misapplied the Pre-18 Factor

In addition to failing to consider all three prongs of the intellectual disability test, the trial court misapplied the sole prong it did consider: the pre-18 factor. The trial court's incorrect application of the pre-18 factor was two-fold.

First, the trial court misconstrued the record in finding that, during the prior Rule 3.203 proceeding, "Defendant's own witness, Dr. Jethro Toomer, testified on cross examination that Defendant did *not* meet the significantly subaverage general intellectual functioning prong of the test, prior to age 18." Order at 4. On the contrary, all parties—Walls, Dr. Toomer, and the State—are in agreement that, during the Rule 3.203 hearing, Dr. Toomer *did* find the pre-18 factor established.

The undersigned, who was appointed as Walls's federal counsel earlier this month, immediately asked Dr. Toomer to provide a declaration, which is attached as an exhibit to this brief. There, Dr. Toomer reiterates his conclusion that Walls suffers from adaptive deficits that manifested before adulthood (*i.e.*, before age 18),

and Dr. Toomer emphasizes that his previous inability to testify that Walls was intellectually disabled under Florida law was solely the result of the 70-IQ cutoff that *Hall* has since invalidated as unconstitutional. Directly contrary to the dispositive issue in the trial court's order, Dr. Toomer has *always maintained that Walls suffered adaptive deficits that manifested before age 18*.[1]

The State itself now acknowledges that Dr. Toomer offered that conclusion in 2007. *See* State's Br. at 7 ("Dr. Toomer found that Walls suffered adaptive deficits prior to age 18."). Because it is undisputed that Dr. Toomer did find the pre-18 factor established, and continues to maintain it is established, there is no basis for the trial court's denial of relief solely based on the pre-18 factor. At a minimum, *Oats* requires the opportunity for a hearing.

Second, in light of *Oats*, the trial court erred in finding that IQ scores received by Walls when he was approximately 12 and 14 years old were sufficient to establish that his intellectual disability did *not* manifest before age 18. The court stated:

> Prior to attaining age 18, as stated in Defendant's motion, he received a full-scale IQ assessment of 102 in 1980, and 101 in 1982. Those IQ scores, which were achieved when Defendant was approximately 12 and 14 years of age, do not place him in the range of concern contemplated by *Hall*, nor do they suggest significantly subaverage general intellectual functioning.

Order at 4. That approach to the pre-18 factor conflicts with *Oats* and *Brumfield*.

[1] Dr. Toomer's 2007 hearing testimony is described in Section I(C), *infra*.

In *Brumfield*, the Supreme Court explained that the pre-18 factor only requires that an individual demonstrate that his "intellectual disabilities manifested while he was in the 'developmental stage'—that is, before he reached adulthood." *Brumfield*, 135 S. Ct. at 2282. In *Oats*, this Court clarified that, under *Brumfield*, a trial court errs when it requires a *diagnosis* before the age of 18, rather than evidence of *manifestation* before age 18, in order to meet the pre-18 factor. *Oats*, 181 So. 3d at 468-70. The relevant pre-18 inquiry is whether "an intellectual disability *manifested* during the period from conception to age 18," *id.* at 468, as did Walls's.

This Court suggested that IQ scores are *never* dispositive of the pre-18 factor; the totality of the evidence must be considered to distinguish an intellectual disability that developed during childhood, which would be subject to *Atkins*, from one that occurred later in life. *Id.* at 468-69 ("[T]his Court has never held that the defendant must be given a specific IQ test prior to the age of 18 in order to find an intellectual disability. That inflexible view would not be supported by the United States Supreme Court's recent enunciations in *Hall* and *Brumfield*.").

Here, the trial court employed a pre-18 analysis strikingly similar to that disapproved by this Court in *Oats*. Whereas in *Oats* the trial court erred by finding that a particular pre-18 IQ score could not establish the pre-18 factor because the score itself was not sufficient for a diagnosis of intellectual disability, the trial court in Walls's case found that two pre-18 IQ scores defeated the pre-18 factor because

the scores cut against a diagnosis of intellectual disability before the age of 18. But *Hall* and *Atkins* do not require a pre-18 diagnosis or IQ score; they only require pre-18 manifestation of an individual's deficits or disability; **and there is a great amount of evidence that Walls's deficits or disability manifested pre-18**.

The trial court's analysis in Walls suffers from the same defect as the trial court's analysis in *Oats*—it focuses on a pre-18 IQ score, instead of evaluating the totality of the evidence to determine whether there was any *manifestation* of adaptive deficits pre-18. This is especially problematic because the two IQ scores cited by the trial court were produced years before Walls turned 18. In *Oats*, this Court made clear that the appropriate remedy in such a case is reversal and remand for an evidentiary hearing consistent with *Hall* and *Brumfield*.

D. The Trial Court Failed to Consider All Prior Evidence and Failed to Hold a Post-*Hall* Hearing as Required by This Court's Decisions

In rejecting Walls's intellectual disability claim based solely on two IQ scores that he received when he was approximately 12 and 14 years old, the trial court failed to consider all the evidence presented at Walls's 2007 hearing, particularly the adaptive deficits testimony of Dr. Toomer. The court also refused to hold a post-*Hall* hearing, despite the fact that the only reason that Walls's previous intellectual disability claim was denied—the rigid 70-IQ score cut off—had been held unconstitutional by the Supreme Court in *Hall*.

In *Oats*, this Court held that trial courts cannot deny an intellectual disability claim "without even considering or weighing *all* of the testimony that [the claimant] presented, including the evidence submitted in prior postconviction proceedings . . . ." *Oats*, 181 So. 3d at 459-60 (emphasis added). *Oats* faulted the trial court for declining to consider evidence of the prisoner's intellectual disability, which had been presented at a pre-*Atkins* postconviction proceeding, and for declining to hold a new hearing on the intellectual disability claim, despite the dramatic developments in the law relating to intellectual disability since the first hearing. *Id.* at 468-69.

Here, the trial court failed to meaningfully consider the evidence establishing Walls's intellectual disability that had been presented at his pre-*Hall* hearing. During that hearing, Dr. Toomer considered voluminous evidence, specifically tested Walls's adaptive functioning in childhood and as an adult, and concluded that Walls had adaptive deficits that originated before he turned 18. At that time, Dr. Toomer was unable to provide an intellectual disability diagnosis *only* because this Court's pre-*Hall* case law—in cases such as *Cherry*—strictly required an IQ score of 70 or below and Walls's adult scores were 72 and 74. The trial court should have not only considered the evidence presented at Walls's prior proceeding, but it also should have held a new hearing in light of the fact that *Hall* had removed the one obstacle that prevented Dr. Toomer from diagnosing intellectual disability in 2007.

Dr. Toomer was clear in both his testimony and written report that Walls met the pre-18 and adaptive deficits prongs of the intellectual disability test. *See* Rule 3.203 Hearing Tr. at 18-38; Toomer Report at 4-5 ("Mr. Walls has limitations in thirteen adaptive skills areas . . . . Mr. Walls meets the criteria for the existence of Adaptive Functioning Deficits as assessed by the SIB-R prior to age 18 . . . ."). With respect to the adaptive deficit prong, Dr. Toomer explained that his specific testing showed that Walls was unable to manage age-level tasks and had *limitations in 13 adaptive skill areas*, including social interaction, language comprehension, language expression, eating, meal preparation, toileting, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, home and community orientation. *See* Hearing Tr. at 29-30; Toomer Report at 4. Dr. Toomer compared Walls's adaptive functioning skills to that of a seven-year-old. Hearing Tr. at 33.

