IN THE SUPREME COURT OF FLORIDA

NO.

MATTHEW L. CAYLOR,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Matthew Caylor's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; claims demonstrating that Mr. Caylor was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on direct appeal concerning the original jury trial proceedings shall be referred to as "R" for the record. The postconviction record on appeal shall be referred to as "PCR."

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, omitted facts, ineffective assistance of appellate counsel, as well as correcting error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Caylor is entitled to habeas relief.

PROCEDURAL HISTORY

Mr. Caylor was tried in Bay County, Florida. After a jury trial, the Defendant was convicted of first-degree murder, sexual battery involving great physical force, and aggravated child abuse in connection with the 2008 murder of 13-year-old Melinda Hinson. At the end of the penalty phase of his trial, the jury recommended the death penalty by a vote of eight to four, and the Court followed the jury's recommendation. The Court also imposed prison sentences of life for sexual battery involving great physical force and thirty years for aggravated child abuse. The Defendant appealed to the Florida Supreme Court, which affirmed in *Caylor v. State,* 78 So.3d 482 (Fla. 2011), *cert. denied,* 132 S.Ct. 2405 (2012).

Caylor raised the following claims on appeal: (1) the trial court erred in denying his motion for judgment of acquittal on the offense of aggravated child abuse (denied at page 492); (2) the trial court erred in denying his motion for judgment of acquittal on the offense of sexual battery involving great force (denied at page 495); (3) the trial court erred in finding as an aggravating circumstance that he committed the murder while on felony probation (denied at page 497); (4) the trial court erred in assigning "little weight" to the "dysfunctional family" and "remorse" mitigating circumstances (denied at page 498); (5) death is a disproportionate punishment (denied at page 500); and (6) Florida's death penalty is unconstitutional under the holding of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(denied at page 500).

After the United States Supreme Court denied certiorari on May 14, 2012, *Caylor v. Florida,* 132 S.Ct. 2405 (2012), the Defendant timely filed his Motion pursuant to Rule 3.851 on May 2, 2013. The Motion asserts six main claims[1]. The

[1] (1) Trial counsel was ineffective during voir dire by failing to challenge jurors, properly inquire, and to move to strike the entire panel in violation of the defendant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights; (2) Counsel was ineffective during the penalty phase of the trial by failing to investigate and present substantial mitigation in violation of Caylor's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (3) Mr. Caylor was denied his rights under *Ake v. Oklahoma* at the guilt and penalty phases of his capital trial,

State filed its Response on June 7, 2013. The Court conducted a *Huff* hearing on August 7, 2013, and entered its Order granting an evidentiary hearing on claim I(1)(B) (regarding juror Marianne Moore), claim II (trial counsel's failure to investigate and present mitigation evidence during the penalty phase), and claim III(2) (trial counsel's failure to have a mental health professional testify with respect to the Defendant's mental state during the penalty phase), with the Court reserving ruling on whether claim VI required further evidentiary consideration. *See* August 13, 2013, Order. The

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when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultant in violation of Mr. Caylor's rights to due process and equal protection under the Fourteenth amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments; (4) Mr. Caylor is denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution and is denied effective assistance of counsel in pursuing his postconviction remedies because of the rules prohibiting Mr. Caylor's lawyers from interviewing jurors to determine if constitutional error was present; (5) Mr. Caylor is denied his rights under the Eighth and Fourteenth Amendments of the United States Constitution and under the corresponding provisions of the Florida Constitution because execution by electrocution and lethal injection are cruel and/or unusual punishments; and (6) Mr. Caylor's trial court proceedings were fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth amendments.

remaining claims were DENIED without an evidentiary hearing. An evidentiary hearing was conducted on June 1 and 2, 2015. Caylor and the State filed respective closing arguments regarding the issues. The Court entered its order denying Caylor's 3.851 Motion on September 9, 2015. Caylor filed his timely Notice of Appeal on October 4, 2015.

JURISDICTION TO ENTERTAIN PETITION

AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Caylor's convictions and sentence of death.

