IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1752

WILLIAM THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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

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PRELIMINARY STATEMENT

This Supplemental Brief is being filed in accordance with the Court's Order on February 16, 2016, entered in response to Mr. Thompson's request for supplemental briefing filed on February 11, 2016, in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016).

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "R1" refers to the record on direct appeal to this Court from the 1976 sentencing; "R2" refers to the record on direct appeal to this Court from the 1978 sentencing; "R3" refers to the record on direct appeal to this Court from the 1989 resentencing; "PCR-I" refers to the postconviction record concerning SC03-2129 on appeal to this Court from the denial of the 3.850 motion. "PCR-II" refers to the postconviction record concerning SC05-279 on appeal to this Court from the denial of the 3.850 motion; "PCR-III" refers to the postconviction record of SC07-2000 on 3.850 appeal to this Court; "PCR-IV" refers to the postconviction record of SC-09-1085 on 3.851 appeal to this Court; "T1" refers to the transcript of the first day of the evidentiary hearing held with respect to SC07-2000, conducted on April 13, 2009; "T2" refers to the transcript of the second day of the evidentiary hearing of the same, conducted on April 27, 2009; "PCR-V" refers to the postconviction record concerning SC15-1752, which includes the transcript of the case management conference. "PCR-V. Supp"

refers to the supplemental record for SC15-1752. All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson requests that oral argument be heard in this case. Mr. Thompson is under sentence of death. This Court has generally granted oral argument in capital cases similarly postured. Oral argument is necessary to fully develop the claims at issue in this case, on which Mr. Thompson's life will turn. Mr. Thompson is entitled to "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Thus, pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Thompson respectfully moves this Court for oral argument on his appeal.

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PRELIMINARY STATEMENT OF THE CASE AND FACTS

William Thompson's case is currently pending before this Court on his appeal of the circuit court's denial of his Successive Motion to Vacate Judgment and Sentence based on the Eighth Amendment's prohibition against executing the intellectually disabled pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014). This case is not yet calendared for oral argument.

On January 12, 2016, the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of *Ring v. Arizona*, 536 U.S. 584 (2002). On February 11, 2016, Mr. Thompson filed a motion seeking leave to file supplemental briefing addressing the applicability of *Hurst* to Mr. Thompson's case and on February 16, this Court granted Mr. Thompson's motion. This Brief follows.

Procedural History

A procedural history and statement of facts is contained in Mr. Thompson's Initial Brief filed on January 27, 2016. Mr. Thompson includes only those additional facts relevant to his *Hurst* argument in this Brief.

Pursuant to this Court's ruling, Mr. Thompson was granted a penalty phase resentencing due to *Hitchcock* error as set out in Mr. Thompson's Initial Brief. *See Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). The circuit court conducted an "advisory sentencing hearing" in May of 1989, and on June 6, 1989 Mr. Thompson's

jury recommended death by a vote of seven to five (R3. 1597; R3. 3192-94). On August 25, 1989, the trial court imposed a sentence of death, and Mr. Thompson received consecutive life sentences for the remaining counts (R3. 3336). *See Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

On direct appeal, Mr. Thompson again challenged the constitutionality of the death penalty statute and the aggravating circumstances applied to him. This Court struck the "cold, calculated, and premeditated" aggravating factor but found the error to be harmless. *Thompson*, 619 So. 2d 261. This Court also found harmless the trial judge's failure to find any mitigation despite the previous judge's finding of two statutory mitigators. *Id.* The United States Supreme Court denied certiorari on November 8, 1993. *Thompson v. Florida*, 114 S. Ct. 445 (1993).

Mr. Thompson continued to collaterally challenge his sentence of death in state and federal court. State proceedings relating to Intellectual Disability ("ID") occurred alongside federal proceedings. In 2001, Mr. Thompson began a challenge to his death sentence based on the newly enacted statute precluding execution of the intellectually disabled. Two years later, he amended his Rule 3.850 and raised both *Ring* and *Atkins v. Virginia,* 536 U.S. 304 (2002) claims (PCR-I. 3). It took six years, and an Order from this Court, before Mr. Thompson was able to even present evidence as to his intellectual disability (PCR-IV. 17). After the hearing, the circuit court denied relief based on *Cherry v. State,* 959 So. 2d 702 (Fla. 2007) (PCR-IV.