Dr. Toomer first explained that Walls's adaptive deficits manifested pre-18. *See* Hearing Tr. at 24-26, 31, 36; Toomer Report at 5 ("Mr. Walls meets the criteria for the existence of Adaptive Functioning Deficits as assessed by the SIB-R prior to age 18 . . . . Overall, Mr. Walls has manifested pervasive maladaptive behavior dating to his early childhood years."). This is dispositive on the question of pre-18 manifestation of Walls's disability. But there is more, Dr. Toomer explained, based on the totality of the records, his testing and data he reviewed and compiled, that the intellectual functioning prong also manifested pre-18. Specifically, Walls suffered

organic brain damage early in life, which was likely caused by anoxia or meningitis, and which triggered a steady decline in his adaptive functioning that continued through his teenage years and then into adulthood. Dr. Toomer explained that, although Walls had received IQ scores of 102 and 101 when he was approximately 12 and 14 years of age, those scores were not inconsistent with a finding that the *onset* of his adaptive deficits occurred before age 18. *Id.* at 24, 34-37. There is no dispute that Walls's IQ was never tested between the ages of 14 and 18, *see id.* at 37, and his score of 72 at the age of 24 supports Dr. Toomer's conclusion about his brain function declining pre-18.

The sole reason that Dr. Toomer could not render an opinion in 2007 that Walls was intellectually disabled was that Walls's IQ scores did not satisfy Florida's then-strict cutoff score of 70. *See* Hearing Tr. at 37-39. Dr. Toomer explained that his inability to offer that opinion did not prevent him from concluding that Walls's IQ has been on a progressive downward pattern. Hearing Tr. at 15, 37. And Mr. Walls has IQ scores of 72 and 74, within the *Hall* range.

The trial court was required by *Oats* to consider all that evidence, and this would have led to the conclusion that a *Hall* hearing was required. Such a hearing would have established a record for a full and fair resolution of the issue. As Dr. Toomer explains in his declaration attached to this brief:

My difficulty [in 2007] in concluding that Mr. Walls had mental retardation—what is now called intellectual disability—is that we were operating under the law in effect at the time in Florida. In 2007, this law required that Mr. Walls have an intelligence ("IQ") test score under 70. Florida did not accept the concept of margin-of-error or the test confidence band. Mr. Walls had a post-18 IQ test score of 74. He also had an early childhood IQ score of 102. Note that this higher childhood IQ was before his cerebral impairments began to undermine his functioning, which occurred while he was still younger than 18. As a result of the 70 cut off, I had to state Mr. Walls would not meet the Florida standard in either adulthood or childhood, and therefore that he could not be characterized as a person with mental retardation. But my testimony was based solely on the strict 70 IQ score cut-off in operation in Florida at that time.

However, under the national standard for assessment of intellectual disability applied in criminal cases in jurisdictions other than Florida in 2007; under the standard applied in other (non-death penalty) settings in Florida in 2007; and under the standard now applied in Florida after the decision in *Hall*, Mr. Walls is a person with an intellectual disability. He meets all three prongs: 1) he has adaptive deficits in many areas, 2) his deficits manifested and originated pre-18, and 3) he has an IQ score of 74, within the *Hall* range.

I never had, and today do not have any doubt, that Mr. Walls functions as an intellectually disabled person in every sense that is meaningful under that diagnosis. It is clear to me, to a reasonable degree of certainty, that post-*Hall*, the appropriate diagnosis for Mr. Walls is the diagnosis of intellectual disability. In every functional sense, Mr. Walls is as disabled, if not more disabled, than the dozens of other intellectually disabled criminal defendants I have seen in my forensic practice and the

> intellectually disabled individuals I have seen in my clinical practice.

App'x at 1-4 (Declaration of Dr. Toomer).

E. *Hall* Retroactivity Issues Do Not Preclude Relief

The State argues that Walls's intellectual disability claim is "untimely" because *Hall* is not retroactive. State's Br. at 17-18. *Hall* retroactivity is not an issue in this case. The trial court appropriately assumed *Hall*'s applicability, citing this Court's decision in *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015). Order at 4. In *Haliburton*, this Court remanded an intellectual disability claim for an evidentiary hearing after the United States Supreme Court had remanded the matter to this Court in light of *Hall*. Thereafter, in *Oats* this Court again remanded an intellectual disability claim for a hearing in light of *Hall*. *Oats*, 181 So. 3d at 467.

Fundamental fairness does not countenance the State's argument that relief under *Hall* should be blocked. In 2006, this Court explicitly informed *Walls* that he may file a motion in the trial court for a determination of intellectual disability. *Walls*, 926 So. 2d. 1156, 1174 (Fla. 2006). Walls did so, and a hearing was held. At the hearing, Dr. Toomer testified that Walls is for all practical purposes intellectually disabled, but could not then be defined as intellectually disabled under Florida law solely because of the strict 70-IQ score cutoff, as articulated in cases like *Cherry*. In *Hall*, the Supreme Court clarified that intellectual disability cannot be defined using

that cutoff, removing the one obstacle to a legal determination that Walls falls into the category of those who are ineligible for execution under *Atkins*. It would be fundamentally unfair to block Walls from ever obtaining that legal determination simply because of this Court's pre-*Hall* misapplication of *Atkins*. As this Court said in *Oats*, "*Cherry* has now been overturned by the United States Supreme Court in *Hall*." *Oats*, 181 So. 3d at 470.

Walls has never had a meaningful post-*Hall* hearing. A remand for such a hearing is appropriate.

II. A Remand is Also Appropriate in Light of *Hurst*

Walls's case should be remanded to the trial court so that he may plead a claim for sentencing relief under *Hurst*. In *Hurst*, the Supreme Court struck down as unconstitutional the statutory provisions under which Walls was sentenced to death, Fla. Stat. §§ 921.141(2) and (3), which provided that a judge, as opposed to a jury, must conduct the fact-finding of aggravating circumstances necessary to impose the death penalty. The Supreme Court confirmed that what it had previously held in *Ring v. Arizona*, 536 U.S. 585 (2002), applied equally to Florida: juries must conduct all fact-finding of aggravating circumstances necessary to impose the death penalty. As the CHU amicus filings explained in the death warrant cases of Cary Michael Lambrix and Mark James Asay, under this Court's retroactivity precedents, individuals like Walls should be permitted to move in the trial court for post-

conviction relief from their death sentences based on *Hurst*.[2] This Court has requested supplemental briefing in light of *Hurst* in numerous pending appeals, and Walls should also be heard.[3]

A. Walls Preserved a *Hurst* Claim

Amicus does not believe that preservation of *Hurst* claims is required, just as this Court did not require "preservation" for petitioners who were retroactively afforded the benefit of *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *See, e.g., Hall v. State*, 541 So. 2d (Fla. 1989); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock*

[2] In *Lambrix*, the undersigned filed an amicus brief addressing the retroactivity of *Hurst* and some of the general "harmless error" issues flowing from *Hurst*. In *Asay*, we addressed the scope of *Hurst*'s retroactivity, including the fundamental unfairness of "partial retroactivity," *i.e.*, allowing only some defendants to receive the benefit of *Hurst*, and explained that, if harmless error review can be conducted at all, initially it should be conducted in the trial court, notwithstanding any specific aggravators found by the sentencing judge. For the Court's convenience, the *Lambrix* and *Asay* amicus briefs are attached to this filing.