Jurisdiction in this action lies in this Court, See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental errors challenged herein arise in the context of a capital case in which this Court heard and denied petitioner's direct appeal. See *Wilson*, 474 So.2d at 1163; *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); cf. *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Caylor to raise the claims presented herein. See, e.g., *Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. The end of justice begs the Court to grant the relief sought in this case, because the Court has done so in past, similar cases. This petition pleads claims involving fundamental constitutional error. See *Dallas v. Wainwright*, 175 So.2d 785 (Fla. 1965); *Palmes v. Wainwright*, 460 So.2d 362 (Fla.

1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Caylor's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Caylor asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSUE I

BECAUSE FLORIDA'S DEATH PENALTY WAS HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES IN HURST V. FLORIDA, SECTION 775.082(2) OF THE FLORIDA STATUTES REQUIRES THAT ALL PERSONS PREVIOUSLY SENTENCED TO DEATH FOR A CAPITAL FELONY BE BROUGHT BEFORE THE SENTENCING COURT FOR RESENTENCING TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

A. Introduction

On January 12, 2016, the Supreme Court of the United States held that Florida's capital sentencing scheme violates the Sixth Amendment to the United States Constitution. Hurst v. Florida, __ U.S. __, 136 S. Ct. 616 (2016). The Court stated:

> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.
>
> * * *
>
> Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Id. at 619, 624.

This Court is now grappling with who is affected by the Hurst decision and what form of relief should be granted. Caylor believes that the resolution is conclusively provided by a straightforward application of statutory-construction guidelines to Florida's criminal

sentencing statute, section 775.082(2) of the Florida Statutes. This provision 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). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

Based on a plain-language reading of this statute, persons previously sentenced to death for a capital felony prior to the decision in *Hurst v. Florida*, are entitled to have their death sentences replaced by sentences of life without parole.

B. Basic rules of statutory construction require that this Court apply the unambiguous, plain language of section 775.082(2).

This Court repeatedly has mandated that the judicial examination of a statute begin with its plain language. See *Alachua Cty. v. Expedia, Inc.*, 175 So. 3d 730, 733 (Fla. 2015); *Diamond Aircraft Indus. Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013); *J.M. v. Gargett*, 101 So. 3d 352, 356 (Fla. 2012); *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007). Under this approach, when a statute's text is clear and "conveys a clear and definite meaning, that meaning

controls." *Gargett*, 101 So. 3d at 356. This method offers the best means to ascertain and give effect to the legislature's intent in enacting the statute, which serves as the "polestar," as this Court has often described it, of statutory interpretation. See *Raymond James Fin. Servs, Inc., v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) (citation omitted); *Hill v. Davis*, 70 So. 3d 572, 575 (Fla. 2011) (a statute's text is the "most reliable and authoritative expression" of the legislature's intent.).

By beginning statutory interpretation with a search for plain meaning, the Court has recognized its own, limited constitutional role: when the text speaks clearly and without ambiguity, the judiciary's proper role is simply to apply it. See *Gomez v. Vill. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010) (quoting *Velez v. Miami- Dade County Police Dep't,* 934 So.2d 1162, 1164-65 (Fla. 2006)) ("We are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.").

In short, this Court, in applying section 775.082(2), should begin and end its interpretation with the statute's plain, unambiguous meaning.

C. Section 775.082(2) unambiguously commands the State's courts to sentence to life imprisonment without parole, all capital felons whose death sentences have been imposed under the statute subsequently held unconstitutional in Hurst v. Florida.

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The plain language contained in the first sentence of section 775.082(2) could not offer a clearer command: upon the condition precedent that the death penalty in a capital felony is held unconstitutional by this Court or the United States Supreme Court, the court having original jurisdiction over the case "shall" resentence the defendant to life imprisonment. The statute gives the trial court no discretion, as "shall" is presumptively mandatory. See *Grip Dev. Inc. v. Caldwell Banker Residential Real Estate, Inc.*, 788 So. 2d 262, 265 (Fla. 4th DCA 2000); *Stanford v. State*, 706 So. 2d 900, 902 (Fla. 1st DCA 1998); *C.M.T. v. State*, 550 So. 2d 126, 127 (Fla. 1st DCA 1989); *White v. Means*, 280 So. 2d 20, 21 (Fla. 1st DCA 1973).