823). This Court denied Mr. Thompson's appeal. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010). (unpublished opinion). On May 26, 2015, Mr. Thompson filed a Rule 3.851 post - conviction motion challenging his sentence of death as unconstitutional on the basis of *Hall* (PCR-V. 74). On July 10, 2015, the lower court summarily denied relief (PCR-V. 126). Mr. Thompson timely appealed to this Court. Mr. Thompson then sought supplemental briefing as set out above.

Penalty Phase Proceedings

During voir dire of the 1989 "advisory sentencing hearing," the court repeatedly instructed the jury that their role was merely advisory, that they would only be giving a "recommendation" as to the sentence, and that the final decision as to punishment "rest[ed] solely with the court" (R3. 1004).

> … [W]e are here to render an advisory opinion, advisory sentence opinion to the court as to whether the facts in the law support the imposition of the death penalty, or life with a minimum of 25 years. The life, minimum with a sentence of 25 years, notwithstanding its advisory sentence, or advisory that will be strongly persuasive to the – to the court, which the jury might recommend, under the circumstances. But the Court does not have to accept the advisory opinion, or sentence of the jury.
>
> At this time, I would like to red to you what I read to you before, to refresh your memory before we go on. It appears that we have perhaps lost sight of what role of this jury is to be – for those of you who will be selected as potential jurors in this case. […]
>
> The final decision as to what punishment to impose rests solely with the judge of this court. However, the law

> requires that you, the jury, render to the court an advisory sentence as to what punishment shall me imposed on the defendant.

(R3. 1071).

After hearing several jurors express difficulty in considering the death penalty, the State took reassured the jury of their advisory role:

> And even when you make that recommendation, it's not binding on this judge. He'll still make the final, ultimate decision. It's just recommending that you as the jurors feel would be the appropriate sentence in this case.

(R3. 1189). The State told the jury, "[y]our only issue here – and I don't mean to minimize it, but your role here is to recommend one of two sentences to the court." (R3. 1673). *See also* R3. 1169 ("And even when you make that recommendation, it's not binding on this judge. He'll still make the final, ultimate decision.")

"Advisory" and "recommendation" were repeated throughout. The judge also told the jury that their recommendation as to penalty did not have to be unanimous.

> What we didn't tell you is that on a regular trial, guilt or innocence, as we all know, it must be unanimous, must be unanimous. However, the law on a capital case says on the second part of the trial, the penalty phase, which is the only part of the trial you're going to see, it only takes a majority, a majority. So if the vote is seven to five for death or eight to four or none to three, that is a death recommendation by the jury. Six to six is a tie, it does to the runner and that's a life recommendation.

(R. 1351).

Before the penalty phase began, the court announced to the jury that "this is an advisory sentencing hearing" (R3. 1595). At the close of penalty phase evidence, before deliberations, the judge noted again "as you have been told, the final decision as to what punishment shall be imposed is a responsibility of the judge" (R3. 3115). The judge then instructed the jury on all aggravating circumstances, even those that did not apply (R3. 3116–17). Following instructions, the jury was told that they were to "retire to consider [their] recommendation" (R3. 3124).

On June 6, 1989, the jury issued an "advisory sentence" and recommended death by a vote of 7 to 5 (R. 3192-94). The jury used only a general verdict form which gave no indication of any findings made by the jury about any death eligibility factors set forth in Florida's statute.

The judge then conducted an independent sentencing proceeding and imposed a death sentence. The court determined the aggravating factors and that no mitigation existed, even though the jury had recommended death by a bare majority and the prior sentencing judge had found two statutory mitigators – Mr. Thompson's age and lack of prior criminal history. In his sentencing order, the trial court stated that it gave the jury's recommendation "the consideration which it deserves" (R3. 3313). What the jury found as a matter of fact is unknown. All that is known is that the jury's death "recommendations" were made by a vote of 7 to 5.