[3] *See, e.g., Lowe v. State*, No. SC12-263; *Wright v. State*, No. SC13-1213; *Mullens v. State*, No. SC13-1824; *Jackson v. State*, No. SC13-1232; *State v. Dougan*, No. SC13-1826; *Williams v. State*, No. SC14-814; *Johnson v. State*, No. SC14-1175; *Morris v. State*, No. SC14-1317; *State v. Bright*, No. SC14-1701; *Knight v. State*, No. SC14-1775, SC15-1233; *King v. State*, No. SC14-1949; *Simmons v. State*, No. SC14-2314; *Abdool v. State*, No. SC14-582, SC14-2039; *Kopsho v. State*, No. SC15-1256; *Anderson* v. *State*, No. SC12-1252; *Bevel v. Florida*, No. SC14-770; *Truehill v. State*, No. SC14-1514; *Phillips v. State*, No. SC12-876; *Williams v. State*, SC13-1472; *Jones v. State*, SC15-1549; *Knight v. State*, SC13-820.

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."). But even assuming such a requirement, Walls has preserved a claim for *Hurst* relief.

In his 2006 state habeas proceeding in this Court, Walls argued that Florida's capital sentencing scheme was unconstitutional in light of *Ring*. This Court denied relief, citing its decision in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), which held that *Ring* was not retroactive because it did not apply in Florida. *See Walls*, 926 So. 2d at 1174.[4]

In *Hurst*, the Supreme Court confirmed the validity of what Walls argued to this Court: "Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Hurst*, 136 S. Ct. at 621. *Hurst* also overruled the basis for this Court's decision in *Johnson* that *Ring* did not apply in Florida, and upon which this Court relied in rejecting Walls's *Ring* claim. In *Johnson*, this Court held that *Ring* was inapplicable because the Supreme Court previously had approved of Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Hurst*, the Supreme Court expressly overruled *Hildwin* and *Spaziano*. *See Hurst*, 136 S. Ct. at 616 ("We now expressly overrule

[4] Alternatively, in *Walls*, the Court ruled that no *Ring* relief was available because the aggravating circumstances found by Walls's trial judge included the fact of a prior violent felony conviction. *Id.* at 1174-75. This aspect of the Court's ruling is discussed in Section II(D), *infra*.

Spaziano and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . .”). *Johnson* is no longer good law.

Fundamental fairness requires that Walls be given an opportunity to seek relief under *Hurst*. Walls did all that he could to challenge Florida’s unconstitutional death penalty statute 10 years ago. To the extent that preservation is a component of a successful *Hurst* claim, which it should not be, Walls is in compliance. The case this Court relied upon in rejecting his claim, *Johnson*, is no longer good law. This Court should remand so that Walls may file an amended motion, or a new motion, for post-conviction relief from his death sentence based on *Hurst*.

B. *Hurst* Applies to Walls

This Court should reject any suggestion that Walls cannot pursue *Hurst* relief on the ground that his sentence became “final” before *Hurst* issued. As described by the CHU amicus briefs in *Lambrix* and *Asay*, *Hurst* is retroactive to defendants like Walls under Florida’s retroactivity test. This Court established that retroactivity test more than 30 years ago in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and has applied it ever since. Under *Witt*, this Court applies new Supreme Court decisions favorable to criminal defendants retroactively when those decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute “a development of fundamental significance.” *Falcon v. State*, 162 So.

3d 954, 960 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931). *Hurst* satisfies all three *Witt* factors. The separate federal retroactivity test is irrelevant.[5]

As to the first *Witt* factor, *Hurst* is a decision of the United States Supreme Court. As to the second factor, *Hurst*'s holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finding that subjects a defendant to a death sentence.

Hurst also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "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). *Hurst*'s purpose is the protection of capital defendants' rights to have the jury find all facts that expose

[5] 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 (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."). 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, 277, 280-82 (2008). Florida traditionally has done so.

them to a death sentence, a punishment that under Florida law is not authorized by any first-degree murder conviction alone. That purpose would be advanced by retroactive application to defendants like Walls. Retroactivity would ensure that the Sixth Amendment rights of individuals like Walls are protected, and is in keeping with this Court's understanding that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify 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). Applying *Hurst* to prisoners like Walls would not have a substantially injurious effect on the administration of justice, as the number of potential *Hurst* claimants is both finite and manageable. For further discussion of *Hurst* retroactivity under *Witt*, the Court is respectfully referred to the attached CHU amicus briefs in *Lambrix* and *Asay*.

This Court should also reject any suggestion that Walls cannot pursue *Hurst* relief on the ground that his sentence became final before *Ring* issued. As the CHU explained in our *Asay* amicus brief, there is no basis in this Court's retroactivity law to apply the unusual and problematic concept of "partial retroactivity" to block pre-*Ring* defendants from seeking *Hurst* relief. *Witt* itself does not recognize the concept of partial retroactivity, and this Court has never held that a new Supreme Court decision is retroactive but then refused to allow some individuals to benefit because they were sentenced before some earlier predicate Supreme Court decision. That is

because "[c]onsiderations of fairness and uniformity make it very 'difficult to justify 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) (emphasis added).

Walls, like all death row inmates in Florida, is currently under a death sentence that is unconstitutional, and he should therefore be permitted to seek *Hurst* relief, regardless of when his sentence became final on direct appeal. That is the procedure recently approved by this Court in *Falcon*. In *Falcon*, this Court announced that "**any** affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for postconviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller*[*v. Alabama*, 132 S. Ct. 2455 (2012)]." *Falcon*, 162 So. 3d at 954 (emphasis added). The Court did not limit *Miller* retroactivity to only **some** prisoners. The Court did not curtail relief for prisoners who were sentenced before the date when the Supreme Court issued the predicate decisions that laid the groundwork for *Miller*, such as *Roper v. Simmons*, 543 U.S. 551 (2005), or *Graham v. Florida*, 130 S. Ct. 2011 (2010).

Similarly, in the context of capital punishment, this Court rejected the dubious "partial retroactivity" approach after the decision in *Hitchcock*, which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *See, e.g.*, *Thompson*, 515 So. 2d at

175; *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court permitted all impacted individuals to seek *Hitchcock* relief by filing a post-conviction motion in the trial court. The Court did not truncate the retroactivity of *Hitchcock* by limiting it to those whose death sentences were "finalized" after *Lockett v. Ohio*, 438 U.S. 586 (1978), a predicate decision upon which *Hitchcock* relied. In circumstances precisely analogous to the current post-*Hurst* landscape, when the Supreme Court in *Hitchcock* rejected this Court's interpretation of *Lockett*, this Court found *Hitchcock* retroactive to all death-sentenced prisoners, regardless of whether their cases became final before the predicate decisions. So too, the availability of *Hurst* relief to defendants like *Walls* should not be truncated by *Ring*.

The concept of "partial retroactivity" is recognized as uncommon and has been criticized as antithetical to basic notions of fairness. Arbitrarily denying Walls access to *Hurst* relief on the ground that he was sentenced before *Ring* would be particularly egregious. After all, "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 . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Walls should not be denied access to *Hurst* relief on the ground that his sentence became

final before *Ring*. For further discussion of the scope of *Hurst* retroactivity, the Court is respectfully referred to the attached CHU amicus brief filed in *Asay*.

C. If Harmless Error Review Applies, it Should Be Initially Undertaken in Trial Court Proceedings

The *Hurst* violation in Walls's sentencing should not be subjected to harmless error analysis. As the CHU amicus briefs described in *Lambrix* and *Asay*, harmless error review is hard to square with *Hurst* because *Hurst* errors are "structural." *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."). The *Hurst* error in Walls's sentencing—stripping the capital jury of its constitutional fact-finding role at the penalty phase—was a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *See id.* at 310. Indeed, the *Hurst* error "infected the entire trial process" in Walls's case, *see Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and deprived Walls "of basic protections without which a [death penalty] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8 (1999).