The Supreme Court in *Hurst* held the Florida death penalty scheme unconstitutional. *Hurst*, 136 S. Ct. at 619 ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."). Thus, the condition precedent of the statute is satisfied and the circuit courts having jurisdiction over Appellants' offenses shall

vacate their death sentences and impose sentences of life without parole. See § 775.082(2), Fla. Stat.

This remedy is also dictated by the lack of any qualifying or limiting language in the statute. Had the Legislature intended to limit the automatic and obligatory reduction of death sentences to life imprisonment upon the death penalty being held unconstitutional, it could have done so; but it did not. This is underscored by the fact that, in 1998, many years after the statute was enacted, the legislature did preclude the replacement of a death sentence with a life sentence, but only based on a state or federal supreme court's holding that the method of execution was found unconstitutional, as opposed to the death penalty. See § 775.082(2), Fla. Stat. (1998) App. at 11, 33 (amending statute to add: "No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.") See also Section E, infra.

Exceptions in statutes are "narrowly and strictly construed." See *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100-01 (Fla. 1990). And the "doctrine of in pari materia is a principle of statutory construction that requires that statutes relating to the same subject or

object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005). Construing together the two sentences, then, the first sentence establishes the general rule, with the second establishing the one exception. As enacted, the section's first sentence—whether read in isolation or in pari materia with the second sentence—plainly commands this Court to reduce to a life sentence any death sentence imposed under the statute held unconstitutional by *Hurst v. Florida*.

D. Because the unambiguous plain language of section 775.082(2) produces a reasonable, non-absurd result, the Court need not consider the statute's legislative history, under its rules of statutory construction.

Given the clarity of section 775.082(2), the only context in which this Court could consider its legislative history is if the statute's plain terms would produce an absurd result. See *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) (citing *Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002)). But the remedy drawn by the Legislature, as limited in 1998 to sentences rather than methods of execution, see App. at 11, 33, was and is eminently reasonable. While the constitutional invalidation of a method of execution does not call into question the

validity of the underlying death sentence, a conclusion that the process used to impose that death sentence is unconstitutional, does so inescapably. Cf. *Austin v. State ex rel. Christian*, 310 So. 2d 289, 292 (Fla. 1975) (any doubts about the scope of a statute may be resolved by consideration of such factors as convenience, sound public policy, or the "due administration of justice").

To be sure, subsection (2)'s first sentence has widespread implications, especially where the number of inmates on death row has reached 390. But this is not the first time the Court has faced a sweeping outcome following the invalidation of the death penalty, and it is not the first time it has determined that a life sentence (or term of years) must be imposed on every individual convicted of a capital felony and sentenced to death. See *In re Baker*, 267 So. 2d 331, 335 (Fla. 1972) (considering the application of sixty death-sentenced defendants and holding that after *Furman v. Georgia*, 408 U.S. 238 (1972), "it is clearly to the best interest of the public that this Court impose [life] sentences upon. . . all of the . . . persons under penalty of death who have been convicted of [capital] murder," and imposing the same life sentence on all persons sentenced to death for rape, but remanding the latter class to the circuit courts to allow defendants to file sentence

mitigation motions); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972) (holding that death sentences of forty defendants pending on appeal must be vacated following Furman and imposing life sentences rather than remanding to the circuit courts for consideration under Rule 3.800, based on the lack of discretion regarding what sentence to impose and the public policy concerns that the Court held justified its exercise of jurisdiction to resentence the appellants).