On August 25, 1989, the trial court imposed a sentence of death, and Mr.

Thompson received life sentences for the remaining counts, to run consecutive to each other (R3. 3336). *See Thompson*, 619 So. 2d 261.

SUMMARY OF THE ARGUMENTS

On January 12, 2016, the United States Supreme Court rendered its decision in *Hurst*. The Court held that Florida's death penalty scheme was unconstitutional because it allowed a judge, not a jury, to find facts necessary to impose a death sentence, and that a jury's mere recommendation is not enough. *Id*. at 619. After *Hurst*, a Florida death sentence unsupported by jury findings of sufficient aggravating circumstances not outweighed by mitigating circumstances has no basis in law, is invalid, void, and unconstitutional.

Hurst requires a global paradigm shift in our understanding of the Sixth Amendment aspects of Florida's death penalty scheme. *Hurst* establishes that our most basic assumptions about the constitutional integrity of Florida's scheme were wrong. The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance and jurisprudential upheaval. Thus, *Hurst* is undoubtedly a "development of fundamental significance" within the meaning of *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980), and must be given retroactive effect.

Hurst error is structural and not amenable to harmless error analysis. Because Mr. Thompson was sentenced to death under an unconstitutional statute, he must be

resentenced to life imprisonment in accordance with Fla. Stat. § 775.082. Or, alternatively, he should be allowed to file a successive 3.851 and have his *Hurst* claim heard by the circuit court. Regardless, his death sentence cannot stand as it was obtained under an unconstitutional statute.

ARGUMENT

MR. THOMPSON'S CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONAL UNDER *HURST V. FLORIDA* BECAUSE A JUDGE, RATHER THAN A JURY, FOUND THE FACTS NECESSARY TO IMPOSE DEATH

A. A Jury Did Not Make The Findings Of Fact Necessary To Render Thompson Eligible For A Death Sentence.

Hurst held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst*, 136 S. Ct. at 619. There is no conviction of capital murder in Florida without the jury findings required by *Hurst*. *Hurst* identified what those critical factual findings are, leaving no doubt as to how Florida's capital sentencing statute must be read:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3). "[T]he jury's

> function under the Florida death penalty statute is advisory only." **The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.**

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

Hurst pointed out that "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment." *Id*. at 619 (citing Fla. Stat. § 775.082(1)). Under Florida law, death eligibility depends on the presence of certain statutorily defined facts, in addition to the verdict unanimously finding the defendant guilty of first degree murder: (1) that sufficient aggravating circumstances exist; and (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *See* Fla. Stat. § 921.141(3); *Hurst*, 136 S. Ct. at 622. Under *Hurst*, these findings of fact must be made by a jury. Neither of these factual determinations was made by Mr. Thompson's jury, and because they were not, Mr. Thompson was not death-eligible and must be sentenced to life imprisonment. The *Hurst* Court squarely held: "As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Hurst*, 136 S. Ct. at 622. The same is true here.

The findings of fact statutorily required to render a defendant death-eligible are elements of the offense which separate first degree murder from capital murder

under Florida law, and form part of the definition of the crime of capital murder. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the ruling of *Jones v. United States*, 526 U.S. 227 (1999) that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" to state sentencing schemes under the Fourteenth Amendment).

In *Ring*, the U.S. Supreme Court applied the *Apprendi* rule to Arizona's capital sentencing scheme and found that it violated the Sixth Amendment.[1] The U.S. Supreme Court in *Hurst* found that this Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) had wrongly failed to recognize that *Ring* and *Apprendi* meant that Florida's capital sentencing statute was also unconstitutional. Much of the basis for this Court's erroneous conclusion that *Ring* and *Apprendi* were inapplicable in Florida was its continued reliance on *Hildwin v. Florida*, 490 U.S. 638 (1989), which held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." This Court's reliance in *Bottoson* upon the continued vitality of *Hildwin* (and related

[1] In Arizona, the factual determination required by Arizona law before a death sentence was authorized was at least one aggravating factor. *Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001). Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon the findings of sufficient aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravators. Fla. Stat. § 921.141(3).

findings in *Spaziano v. Florida*, 468 U.S. 447 (1984)) was misplaced and contrary to *Apprendi* and *Ring*. "*Spaziano* and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin*, 490 U.S., at 640-41. Their conclusion was wrong, and irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623 (citations omitted).