The structural nature of *Hurst* claims is underscored by what the late 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. For further discussion of the structural nature of *Hurst* errors, the Court is respectfully referred to the attached CHU amicus brief filed in *Lambrix*.

To the extent that the *Hurst* error in Walls's sentencing is reviewed for harmlessness, this Court should not perform that analysis in the first instance. This Court's *Witt* precedents suggest that a trial court should review Walls's *Hurst* claim first and evaluate harmlessness based on the facts of his case. Indeed, in a recent filing in *Lambrix*, the State agreed that harmless error analysis rests on the facts of each case. *See Lambrix v. State*, No. SC16-56, State's Response to Petitioner's Second Motion to Supplement Reply (filed Feb. 9. 2016) at 10. Because harmlessness analysis will require fact-finding as to the impact of the *Hurst* error on Walls's sentencing, this Court should permit a trial court to make those findings.

D. There are No "Automatic" Aggravating Circumstances Rendering the Sixth Amendment Error Harmless in Florida, Where the Sentencer Must Find "Sufficient" Aggravating Factors to Justify a Death Sentence, and "Insufficient" Mitigating Factors to Overcome the Aggravators

Trial court proceedings on *Hurst* are appropriate in Walls's case even though one of the six aggravating factors found by his trial judge was a prior violent felony conviction. Although *Ring* referred to an exception allowing Arizona judges to find

the fact of a prior conviction, the Florida death penalty law under which Walls was sentenced, unlike the Arizona law at issue in *Ring*, required not only that one or more aggravating factors be found to impose a death sentence, but also required factual determinations that "**sufficient** aggravating circumstances exist" to impose a death sentence, and that "there are **insufficient** mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). As far back as four decades ago, this Court made clear that the "sufficiency" fact determination "is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). The Florida system under which Walls was sentenced is qualitatively different than the Arizona system at issue in *Ring*.

In the context of Florida's capital sentencing structure, this Court cannot determine, without first remanding for trial court proceedings, whether a jury in a hypothetical capital sentencing proceeding that complied with *Hurst* would have made the same "sufficiency" findings as the trial judge in Walls's case, even though one of the aggravating circumstances was permissibly found by the judge. Similarly, determination of whether a jury would have found that mitigating circumstances

were "insufficient" to outweigh the aggravating circumstances in Walls's case also requires a trial court hearing in the first instance.[6]

Capital penalty phase proceedings do not occur in a vacuum. For instance, defense counsel's entire approach to the presentation of evidence in Walls may have been different had counsel known that the jury, as opposed to the judge, was required to make the "sufficiency" and "insufficiency" fact-findings.

This Court, like all appellate courts, is ill-equipped to determine how much influence the trial judge's role as the "sufficiency" fact-finder had on defense counsel's presentation or the jury's deliberations in Walls's case. *See Hall*, 541 So. 2d at 1128 (explaining that "[a]ppellate courts are reviewing, not fact-finding courts . . . ."). As this Court has recognized in the context of *Hitchcock*, such harmless error determinations should be made first by trial courts following an evidentiary hearing. *See, e.g.*, *Meeks*, 576 So. 2d at 716; *Hall v. State*, 541 So. 2d at 1125. And Florida's Legislature has not yet even passed a new statute, which can be considered as part of any harmless error review.

[6] The jury's consideration of the evidence in Walls's case may well have been different if the jury had been required to conduct the fact-finding, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). Trial court proceedings are where such questions should be resolved in the first instance.

Accordingly, this Court should remand so that Walls may file a motion or amended motion for post-conviction relief from his death sentence based on *Hurst*. To the extent that harmless error review is applicable at all, the trial court should hold fact-finding proceedings to determine the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome in Walls's case.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed and the matter remanded for proceedings consistent with *Hall*, *Brumfield*, and *Hurst*.

Respectfully submitted,
/s/ Billy H. Nolas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic service to the Office of the Attorney General at *Charmaine.Millsaps@myfloridalegal.com, Sandra.Jaggard@myfloridalegal.com,* and to counsel for Appellant at *bayalaw@aol.com,* on February 25, 2016.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Billy H. Nolas
Billy H. Nolas

APPENDIX

AFFIDAVIT/DECLARATION OF JETHRO TOOMER, PH.D.
PURSUANT TO 28 U.S.C. § 1746

I, Jethro Toomer, Ph.D., hereby testify, affirm, and declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a licensed psychologist. My practice includes clinical and forensic psychology. I have been qualified by federal and state courts in several jurisdictions to testify about questions of intellectual disability and other forensic issues. I have also served as a professor of psychology. In 2007, I was asked to testify in a post-conviction hearing in the case of *Frank Walls v. State of Florida*. Federal Defender counsel in Mr. Walls' case has now asked me to provide a declaration about my testimony and opinions so that there would be no confusion.

2. My testimony in 2007 pre-dated the United States Supreme Court's decision in *Hall v. Florida*, 134 S.Ct. 1986 (2014) and the subsequent decisions issued by the Florida Supreme Court addressing *Hall*. As an expert witness in Florida, my testimony and opinions were guided by the pre-*Hall* Florida standard. Under that pre-*Hall* standard, a strict IQ cut-off of 70 applied to "mental retardation" cases in Florida.

3. In Mr. Walls' case, I concluded that he had significant deficits in adaptive functioning. I also concluded that his deficits originated and manifested prior to

the age of 18. In fact, there is no doubt that his impairments had their onset before Mr. Walls turned 18.

4. I tested Mr. Walls' adaptive functioning with a specific standardized instrument, the SIB-R, and the results were that Mr. Walls had adaptive deficits in many areas and that these deficits existed and had their onset pre-18. His adaptive deficits were manifold and easily established two of the three prongs necessary for a diagnosis of mental retardation: 1) the age of onset (pre-18) prong and 2) the adaptive deficits prong.

5. My difficulty in concluding that Mr. Walls had mental retardation—what is now called intellectual disability—is that we were operating under the law in effect at the time in Florida. In 2007, this law required that Mr. Walls have an intelligence ("IQ") test score under 70. Florida did not accept the concept of margin-of-error or the test confidence band. Mr. Walls had a post-18 IQ test score of 74. He also had an early childhood IQ score of 102. Note that this higher childhood IQ was before his cerebral impairments began to undermine his functioning, which occurred while he was still younger than 18. As a result of the strict 70 cut off standard in Florida, I had to state Mr. Walls would not meet the test in either adulthood or childhood, and therefore that he could not be characterized as a person with mental retardation. My hearing testimony was based solely on the strict 70 IQ score cut-off in operation in Florida at that time.

6. However, under the national standard for assessment of intellectual disability applied in jurisdictions other than Florida in 2007; under the standard applied in other (non-death penalty) settings in Florida in 2007; and under the standard now applied in Florida death penalty cases after the decision in *Hall*, Mr. Walls is a person with an intellectual disability/mental retardation. He meets all three prongs: 1) he has adaptive deficits in many areas, 2) his deficits manifested and originated pre-18, and 3) he has an IQ score of 74, within the *Hall* range.

7. I neither had then, nor do I have a doubt today, that Mr. Walls functions as an intellectually disabled person in every sense that is meaningful under that diagnosis. It is clear to me, to a reasonable degree of certainty, that the appropriate diagnosis for Mr. Walls post-*Hall* is the diagnosis of intellectual disability. In every functional sense, Mr. Walls is as disabled, if not more disabled, than the dozens of other intellectually disabled criminal defendants I have seen in my forensic practice and the intellectually disabled individuals I have seen in my clinical practice.