In short, this Court has previously been faced with the dilemma now presented by Hurst, and it did not hold then that the remedy required by section 775.082(2) and (3) was "absurd." Quite the contrary—the Court applied it. The absurd result would arise now only if, by contrast, the Court (1) ordered that almost 400 individuals convicted of capital murder, many of whom have been on death row for a decade or more, be granted a resentencing hearing; (2) attempt to assess the harmlessness of almost 400 Sixth Amendment violations that occurred during unconstitutional procedures yielding a death sentence in every case; or (3) had to manage the protracted litigation that will inevitably result if options (1) or (2) are implemented.

E. The legislative history of section 775.082 also supports the remedy required by the statute's plain language.

While the plain language of a statute provides the first basis of inquiry as to its scope, legislative intent can also be revealed through the application of legislative history. See *DIRECTV, Inc. v. State, Dept. of Revenue*, 40 Fla. L. Weekly D1375 (Fla. 1st DCA June 11, 2015) (quoting *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 150 (Fla. 2013) (other citations omitted). This Court and the United States Supreme Court have held the same. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268, 270-71 (1984) (holding that the statute under review was non-discriminatory based on legislative history, despite plain language in the statute suggesting the contrary); *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987) ("[W]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch"); *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1047 (Fla. 1991) ("One method of ascertaining the legislative intent is by tracing the legislative history of the act, the evil to be corrected, and the purpose of the enactment.").

(1) <u>This Court previously has attributed legislative intent regarding the language in section 775.082(2) as requiring the imposition of life sentences even in the</u>

absence of a supreme court decision categorically banning the death penalty nationwide or in Florida under the Florida or United States Constitutions.

a. Senate Bill 153

Senate Bill 153, enacting section 775.082(2) and (3), was prefiled in August, 1971, just after the Supreme Court granted certiorari in *Furman*. *See Furman v. Georgia*, 403 U.S. 952 (1972) (granting certiorari June 28, 1971). The provisions provided as follows:

> (2) 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, a person who has been convicted of a capital felony shall be punished by life imprisonment.
>
> (3) 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.

(App. at 1-2) (emphasis added). The preamble to the bill described these provisions as "providing that if the courts declare the death penalty unconstitutional, then those persons to be sentenced or those previously sentenced to death should be sentenced to life without parole." (App. at 1.)

The timing of SB 153 may suggest to some that it was intended solely to provide a reasonable remedy should the United States Supreme Court hold in Furman that the death

penalty was per se unconstitutional under the Eighth Amendment—i.e., that sections 775.082(2) and (3) were never intended to apply in perpetuity, nor, indeed, if anything less than a categorical ban was imposed by the Furman Court. However, this Court's decisions in the wake of Furman make clear that such suggestion bears no relationship to the actual legislative intent behind the bill.

First, the Furman decision did not "declare the death penalty unconstitutional" (quoting Preamble to SB 153 (1971)), nor was the systemic application of the death penalty even explicitly before the Court when it granted certiorari in Furman. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) ("Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?'") (quoting 403 U.S. 952 (1971) (emphasis added). Rather, the five justices who joined the majority opinion (only a paragraph long), agreed only on the fact that the three death sentences that were before the Court were unconstitutional under the Eighth Amendment.[2]

[2] The majority holding in Furman was as follows:

The Court holds that the imposition and carrying

Second, this Court also never explicitly held the "death penalty" unconstitutional, even after Furman. See *Baker*, 267 So. 2d at 331 ("This Court has itself never declared the death penalty unconstitutional, but has recognized and followed the decision of the United States Supreme Court in *Furman v. Georgia*, *Supra*.") (citing *Donaldson*, 265 So. 2d 499, and *Anderson*, 267 So. 2d 8); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (Capital punishment is not, Per se, violative of the Constitution of the United States (*Furman v. Georgia*, *supra*) or of Florida. *Wilson v. State*, 225 So.2d 321 (Fla. 1969)).

Nonetheless, the Court "had no difficulty" holding that defendants indicted with a "former" capital offense should automatically be sentenced to life in prison upon conviction, id. at 501, and that the same was the case for defendants who had already been sentenced to death,

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> out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (reversing death sentences of two Georgia death row inmates and one Texas death row inmate). Because each of the five justices in the majority wrote separately to explain his reasoning for the result, the portion of the opinion on which they all agreed is only a paragraph long.