The fact that sufficient aggravating circumstances must be found under Florida law to render a capital defendant death-eligible is unlike the Arizona law that was at issue in *Ring*, and has at least two important consequences in assessing *Hurst's* scope and impact in Florida: (1) the finding of a prior violent felony does not cure *Hurst* error; and (2) a finding of the felony murder aggravator does not cure *Hurst* error. Before a death sentence can be imposed, there must be a finding that those circumstances—if present—are **sufficient** in a given case to justify a death sentence.[2] Not all prior violent felonies are equal. The sufficiency finding required

[2] Evidencing this are the numerous cases whether this Court has found single aggravating circumstances to be insufficient to support a death sentence during proportionality review. *See, e.g.*, *Yacob v. State*, 136 So. 3d 539 (Fla. 2014) (felony murder and pecuniary gain merged); *Ballard v. State*, 66 So. 3d 912 (Fla. 2011) (CCP); *Williams v. State*, 37 So. 3d 187 (Fla. 2010) (avoid arrest); *Green v. State*, 975 So. 2d 1081 (Fla. 2008) (prior conviction); *Jones v. State*, 963 So. 2d 180 (Fla. 2007) (felony murder and pecuniary gain merged); *Offord v. State*, 959 So. 2d 187 (Fla. 2007) (HAC); *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (prior conviction); *Woods v. State*, 733 So. 2d 980 (Fla. 1999) (prior conviction); *Hardy v. State*, 716 So. 2d 761 (Fla. 1998) (victim was law enforcement); *Jones v. State*, 705 So. 2d 1364 (Fla. 1998) (felony murder and pecuniary gain merged); *Jorgenson v. State*,

by the statute means that there must first be a case-specific assessment of the facts of the prior crime and a determination by the jury as to whether those facts—in conjunction with the factual basis for any other aggravators—are sufficient to justify the imposition of a death sentence. Then the jury must likewise evaluate the mitigating factors and make a finding that they are not sufficient to outweigh the aggravators.

Mr. Thompson's jury did not make any such findings. In fact, they made no findings at all. The jury was repeatedly told that its role in determining punishment was merely advisory, and that it was only required to provide an advisory opinion or recommendation. The form signed and returned merely stated that "a majority of the jury . . . **advise and recommend to the Court** that it imposes the death sentence"

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714 So. 2d 423 (Fla. 1998) (prior conviction); *Williams v. State*, 707 So. 2d 683 (Fla. 1998) (pecuniary gain); *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995) (prior conviction); *Chaky v. State*, 651 So. 2d 1169 (Fla. 1995) (prior conviction); *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995) (felony murder); *Thompson v. State*, 647 So. 2d 824 (Fla. 1994) (felony murder); *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993) (CCP); *Knowles v. State*, 632 So. 2d 62 (Fla. 1993) (prior conviction); *White v. State*, 616 So. 2d 21 (Fla. 1993) (prior conviction); *Clark v. State*, 609 So. 2d 513 (Fla. 1992) (pecuniary gain); *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991) (CCP); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991) (felony murder); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990) (HAC); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989) (HAC); *Songer v. State*, 544 So. 2d 1010 (Fla. 1989) (under sentence); *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988) (felony murder); *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987) (felony murder); *Caruthers v. State*, 465 So. 2d 496 (Fla. 1985) (felony murder); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985) (HAC); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984) (felony murder); *Menendez v. State*, 419 So. 2d 312 (Fla. 1982) (felony murder).

on Mr. Thompson (R3. 3193). The jury made no findings as to the facts necessary to make Mr. Thompson death-eligible and the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622; *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Additionally, although the U.S. Supreme Court did not specifically address whether Petitioner Hurst was entitled to a jury determination of his ID, the logic of *Hurst* suggests that the Sixth Amendment right must also attach to an ID claim. The *Hurst* Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each necessary to impose a sentence of death. A jury's mere recommendation is not enough." Florida Statute § 921.137(2) provides that "[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is ID." The determination of whether someone is ID is made by a judge, not a jury. Fla. Stat. § 921.137(4). This is given even greater significance in Mr. Thompson's case since the trial judge remarkably found *no mitigation* and the jury verdict for death was by a bare majority.