8. I ask that my testimony in 2007 not be taken out of context. The context was the strict cut-off IQ score of 70 in effect at that time in Florida. That cut-off no longer being the law after *Hall*, I believe that Mr. Walls—who meets all three prongs under the standard in effect today—should be given the opportunity to

demonstrate that he is, under the current post-*Hall* standard, intellectually disabled. I am available to testify at such a hearing.

I HEREBY CERTIFY that this affidavit/declaration is true and correct pursuant to 18 U.S.C. § 1746.

Jethro Toomer, Ph.D.

Dated: 2-24-16

D/L T560439451830

PATRICIA SIRVAS-PAZ
MY COMMISSION # EE 185924
EXPIRES: April 2, 2016
Bonded Thru Budget Notary Services

No. SC16-102
Lower Tribunal No. 161987CF006876AXXXMA

IN THE

Supreme Court of Florida

MARK JAMES ASAY,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

**BRIEF OF AMICUS CURIAE,
THE CAPITAL HABEAS UNIT OF THE
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE NORTHERN DISTRICT OF FLORIDA,
IN SUPPORT OF PETITIONER MARK JAMES ASAY**

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REQUEST FOR LEAVE TO FILE UNDER RULE 9.370

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida, as amicus curiae, respectfully requests leave to file the accompanying brief in support of habeas Petitioner Mark James Asay, whose execution is scheduled for March 17, 2016.

The Statement of Interest describes the interest of the CHU and its belief that the arguments presented in the amicus curiae brief will be helpful to the Court.

Counsel for Petitioner consents to the filing of this amicus brief. Counsel for Respondent does not object to the filing of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida was established with the concurrence of the Chief Judge of the United States Court of Appeals for the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court for the Northern District of Florida (the Honorable M. Casey Rogers), and the Administrative Office of the United States Courts. The Capital Habeas Unit was established because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concerns for the bench and bar. As the Eleventh Circuit commented:

> Establishing a CHU in one of [Florida's] . . . federal districts would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, . . . but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings.

Lugo v. Secretary, 750 F.3d 1198, 1215 (11th Cir. 2014). The office advises, assists, and trains counsel in capital cases. The office also represents a number of Florida death-sentenced individuals in federal habeas cases. This Court's resolution of the questions flowing from *Hurst v. Florida*, 136 S. Ct. 616 (2016), may well have a life-and-death impact on our clients.

The United States Supreme Court's decision in *Hurst* has marked ramifications on Florida's judicial and legislative branches. This Court stayed the first execution scheduled post-*Hurst*. This Court also ordered supplemental briefing related to the *Hurst* decision in nearly 20 pending post-conviction and direct appeals. At least one trial court ordered death penalty cases halted pending legislative action, and other proceedings in the state and federal courts have been continued until this Court addresses *Hurst*. The Florida Legislature is debating a statute to supplant Fla. Stat. §§ 921.141(2) and (3), which the United States Supreme Court invalidated as unconstitutional in *Hurst*.

This Court granted the undersigned leave to file an amicus brief in the Cary Michael Lambrix death warrant litigation. That brief broadly addressed the retroactivity of *Hurst* and some of the "harmless error" issues flowing from *Hurst*. For the Court's convenience, the *Lambrix* amicus brief is attached to this filing.

This amicus brief is intended to continue that dialogue in the context of Petitioner Mark James Asay's death warrant litigation. Specifically, this brief addresses our perspective on the *scope* of *Hurst*'s retroactivity, explaining that the concept of "partial retroactivity" is antithetical to this Court's established law and fundamentally unfair. We also revisit the question of harmless error review, explaining that such review, if it can be conducted at all, should be conducted in the

first instance in trial courts, notwithstanding any specific aggravators that may have been found by the trial judge or were at issue at sentencing.

We hope the Court will find our perspective helpful.

SUMMARY OF ARGUMENT

This Court should hold that *Hurst* is retroactive under the test established more than 30 years ago in *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

The retroactivity of *Hurst* should not be truncated by limiting claimants to those whose sentences became final after the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). There is no basis under *Witt* for applying the unusual and problematic concept of "partial retroactivity" to *Hurst*. Considerations of fairness and uniformity make it impossible to justify depriving some inmates of their lives under a process no longer considered acceptable and no longer applied to indistinguishable cases. All death row inmates in Florida, regardless of when their sentences became final, should be permitted to file petitions in the trial court for *Hurst* relief and, if necessary, appeal to this Court. That is how the Court proceeded after the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was issued. Fundamental fairness counsels the same approach here, permitting Petitioners Lambrix and Asay and others similarly situated the opportunity to challenge their unconstitutional death sentences.

Hurst claims should not be subjected to harmless error analysis because the Sixth Amendment error identified in *Hurst* is structural. To the extent that *Hurst* claims are subject to harmlessness analysis, this Court should not perform that analysis in the first instance. Consistent with this Court's *Witt* precedent, trial courts should review *Hurst* claims first and should evaluate harmlessness based on the facts of each individual case, including the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome.

ARGUMENT

I. *Hurst* Is Retroactive Under The *Witt* Test

As described by the CHU amicus brief in *Lambrix*, *Hurst* plainly is retroactive under Florida's test. This Court established that retroactivity test more than 30 years ago in *Witt*, and has applied it ever since. Under *Witt*, this Court applies new decisions favorable to criminal defendants retroactively when those decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931).

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 (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."). 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, 277, 280-82 (2008). Florida traditionally has done so.

Hurst satisfies the first two *Witt* retroactivity factors—(1) it is a decision of the United States Supreme Court, and (2) its holding is constitutional in nature: the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "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).

Hurst's purpose is the protection of capital defendants' rights to have the jury find all facts that expose them to a death sentence, a punishment that under Florida law is not authorized by any first-degree murder conviction alone. That purpose would be advanced by retroactive application. Retroactivity would ensure that *all* capital defendants' Sixth Amendment rights are protected, and is in keeping with this Court's understanding that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify 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* would not have a substantially injurious effect on the administration of justice, as the number of potential *Hurst* claimants is both finite and manageable. As of February 2014, Florida's total death row population was less than 400. *See Death Row Roster*, Florida Department of Corrections, *available at* http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last accessed 2/10/16). Retroactive application of new rules affecting much larger populations have been approved. For example, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the United States Supreme Court approved of retroactive application of a new rule prohibiting mandatory life sentences for juveniles, which one study estimated could impact as many as 2,300 cases nationwide. *See* John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-*

Examining Lifetime Sentences for Juvenile Offenders, The Phillips Black Project, *available at* http://www.phillipsblack.org /s/JLWOP-2.pdf (last accessed 2/10/16).

For further discussion of *Hurst* retroactivity under *Witt*, the Court is respectfully referred to the attached amicus brief the undersigned filed in *Lambrix*.

II. The Scope of *Hurst* Retroactivity Should Not Be Truncated

During the oral argument in *Lambrix*, the Court asked questions regarding the scope of *Hurst*'s retroactivity. Specifically, the Court inquired whether *Hurst* should be applied to all cases or limited to death sentences that were finalized after *Ring* or after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which *Ring* relied upon. In subsequent briefing in *Lambrix*, the parties referred to this concept as "partial retroactivity." This Court should reject the idea that *Hurst*'s retroactivity should be so truncated, *i.e.*, limited to a subset of death sentences, such as those "finalized" after *Ring* or after *Apprendi*.