Anderson, 267 So. 2d 8. Notably, in reaching this conclusion, the Court gave

> general consideration to any effect upon the current legislative enactment [referencing § 775.082(3)] to commute present death sentences. . . . The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. This provision is not before us for review and we touch on it only because of its materiality in considering the entire matter.

Donaldson, 265 So. 2d at 505 (emphasis added). See also id. at 502 (noting that such result was not only proper under the severability doctrine, but consistent with the Legislature's "express intent" as demonstrated in section 775.082(2), which was to become effective less than three months later) (quoting Chapt. 72-118, Laws of Fla. (1972)).

The effect, then, of Furman's reversal of just three death sentences from Texas and Georgia was a swift, fair, and across-the-board remedy employed even before the statute that commanded it was operative. Months after Furman, Chapter 72-118 inexorably went into effect without interruption and the first half of section 775.082(2) (originally numbered section 775.082(3)), has remained unchanged for decades. Thus, any suggestion that it applies, or was meant to apply, solely to the particular circumstances posed by Furman, or when this Court or the Supreme Court categorically bans the death penalty—

nationwide or in Florida—is incorrect based on this Court's own application of the statute's legislative intent.

b. The legislative history of section 775.082(2), as demonstrated by amendments and staff analyses, is consistent with the plain language of the statute and this Court's previous application thereof.

In 1974, after the Furman dust had settled and the Court had sentenced to life in prison the class of individuals covered by section 775.082(2) and (3), the Legislature revoked subsection (2), substituting the language from subsection (3) in its place. Chapt. 74-383, s. 5, Laws of Fla. (1974); App. at 11. Because the Legislature revoked the remedy of life without parole as to one class of offenders (capital defendants pending sentencing), but not with regard to the other (defendants already sentenced to death), it clearly conducted a thorough review of the statute. Thus, subsection (2) remained intentionally on the books after Furman.

Perhaps most compelling, in 1998, the Legislature revisited section 775.082(2) again when doubts arose about the constitutionality of Florida's method of execution. House Bill 3033 proposed adding the following after the first and only sentence previously in subsection (2): "No sentence of death shall be reduced as a result of a determination that a method of execution is held to be

unconstitutional under the State Constitution or the Constitution of the United States." § 775.082(2), Fla. Stat. (1998); see also App. at 31-3.

The House of Representatives' Committee on Crime and Punishment noted that the limitation was proposed to avoid what Justice Harding previously described as a "'constitutional train wreck' with all the people on Death Row having their sentences commuted to life unless an alternative to electrocution is passed by the legislature." CS/HB 3033, Bill Res. & Econ. Impact Stat., at 2 (Feb. 4, 1998) (citing Anderson, 267 So. 2d 8; Furman, 408 U.S. 238)); App. at 36-7.

Thus, the Legislature was aware of the statute and considered its terms. The Legislature, then, chose to make one exception in which a ruling of unconstitutionality based on the Florida's death penalty would not mandate the reduction to life imprisonment for all death-sentenced individuals. That lone exception is where the unconstitutionality of the death penalty is premised on the execution method. The rest of the statute, the general rule for all other holdings of "death-penalty" unconstitutionality, remained, and still remains, untouched.

In short, the 1974 and 1998 amendments to section 775.082(2) demonstrate that the Legislature meant what it said in 1972:

> 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).

The statute before the Court is not ambiguous, nor is the result urged herein absurd. But should the Court find it necessary to examine the legislative history to determine the legislature's intent, it will find only amplification of the plain language, not inconsistencies therewith.

F. The rule of lenity also requires re-sentencing to life imprisonment without any opportunity for parole.

If any doubt could remain about the intended application of section 775.082(2), the "Rule of Lenity" dictates that the statute be construed in the manner most favorable to the capital defendant. See, e.g., *Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977). This statutory-construction tool has long been codified in the Florida Statutes, providing: "The provisions of this code and offenses defined by other statutes shall be strictly

construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." section 775.021(1), Fla. Stat. (1983).