The logic of *Hurst* means that the Sixth Amendment right to a jury attaches to the ID determination. Mr. Thompson is categorically ineligible for death if he is ID. Once there is evidence raising a question of fact as to a defendant's ID, there must be a factual finding that the defendant is **not** ID before he can be subjected to a death sentence. Under *Hurst*, such a factual finding must be made by a jury, not a judge.

B. The Elements A Jury Must Find In Order To Subject A Defendant To Death Must Be Found Unanimously.

Apprendi, *Ring*, and *Hurst* hold that the facts necessary to render a capital defendant death-eligible are elements which must be found by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 602.

The requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Bottoson*, 833 So. 2d at 714 (Shaw, J., concurring). This Court held to that requirement over the years, stating in *Patrick v. Young*, 18 Fla. 50, 50 (Fla. 1881) that "[t]he record of a verdict implies a unanimous consent of the jury, and is conclusive evidence of that fact," and later in *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956) that "[i]n this state, the verdict of the jury must be unanimous."

This Court memorialized the unanimity requirement in Florida Rule of Criminal Procedure 3.440, which provides that "[n]o verdict may be rendered unless all of the trial jurors concur in it," that a court may not even correct matters of form in a verdict without "the unanimous consent of the jurors," and that a verdict cannot be entered of record if "disagreement is expressed by one or more" jurors. Fla. R. Crim. P. 3.440 (Rendition of Verdict; Reception and Recording). The requirement also appears in Florida Court's Standard Jury Instruction 3.10(6), which admonishes

juries that "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." The right to a unanimous jury finding on elements of crime is foundational in Florida law.

This means that *Hurst's* application of *Apprendi* to the § 921.141(3) findings comes with a concomitant requirement of unanimity. At issue in *Apprendi* was a sentencing statute in which the New Jersey Legislature "decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense," so that it would be found by a judge, rather than a jury. *Apprendi*, 530 U.S. at 471. This violated the Sixth Amendment and the right to a jury trial embodied therein, as the United States Supreme Court explained in *Apprendi*:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."

Apprendi, 530 U.S. at 477 (alterations and emphasis in original) (citations omitted). Observing that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding," *id*. at 478 (footnote omitted), the *Apprendi* Court ruled that any finding of fact which "expose[s a defendant] to a penalty exceeding the maximum

he would receive if punished according to the facts reflected in the jury verdict alone," **is an element,** and thus must be found by a jury. *Ring*, 536 U.S. at 586 (citing *Apprendi*) (emphasis added).

Because in Florida "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment," *Hurst*, 136 S. Ct. at 620, the § 921.141(3) findings are an element of the offense of capital murder. This conclusion necessarily follows from *Hurst*, because the only way the Sixth Amendment would have applied to those findings was if they were elements. There is no *Hurst* without § 921.141(3) delineating elements of the crime of capital murder.

Now that *Hurst* has held that *Bottoson* erred in failing to find Florida's capital sentencing scheme unconstitutional under *Apprendi* and *Ring*, the factual determinations set forth as prerequisites for the imposition of a death sentence in § 921.141(3) are now, in fact, *Apprendi* elements which must be found unanimously by a jury.

Mr. Thompson's jury never made any findings. No sufficiency determination was made, and no elements were found, unanimously or otherwise. The jury's previous recommendation is meaningless, unconstitutional, and void.

C. *Hurst* Is A Development Of Fundamental Significance Under *Witt V. State* And Must Be Given Retroactive Effect.

The essential principle of Florida's retroactivity law is that only the very important cases apply retroactively. Only a "sweeping change of law" of

"fundamental significance" constituting a "jurisprudential upheaval" will qualify. *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (brackets omitted) (citing *Witt*, 387 So. 2d at 925, 929, 931). *Hurst*, perhaps more so than virtually any other case, satisfies this standard.