To be sure, *Hurst* should apply retroactively to all Florida death sentences finalized after *Ring*. But there are compelling reasons why *Hurst* should apply to *all* death row inmates, including Petitioners Asay and Lambrix. The United States Supreme Court rejected this Court's view, stated in multiple cases, that *Ring* has no applicability to Florida's capital sentencing scheme. Many of those cases involved petitioners whose death sentences became final *before* the decisions in *Ring* and *Apprendi*. Accordingly, in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *King v.*

Moore, 831 So. 2d 143 (Fla. 2002), and *Johnson v. State*, 904 So. 2d 400 (Fla. 2005), this Court held that *Ring* was inapplicable in Florida because the United States Supreme Court previously had approved of Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Hurst*, the Supreme Court explicitly overruled *Hildwin* and *Spaziano*, leaving this Court's decisions in those cases no legs upon which to stand. *See Hurst*, 136 S. Ct. at 616 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . .").

There is no basis in this Court's retroactivity law to block pre-*Ring* or pre-*Apprendi* defendants from seeking *Hurst* relief. Under *Witt*, all death row inmates in Florida, regardless of when their sentences were finalized, are under a death sentence that is unconstitutional, and all should be permitted to seek *Hurst* relief. That is the procedure recently approved by this Court in *Falcon*. In *Falcon*, which applied *Witt* and ruled retroactive the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that mandatory life sentences for juveniles are unconstitutional), the Court announced that "**any** affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for postconviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller*." *Falcon*, 162 So. 3d at 954 (emphasis added). The Court did not limit *Miller* retroactivity to only **some** prisoners. The Court did not curtail relief for

prisoners who were sentenced before the date when the Supreme Court issued the predicate decisions that laid the groundwork for *Miller*, such as *Roper v. Simmons*, 543 U.S. 551 (2005), or *Graham v. Florida*, 130 S. Ct. 2011 (2010).

Witt itself does not recognize the concept of "partial retroactivity," and this Court has never held that a new Supreme Court decision is retroactive but then refused to allow some individuals to benefit because they were sentenced before some earlier predicate Supreme Court decision. That is because "[c]onsiderations of fairness and uniformity make it very 'difficult to justify 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) (emphasis added).

In the context of capital punishment, this Court rejected the dubious "partial retroactivity" approach after the decision in *Hitchcock*, which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *See, e.g., Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (1987). The Court permitted all impacted individuals to seek *Hitchcock* relief pursuant to Florida Rule of Criminal Procedure 3.850, or if Rule 3.850 relief was unavailable, through a petition in this Court for a writ of habeas corpus. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (holding that

Hitchcock claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So. 2d 713 n.1 (Fla. 1991) ("Because this petition was filed prior to our disposition of *Hall* . . . we will allow the instant claim to be raised in a petition for a writ of habeas corpus.").

This Court did not truncate the retroactivity of *Hitchcock* by limiting it to those whose death sentences were "finalized" after *Lockett v. Ohio*, 438 U.S. 586 (1978). Nor did the Court limit *Hitchcock* relief to cases "finalized" after *Skipper v. South Carolina*, 476 U.S. 1 (1986), or *Eddings v. Oklahoma*, 455 U.S. 104 (1982)—the predicate decisions upon which *Hitchcock* actually relied. *See Hitchcock*, 481 U.S. at 394, 399.

And so, in circumstances precisely analogous to the current post-*Hurst* landscape, when the Supreme Court in *Hitchcock* rejected this Court's interpretation of *Lockett*, this Court found *Hitchcock* retroactive to all death-sentenced prisoners, regardless of whether their cases became final before the predicate decisions in *Skipper*, *Eddings*, or *Lockett*. By way of example, in *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991), this Court permitted a *Hitchcock* claim in a case where the death sentence had been finalized two years prior to *Lockett*. So too, the availability of *Hurst* relief should not be truncated by *Ring* or *Apprendi*.

The concept of "partial retroactivity" is recognized as uncommon and has been criticized as antithetical to basic notions of fairness. Arbitrarily denying relief

to some defendants sentenced to death but not others is particularly egregious. After all, "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 . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

Surely, the question should not be how many executions based upon unconstitutional death sentences Florida will tolerate before *Hurst* is given effect. In ruling *Hurst* retroactive under *Witt*, this Court should not truncate the scope of retroactivity. This Court's history of adherence to principles of fundamental fairness opposes such a miserly approach. All death row inmates in Florida, including Petitioners Asay and Lambrix and others similarly situated, should be permitted to file petitions for *Hurst* relief.

III. Any Harmless Error Review Requires Trial Court Proceedings

In *Hurst*, the Supreme Court did not reach the issue of harmless error, observing that such analysis is ordinarily left to the state courts. *Hurst*, 136 S. Ct. at 616 ("[W]e do not reach the State's assertion that any error was harmless."). As the CHU amicus described in *Lambrix*, harmless error review is hard to square with *Hurst* because *Hurst* errors are "structural." *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."). 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. *Hurst* errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "deprive defendants of basic protections without which a [death penalty] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8 (1999).

However, even if *Hurst* errors are deemed subject to harmless error analysis, individualized trial court proceedings are required before this Court can properly evaluate harmlessness in particular cases. In a recent filing in *Lambrix*, the State agreed that harmless error analysis rests on the facts of each case. *See* State's Response to Petitioner's Second Motion to Supplement Reply, No. SC16-56 (filed Feb. 9. 2016) at 10. Because harmlessness analysis will require fact-finding as to the impact of the *Hurst* error, this Court should allow trial courts to make those findings in the first instance.

This holds true even where the trial judge in a particular case found one or more aggravating circumstances based on the defendant's prior or contemporaneous

convictions. Although *Ring* referred to an exception allowing Arizona judges to find the fact of a prior conviction, Florida's death penalty law, unlike the Arizona law at issue in *Ring*, requires not only that one or more aggravating factors be found to impose a death sentence, but also requires factual determinations that "**sufficient** aggravating circumstances exist" to impose a death sentence, and that "there are **insufficient** mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (emphasis added). As far back as four decades ago, this Court made clear that the "sufficiency" fact determination "is not a mere counting process of X number of aggravating circumstances and number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). This is qualitatively different than the Arizona system at issue in *Ring*.

In the context of Florida's capital sentencing structure, this Court cannot determine, without first remanding for trial court proceedings, whether a jury in a hypothetical capital sentencing proceeding that complied with *Hurst* would have made the same "sufficiency" findings as the trial judge in any particular case, even where one or more of the aggravating circumstances were permissibly found by the judge. A determination of whether an individual petitioner would have been sentenced to death, notwithstanding the Sixth Amendment infirmity baked into

Florida's now-invalidated capital sentencing system, would require the Court to hypothesize—in an imaginary proceeding consistent with *Hurst*—whether the jury would have found "sufficient" aggravating circumstances for a death sentence, and whether the jury would have found that any mitigating circumstances were "insufficient" to outweigh the aggravating circumstances.

Such hypotheses-based harmless error review is rendered even more problematic by the fact that capital penalty phase proceedings do not occur in a vacuum. For instance, a defense counsel's entire approach to the presentation of evidence may have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. And the jury's consideration of the evidence may well have been different if the jury had been required to make the findings, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). Further complicating matters, the Florida Legislature has not yet enacted a statute in response to *Hurst* that can be measured against the record of individual cases for harmlessness.