This Court has emphasized that "[o]ne of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter." *Perkins v. State*, 574 So. 2d 1310, 1312 (Fla. 1991). This rule further requires that any ambiguity or susceptibility to differing constructions, must be resolved in favor of the criminal defendant. *State v. Byars*, 823 So. 2d 740, 742 (Fla. 2002). "Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute," *Perkins v. State*, 576 So. 2d at 1312, and where a statute is ambiguous, "it must be construed in the manner most favorable to the accused." Id.; accord, *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008); *Lamont v. State*, 610 So. 2d 435, 437-38 (Fla. 1992). Indeed, in *Kasischke*, this Court recognized that this lenity rule "is not just an interpretive tool but a statutory directive." 991 So. 2d at 814 (citation omitted).

Section 775.082(2) is neither vague nor ambiguous. The first sentence of the statute is clear in its mandate. But

if there could be any ambiguity, it must be resolved in favor of the capital defendant.

ISSUE II

MR. CAYLOR WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE JURY VERDICT AT THE SENTENCING PHASE OF HIS TRIAL WAS NOT UNANIMOUS AND THE JURY'S SENSE OF RESPONSIBILITY WAS DILUTED BECAUSE OF INADEQUATE JURY INSTRUCTIONS.

Pretrial, appellant filed a Motion to Declare Florida's Death Penalty unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002) (R V1 85-87). Trial counsel argued the motion before the court (R V22 780). The trial court denied the motion (R V22 781).

On direct appeal, appellant raised and argued the issue before this court (Initial Brief p36). As to this issue, this Court stated:

> As Caylor acknowledges, this Court has repeatedly held that Florida's death penalty does not violate *Ring. See Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002) (observing that the United States Supreme Court did not direct this Court to reconsider Florida's capital sentencing statute in light of *Ring*); *King v. Moore,* 831 So.2d 143 (Fla. 2002) (same); *see also Darling v. State,* 966 So.2d 366, 387 (Fla. 2007) ("This Court has repeatedly and consistently rejected claims that

> Florida's capital sentencing scheme is unconstitutional under *Ring*....").
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> Furthermore, Caylor was contemporaneously convicted of aggravated child abuse and sexual battery involving great physical force by a unanimous jury during the guilt phase of his trial. *Ring* is not implicated when, as here, the trial court has found as an aggravating circumstance that the murder was committed in the course of a felony that was found by the jury during the guilt phase. *See McGirth v. State,* 48 So.3d 777, 795 (Fla. 2010), *cert. denied,* --- U.S. ----, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011). Evidence was also presented that Caylor was on felony probation at the time of the murder based on a prior conviction, which the defense conceded during the penalty phase. For the purposes of a claim under *Ring,* the fact of a prior conviction does not need to be found by a jury. *See Allen v. State,* 854 So.2d 1255, 1262 (Fla. 2003). Accordingly, *Ring* is not implicated in this case.

Caylor v. State, 78 So.3d 482, 500 (Fla. 2012). However, subsequent to this court's ruling, the United States Supreme Court has declared Florida's sentencing scheme unconstitutional. See *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016)(We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.)

Appellant contends that notwithstanding Caylor having been found guilty of a violent felony (which may qualify as an aggravator), and being on probation, the statue requires a finding by the jury, not the judge, that *sufficient*

aggravating circumstances existed to justify imposing the death penalty. Given that the jury made no unanimous finding that any specific aggravator existed and was sufficient to justify imposing the death penalty, Caylor's sentence cannot stand.