Before *Hurst*, *Furman v. Georgia*, 408 U.S. 238 (1972) was the paradigmatic example.[3] In *Furman*, the U.S. Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. *Furman* was a difficult decision for the Supreme Court, which "had not been so visibly fragmented since its earliest days," agreeing only on a "terse per curiam statement announcing the result reached," and issuing nine separate opinions. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1758 (1987).

On the basis of *Furman*, this Court ordered life sentences imposed on all capital defendants who had been under a sentence of death. *Anderson v. State*, 267

[3] When *Hurst's* predecessor *Ring* issued and it appeared that *Ring's* holding would do essentially what *Hurst's* has now done, Justice Anstead commented that "*Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*," that "we cannot simply stand mute in the face of such a momentous decision," and that "[t]he question is where do we go from here." *Bottoson,* 833 So. 2d at 703 (Anstead, J., concurring).

So. 2d 8, 9-10 (Fla. 1972).[4] There was no question, no statutory interpretation, no retroactivity analysis, no harmless error analysis, no recalcitrance, and no attempts to save prior death sentences and still go forward with unconstitutional executions.

As noted *supra*, the Florida Legislature, in anticipation of the holding in *Furman,* enacted Florida Statutes § 775.082(2), which provides:

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

This Court read this statute to leave absolutely no discretion for Florida courts when, as in *Hurst*, the death penalty was found unconstitutional in *Furman*. This Court found that the statute requires "an automatic sentence and a reduction from the sentence previously imposed," because "**[t]he Court has no discretion**." *Anderson*, 267 So. 2d at 9 (Fla. 1972). The Court found simply that "[u]nder the circumstances of these particular cases, it is our opinion that we should correct the illegal sentences previously imposed without returning the prisoners to the trial court," and vacated

[4] In *Anderson*, this Court explained that after *Furman* issued, the Attorney General of Florida filed a motion asking that life sentences be imposed in 40 capital cases in which the defendant was under a death sentence. *Anderson*, 267 So. 2d at 9 ("The position of the Attorney General is, that under the authority of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the death sentence imposed in these cases is illegal.").

the sentences. *Id*. at 10. Everyone who had received a sentence of death under the unconstitutional scheme in *Furman* received the benefit of the decision.

The imposition of life sentences on defendants sentenced under the death penalty scheme found unconstitutional in *Furman* was a ministerial, administrative matter. There was no inquiry into retroactivity. There was no argument that harmless error analysis applied when a capital sentencing scheme was declared unconstitutional. There was no parsing of the language of *Furman* to attempt to minimize its impact. There was no discretion to exercise. Life sentences were mandated for everyone sentenced under the unconstitutional sentencing scheme.

Because Mr. Thompson was sentenced under an unconstitutional scheme, he should be resentenced to life pursuant to §775.082. However, if a retroactivity analysis is deemed necessary, *Hurst* must be found to apply retroactively under Florida law. *Hurst,* unlike *Furman*, directly assessed Florida's scheme and found it unconstitutional. *Hurst*, unlike *Furman,* did not fragment the Court at all. On the contrary, *Hurst* was an 8-1, resoundingly unified pronouncement from the Court that Florida's death penalty scheme has long been unconstitutional. In Florida, *Hurst* is as sweeping a jurisprudential upheaval of fundamental significance as *Furman*.

This Court explained in *Falcon v. State,* 162 So. 3d 954, 962 (Fla. 2015), that the principles of fairness underlying *Witt* "make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and

no longer applied to indistinguishable cases.'" In *Falcon*, this Court found that applying a constitutional rule to some but not other similarly situated juvenile offenders meant that some would "serve lesser sentences merely because their convictions and sentences were not final" when the rule was announced. *Id.* The Court stated that "[t]he patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of [retroactivity]." *Id*.