This Court, like all appellate courts, is ill-equipped to determine how much influence the trial judge's role as the "sufficiency" fact-finder had on defense

counsel's presentation or the jury's deliberations. *See Hall*, 541 So. 2d at 1128 (explaining that "[a]ppellate courts are reviewing, not fact-finding courts . . . ."). As this Court has recognized in the context of *Hitchcock*, such harmless error determinations should be made first by trial courts following an evidentiary hearing. *See, e.g.*, *Meeks*, 576 So. 2d at 716; *Hall*, 541 So.2d at 1125.

CONCLUSION

Hurst is retroactive under *Witt*. *Hurst*'s retroactivity should not be truncated by limiting claimants to those whose sentences were finalized after *Ring*, *Apprendi*, or some other point in time. All death row inmates in Florida, regardless of when their sentences were finalized, should be permitted to file petitions in the trial court for *Hurst* relief and, if necessary, appeal the trial court's ruling to this Court.

Hurst claims should not be subjected to harmless error analysis because the Sixth Amendment error identified in *Hurst* is structural. However, if the Court concludes *Hurst* claims should be subjected to harmlessness analysis, this Court should not perform that analysis in the first instance. The trial courts that review *Hurst* claims should evaluate harmlessness based on the facts of each individual case, including the *Hurst* error's impact on the defense presentation, jury deliberations, and sentencing outcome.

The Court should permit Petitioner Asay and other death-sentenced Petitioners to litigate their *Hurst* claims initially in the trial court.

Respectfully submitted,
/s/ Billy H. Nolas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by email to the Office of the Attorney General at *Charmaine.Millsaps@myfloridalegal.com*, *capapp@myfloridalegal.com*, and *warrant@flcourts.org*, on February 12, 2016.

/s/ Billy H. Nolas
Billy H. Nolas

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Billy H. Nolas
Billy H. Nolas

No. SC16-56
Lower Tribunal No. 221983CF000012CFAXMX

IN THE

Supreme Court of Florida

CARY MICHAEL LAMBRIX,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

**BRIEF OF AMICUS CURIAE,
THE CAPITAL HABEAS UNIT OF THE
OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE NORTHERN DISTRICT OF FLORIDA,
IN SUPPORT OF PETITIONER LAMBRIX
AND CONSOLIDATED MOTION FOR LEAVE TO FILE**

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MOTION FOR LEAVE TO FILE UNDER RULE 9.370

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida, as amicus curiae, respectfully moves for leave to file the accompanying brief in support of Petitioner Cary Michael Lambrix, whose execution is scheduled for February 11, 2016.

The Statement of Interest describes the interest of the CHU and its belief that the arguments presented in the amicus curiae brief will be helpful to the Court.

Counsel for Petitioner has agreed to the filing of the accompanying brief. Counsel for Respondent, representing the State, objects to the filing of the brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida was established with the concurrence of the Chief Judge of the United States Court of Appeals for the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court for the Northern District of Florida (the Honorable M. Casey Rogers), and the Administrative Office of the United States Courts. The Capital Habeas Unit was established because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concerns for the Bench and Bar. As the Eleventh Circuit commented:

> Establishing a CHU in one of [Florida's] . . . federal districts would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, . . . but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings.

Lugo v. Secretary, 750 F.3d 1198, 1215 (11th Cir. 2014). The office advises, assists, and trains counsel in capital cases. The office also represents a number of Florida death-sentenced individuals in federal habeas cases, and this Court's resolution may well have a life-and-death impact on our clients.

As the institutional federal capital defender office of Florida, our office, as a friend of the Court, hopes that the Court will find helpful our perspective on the retroactivity of the recent federal constitutional decision in *Hurst v. Florida,* No.

14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016), as well as on some of the general "harmless error" questions that the Court will confront in light of *Hurst*.

SUMMARY OF ARGUMENT

Hurst raises highly consequential questions. Those questions include complex issues of retroactivity and harmless error analysis. This amicus curiae brief primarily addresses retroactivity and comments on harmless error, explaining that *Hurst* should be applied to cases on collateral review under the *Witt* test, and that *Hurst* claims may not be easily—if at all—subject to harmless error review.

Above all, amicus submits that *Hurst* retroactivity and harmless error analysis—life or death matters for many—should not be resolved by this Court in the first instance, mid-way through Petitioner's state habeas proceeding, and under the constraints of an active death warrant. It is urged that this Court, consistent with its practice in similar cases, enter a stay of execution and permit Petitioner to litigate his *Hurst* claim initially in the trial court. At a minimum, it is urged that a stay of execution be granted and that Petitioner be permitted to file an amended petition in this Court so that he can make arguments based on the actual *Hurst* decision, as opposed to the preliminary and speculative arguments in his pre-*Hurst* petition.

ARGUMENT

"Florida's capital sentencing scheme violates the Sixth Amendment . . . ." *Hurst*, 2016 WL 112683, at *5. The *Hurst* Court invalidated as unconstitutional Fla.

Stat. §§ 921.141(2) and (3), which provide that a defendant who has been convicted of a capital felony may be sentenced to death only after (1) a penalty phase jury renders an advisory verdict, without specifying the factual basis for its recommendation, and (2) notwithstanding the recommendation of a majority of the jury, the court decides whether sufficient aggravating circumstances exist and that they are not outweighed by the mitigating circumstances. *See id.* at *3.

The *Hurst* ruling emanates from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). In *Apprendi*, the Supreme Court held that the Sixth Amendment, in conjunction with the Due Process Clause, requires 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 the jury. *Apprendi*, 530 U.S. at 494. In *Ring*, the Court applied *Apprendi* in the capital punishment context, ruling that Arizona's capital sentencing scheme was unconstitutional because it required judges to independently find at least one aggravating circumstance before imposing a death sentence. *Ring*, 536 U.S. at 604.

In *Hurst*, the Supreme Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 2016 WL 112683, at *5. That is because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* Accordingly, the Court ruled that Florida's capital sentencing

scheme violated the Sixth Amendment. *Id.* at 6. The Court did not address whether its decision was retroactive to cases on collateral review, and indicated that any harmless error determinations will ordinarily be left to the state courts. *Id.* at 8.

I. *Hurst* Claims Should Be First Brought In Florida's Trial Courts

The appropriate place to resolve the difficult retroactivity and harmless error questions raised by *Hurst* in the first instance is not mid-way through a state habeas corpus proceeding under the time constraints of an active death warrant. When Petitioner initiated these proceedings, *Hurst* had not yet been decided, meaning that his initial arguments were necessarily speculative and preliminary. Now that *Hurst* has issued, Petitioner Lambrix should be permitted, consistent with this Court's practice, to return to the trial court to litigate his *Hurst* claims on the basis of the actual decision in *Hurst*. In similar situations in the past, this Court has permitted litigation based on recently-issued Supreme Court decisions to first occur in the trial court and later to be appealed. *See, e.g.*, *Hall v. State*, 941 So. 2d 1125, 1128 (1989) (explaining that because "[a]ppellate courts are reviewing, not fact-finding courts," claims under the Supreme Court's recent decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), "should be presented to the trial court in a rule 3.850 motion for postconviction relief . . . ."); *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991); *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (permitting life-sentenced juvenile offenders

two years to petition the trial court for relief under the Supreme Court's recent decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)).

At a minimum, Petitioner Lambrix should be permitted to re-file an amended petition with the benefit of the *Hurst* opinion. His present petition, based on what he surmised the Supreme Court *could* say in *Hurst*, is by its very nature insufficient and not appropriate for adjudication under the actual *Hurst* opinion.

II. *Hurst* Is Retroactive Under The *Witt* Test

A. The *Witt* Test

This Court recently reaffirmed the continuing validity of Florida's long-applied retroactivity test, established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), for determining 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. *See Falcon*, 162 So. 3d at 954 (holding that *Miller v. Alabama* is retroactive). 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.

B. Applying *Witt* to *Hurst*

Here, it is not debatable that *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; *see also Falcon*, 162 So. 2d at 960 (finding that Supreme Court decision that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders is clearly constitutional in nature.") (internal quotation omitted).

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. The factor is established.

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.

Here, *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).

Put simply, death sentences imposed with a judge's, but not a jury's findings on the defendant's eligibility for capital punishment are unconstitutional. The question should not be how many executions based upon such unconstitutional

sentences will Florida tolerate before *Hurst* is given effect. This Court's history of adherence to principles of fundamental fairness opposes such a miserly approach.

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.

C. This Court's Retroactivity Decisions in Similar Contexts

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 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.

Hurst is about aggravation findings. This Court has found retroactive the Supreme Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that Florida's "heinous, atrocious or cruel" aggravating circumstances was, without a clarifying instruction, impermissibly vague under the Eighth Amendment and the Court's prior decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988). Before *Espinosa*, this Court interpreted *Maynard*'s vagueness analysis of a similar

Oklahoma aggravating factor to be inapplicable to Florida's aggravating factor. Following the contrary decision in *Espinosa*, this Court applied the *Witt* test and determined that *Espinosa* was retroactive, permitting the revisiting of previously rejected challenges to the "heinous, atrocious or cruel" aggravating circumstance. *James v. State*, 615 So. 2d 688, 669 (Fla. 1993); *see also Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994). Again, *Hurst* is no less significant.

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.

D. The Supreme Court's Decision in *Summerlin*

Any State arguments focused on the Supreme Court's decision in *Summerlin*, would be misplaced. *Summerlin* has no impact on this Court's retroactivity analysis. In *Summerlin*, the Supreme Court ruled that *Ring* would not be applied retroactively under the stringent *Teague* retroactivity standard applied by federal courts in a habeas corpus case. Those special federal standards were developed with "[c]omity interests and respect for state autonomy" in mind. *Summerlin*, 542 U.S. at 364. Such considerations are inapplicable when a state decides whether to apply a new Supreme Court decision to its own collateral review docket, particularly when, as in Petitioner's case, the relevant Supreme Court decision addressed that same state's procedures. This Court, as recently as last year, continues to apply Florida's retroactivity standard, as set down in *Witt*. Under *Witt*, this Court is empowered to apply *Hurst* retroactively in Florida and in accord with its tradition of respect for the rights of capital defendants. Amicus urges that the Court do so.

E. This Court's Decision in *Johnson*

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* outlined earlier decisions espousing that *Ring* did not apply in Florida:

> We first analyzed *Ring*'s effect on Florida law in two plurality opinions, *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). Both opinions noted that the United States Supreme Court repeatedly has upheld Florida's capital sentencing scheme. *Bottoson*, 833 So. 2d at 695; *King*, 831 So. 2d at 143.

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 v. Florida*, 490 U.S. 638 (1989), and *Spaziano v.*

Florida, 468 U.S. 447 (1984). *Hurst* **explicitly overruled** *Hildwin* and *Spaziano*, leaving *Johnson* no remaining legs to stand on. *See Hurst*, 2016 WL 112683, at *7-8 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part . . . . Time and subsequent cases have washed away the[ir] logic . . .").

F. *Hurst* Should Be Applied Retroactively

Based on the foregoing, *Hurst* should be applied retroactively under this Court's *Witt* test. The appropriate remedy, as this Court explained in *Falcon*, is to permit capital defendants in Florida, even those whose convictions have become final, an opportunity to file Rule 3.851 petitions in light of *Hurst*. Possibly following the Legislature's enactment of a new death penalty statute, which the Legislature has already begun to draft, Florida courts presented with *Hurst* petitions should conduct resentencing proceedings in conformance with the new legislation. *See Falcon*, 162 So. 3d at 963 ("[W]e conclude that trial courts should apply chapter 2014-220, Laws of Florida, and conduct a resentencing proceeding in conformance with that legislation, when presented with a timely rule 3.850 motion for postconviction relief from any juvenile offender whose sentence is unconstitutional under *Miller*."). This Court may impose a time limitation on the filing of *Hurst* petitions, as it has in other instances. *See id.* at 954 ("[A]ny affected juvenile offender shall have two years from the time the mandate issues in this case to file a motion for postconviction relief in the trial court seeking to correct his or her sentence pursuant to *Miller*.").

At a minimum, this Court should grant stays of execution to *Hurst* petitioners under active death warrants, such as Petitioner Lambrix, pending a more complete presentation. *See, e.g.*, *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) (granting stay of execution to determine whether *Hitchcock* was retroactive under *Witt*); *Riley*, 517 So. 2d at 660 (same); *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (granting stay of execution to determine whether *Booth v. Maryland*, 482 U.S. 496 (1987), was retroactive under *Witt*). The question of *Hurst*'s retroactivity—a matter of life and death—is too consequential to decide mid-way through an appellate proceeding filed pre-*Hurst* and under the time constraints of an active death warrant.

III. *Hurst* Claims Present Harmless Error Analysis Problems Not Suited for Expedited Resolution by This Appellate Court in the First Instance

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*, 2016 WL 112683, at *8 ("[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. However, this Court should not decide those highly-consequential issues

mid-way through the instant proceeding. Rather, the complexity of conducting proper harmless error analysis in the context of *Hurst* claims is appropriately resolved by trial courts in the first instance, and appealed to this Court with the opportunity for full, untruncated briefing and oral argument.

There is a serious question as to whether *Hurst* claims are subject to harmless error analysis at all, or whether 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 likely to be found 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 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.

Moreover, the Florida Legislature has not yet enacted any statute in response to *Hurst* that courts can measure against the records of individual cases to conduct harmless error review. Today, this Court would be simply guessing what the Legislature will enact and then using that estimation to measure against the record of individual cases for harmlessness.

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.

This Court must ultimately determine whether *Hurst* errors are structural or subject to harmless error review, and if the Court determines that such errors are subject to harmless error review, it must come to terms with various fact patterns relating to how such review should be conducted. The Court should not decide such serious and consequential matters in the first instance, mid-way through Petitioner's current proceeding, and under the constraints of an active death warrant. As explained above, the appropriate course is to permit capital petitioners in Florida an opportunity to file Rule 3.851 petitions in light of *Hurst*. The trial courts can rule

on the harmless error issue as to each case in the first instance, and the decisions can then be appealed to this Court.

CONCLUSION

Hurst raises significant and highly-consequential questions involving retroactivity and harmless error analysis. Amicus respectfully submits that *Hurst* should be applied to cases on collateral review under the *Witt* test, and that harmless error analysis of *Hurst* claims would be either inapplicable or extremely problematic. Because of the importance of these issues, this Court should not decide them in the first instance, mid-way through Petitioner's habeas corpus proceeding, and under the constraints of an active death warrant. It is urged that this Court, consistent with its practice in similar prior cases, enter a stay of execution and permit Petitioner to litigate his *Hurst* claim initially in the trial court. At a minimum, it is urged that a stay of execution be granted and Petitioner be permitted to re-file his petition so that he can make arguments based on the actual *Hurst* decision, as opposed to the speculative and preliminary arguments in his pre-*Hurst* filings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at *Scott.Browne*@myfloridalegal.com, *capapp@myfloridalegal.com*, and *warrant@flcourts.org*, on January 15, 2016.

/s/ Billy H. Nolas
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Billy H. Nolas
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