If the unfairness resulting from loss of liberty demands retroactive application, then so too does loss of life. If the unfairness to juveniles in indistinguishable cases receiving different non-capital sentences is too great, then so too is the unfairness of executing Mr. Thompson while other defendants with indistinguishable cases will receive the benefit of *Hurst* (and not be put to death under an unconstitutional death penalty scheme). Such patent unfairness and arbitrariness, certainly great enough to implicate the Eighth Amendment principles enunciated in *Furman v. Georgia*, requires that *Hurst* be applied retroactively.

D. This Court's Prior Discussions Regarding The Retroactivity Of *Apprendi* And *Ring* Do Not Resolve Or Affect In Any Way *Hurst's* Retroactivity.

This Court engaged in a retroactive analysis of *Apprendi* in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), and of *Ring* in *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). However, the *Witt* analyses in both *Hughes* and *Johnson* were infused with this Court's failure to recognize that *Apprendi* and *Ring* do in fact apply in

Florida, and that as a result, Florida's capital sentencing scheme was unconstitutional. This Court did not resolve the retroactivity of *Hurst* in either case.

Hughes and *Johnson*, decided on the same day, both presumed the inapplicability of *Ring* in Florida in assessing the impact of *Apprendi* and *Ring* under *Witt*. Because the *Witt* analysis depends on the impact of the change in the law, a prior finding that there is little to no change profoundly affects the *Witt* analysis. Now that we know from *Hurst* that *Apprendi* renders Florida's capital sentencing scheme unconstitutional and caused *Hildwin* and *Spaziano* to be overruled, we must do a new assessment under *Witt*. *Hurst's* retroactivity in Florida must be assessed, not *Apprendi's* (which was not a capital case), and certainly not *Ring's* (which contemplated Arizona's sentencing scheme).

When this Court adopted the *Witt* retroactivity standard, the Court specifically ruled that it was not bound by the federal standard. *Witt*, 387 So. 2d at 926. This Court found federal retroactivity law too restrictive, and crafted *Witt* specifically to provide greater, more expansive, more inclusive protection. *See Johnson*, 904 So. 2d at 409 (reaffirming commitment to "our longstanding *Witt* analysis, which provides more expansive retroactivity standards than those adopted in *Teague [v. Lane*, 489 U.S. 288 (1989)]"); *see also Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting) (observing that the federal standard is "considerably more restrictive" than *Witt*).

The decision to have a more expansive retroactivity standard was wise because the federal standard was "fashioned upon considerations wholly inapplicable to state law systems." *Hughes*, 901 So. 2d at 861 (Anstead, J., dissenting). The federal standard in *Teague*, 489 U.S. 288 is "focus[ed] on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case.'" *State v. Whitfield*, 107 S.W. 3d 253, 268 n. 15 (Mo. 2003) (quotations omitted). "[T]he *Teague* plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions." *Hughes*, 901 So. 2d at 862. Indeed, federal habeas courts, in capital cases, are directed to uphold state court decisions **that they find to be incorrect**, as long as there is some reasoning to support the incorrect ruling. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000).

It would thus seem that some reasoning would be required on the part of state courts, but it is not. Federal habeas courts must supply their own reasoning—asking "what arguments or theories supported or . . . could have supported[] the state court's decision," *Harrington v. Richter*, 562 U.S. 86, 102 (2011)—support, and ultimately uphold **incorrect state court rulings supported by no reasoning at all**. The reason for this is that "requiring a statement of reasons [from state courts] could undercut state practices designed to preserve the integrity of the case-law tradition." *Id*. The goal is "deference and latitude" for state courts. *Id*. It is not to do justice on the facts.

Teague arises from these same considerations and has been "universally criticized by legal commentators 'as being fundamentally unfair, internally inconsistent, and unreasonably harsh.'" *Hughes*, 901 So. 2d at 862 (Anstead, J., dissenting).

Thus, "[i]t would make little sense for state courts to adopt the *Teague* analysis when a substantial part of *Teague's* rationale is deference to a state's substantive law and review." *Hughes*, 901 So. 2d at 863 (Anstead, J., dissenting). On the contrary, "[i]f anything, the more restrictive standards of federal review place **increased and heightened importance upon the quality and reliability of the state proceedings**." *Id*. at 863 (Anstead, J., dissenting). This nation's judicial system presumes that Florida courts will do justice, will get it right, will be hypersensitive to constitutional violations in the first instance, and require federal habeas review only in the rarest of cases. The reliability and confidence in Florida's judicial system depends on Florida courts being more protective of constitutional rights. Florida is the bulwark.

Thus, it is hugely problematic that the *Hughes* Court "rel[ied] almost exclusively on federal decisions that evaluate retroactivity under the irrelevant and considerably more restrictive federal standard announced in the plurality opinion in *Teague* . . . ." *Hughes*, 901 So. 2d at 857 (Anstead, J., dissenting). It is hugely problematic that the *Johnson* Court "[d]eferr[ed] to the United States Supreme Court's assessment of its own decision in *Ring*," *Johnson*, 904 So. 2d at 410, where

"in *Schriro v. Summerlin*, 542 U.S. 348 (2004), [it found] that *Ring* does not apply retroactively for purposes of federal law." *Id*. at 408 (citation partially omitted).

In *Hughes* and *Johnson*, Justice Anstead warned that the Court, in its retroactivity analyses, "simply turned a blind eye to the most important and unique feature of the American justice system upon which we have relied for centuries to ensure fairness and justice for our citizens: the right to trial by jury." *Hughes*, 901 So. 2d at 858 (Anstead, J., dissenting), lamenting that "[n]o other right in our system has been so jealously guarded, until today." *Id*. (Anstead, J., dissenting). *Hughes* and *Johnson* should have no bearing on this Court's assessment of *Hurst's* retroactivity.

E. *Hurst* Error Is Structural And Can Never Be Harmless.

After declaring Florida's capital sentencing scheme unconstitutional, *Hurst* reversed the judgment of this Court and remanded for further proceedings not inconsistent with the *Hurst* opinion. The U.S. Supreme Court specifically, and as a matter of course, left it for this Court to consider on remand "the State's assertion that any error was harmless." *Hurst*, 136 S. Ct. at 624. The U.S. Supreme Court stated, "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." *Id*. It is important to note that the Court's only purpose in addressing the State's assertion of harmless error was to decline to address it in any way. Nothing in *Hurst* requires or endorses a harmless error analysis. And indeed, such an analysis would be inappropriate,

because *Hurst* found a structural error that can never be harmless.[5] Florida cannot correct its error in allowing trial judges to do the work of juries by substituting the guess work of post-conviction or appellate judges.

The U.S. Supreme Court recognized a limited class of fundamental constitutional errors that defy harmless error analysis in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. The *Hurst* error in Mr. Thompson'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 Mr. Thompson's case (*see Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)) and deprived Mr. Thompson of "basic protections without which a [capital] 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).

[5] When *Furman* issued, harmless error was not an unfamiliar concept. The Court had explained five years earlier when constitutional error could be found to be harmless. *Chapman v. California*, 386 U.S. 18, 21-22 (1967) ("We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule."). Yet, no argument was ever advanced that *Furman* error was harmless.

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." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). Since there are no jury findings, it is not possible to review whether such findings would have occurred absent the *Hurst* error.

It is impossible to guess how the verdict would have been different if the jurors had known it would be their responsibility to decide life or death. It cannot be known how counsel's trial preparation and penalty phase strategies were impacted by the now-unconstitutional capital sentencing scheme. If a harmless error analysis is undertaken, it requires fact-finding as to the impact of the *Hurst* error.

CONCLUSION AND REQUEST FOR RELIEF

In light of *Hurst,* Mr. Thompson asks that this Court vacate his unconstitutional sentence of death; and/or permit him to file a state habeas petition to raise a *Hurst* claim; and/or allow him to file a Rule 3.851 motion raising a *Hurst* claim; and/or grant any other relief that this Court deems just and proper.

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief has been filed with the Court and served on opposing Counsel, Assistant Attorney General Sandra Jaggard, using the Florida Courts e-filing portal on the 2nd of March, 2016. Counsel further certifies that on the same day a copy has been mailed to Mr. Thompson via U.S. Mail, first class postage prepaid.

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