The *Caldwell* issue:

The *Hurst* case invokes both the Sixth and Eighth Amendments. This Court has long held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) is not applicable to the Florida death penalty scheme. *See Darden v. State*, 475 So.2d 217, 221 (Fla. 1985). In *Darden,* the Court held that under Florida's sentencing scheme the jury was not responsible for the sentence and that *Caldwell* was inapplicable in Florida. *See also Pope v. Wainwright*, 496 So.2d 798, 805 (Fla. 1986); *Smith v. State*, 515 So.2d 182, 185 (Fla. 1987). However, during oral argument in *Hurst*, Justice Ginsburg directly raised concerns about whether Florida's capital sentencing scheme comports with the Eighth Amendment principles set forth in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Justice Scalia also expressed concern about Florida's compliance with *Caldwell*. The history of Mr. Caylor's case shows that the Eighth Amendment concerns surrounding the *Hurst* decision apply equally to Mr. Caylor. Mr. Caylor's conviction and sentence

became final with this Court's affirmance of his convictions and sentences **after** *Caldwell* had become the controlling Eighth Amendment precedent. Mr. Caylor's first opportunity to raise the *Caldwell* claim is with this Petition. The claim asserts *inter alia* that the jury was substantially misled and misinformed by the trial prosecutor's comments and arguments, as well as the court's comments at trial and sentencing as to its proper role at trial and sentencing.

The instructions given to the jury at the penalty phase were as follows:

> The final decision as to **which punishment shall be imposed rests with the judge** of this court; however, the law requires that you, the jury, render to the court an **advisory sentence** as to which punishment should be imposed upon the defendant. (R V1 114).
>
> * * *
>
> It is now **your duty to advise the court as to the punishment that should be imposed** upon the defendant for the crime of First Degree Murder. (R V1 115).
>
> * * *
>
> As you have been told, **the final decision as to which punishment shall be imposed is the responsibility of the judge**. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an **advisory sentence** as to which punishment should be imposed - life imprisonment without the possibility of parole or the death penalty.

> Although the **recommendation of the jury** as to the penalty is advisory in nature and **is not binding,** the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose. Your **advisory sentence** should be based upon the evidence of aggravating and mitigating circumstances that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings. (R V1 115).
>
> * * *
>
> If a majority of the jury, seven or more, determine that Matthew Lee Caylor should be sentenced to death, your **advisory sentence** will be: (R V1 121).
>
> * * *
>
> When you have reached an **advisory sentence** in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court. (R V1 122).

Clearly in *Hurst,* the United States Supreme Court applied *Ring* so as to declare Florida's capital sentencing statute unconstitutional. *Ring* was decided in 2002, and *Hurst* recognizes that the analysis the *Ring* court applied to Arizona's capital sentencing scheme applies equally to Florida's. Indeed, by early 2006, all seven members of this Court expressed their awareness of the constitutional problems (including the lack of jury findings and the absence of a unanimity requirement), and recommended legislative action to remedy the defects.

Hurst Is Retroactive Under The *Witt* Test[3]

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 postconviction relief in the same manner as its federal counterpart .... [T]he

[3] Most, if not all, of the arguments for this issue have been reprinted and/or adopted from various briefs previously submitted to this Court in other cases.

concept of federalism clearly dictates that we retain the authority to determine which 'changes of law' will be cognizable under this state's postconviction relief machinery."). After all, the federal retroactivity test was designed with "comity 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 are 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.")

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* predate 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' inalienable 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 nonstatutory 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.2d 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 process, 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 toward 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. Petitioner 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, 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.*

III. *Hurst* Claims Present Harmless Error Analysis Problems Not Suited for 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.

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, 521* 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 it 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 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 *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.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO RAISE AND ARGUE THAT THE APPELANT WAS DENIED DUE PROCESS BY NOT RECEIVING A COMPETENT MENTAL HEALTH EVALUATION PRUSUEANT TO *AKE*?

The Appellant was denied access to a competent psychiatrist to assist in his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985):

> …the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. *Id.* at 83.

* * *

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, *due process* requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase. *Id*. at 84.

This Court has held previously that a violation of due process amounts to a fundamental error: Jaimes v. State, 51 So.3d 445 (Fla. 2010)(In other words, the doctrine of fundamental error applies when an error has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law.); *Cromartie v. State*, 70 So.3d 559 (Fla. 2011).

Appellate counsel failed to raise this issue on appeal even though it was clear on the record the Appellant was denied the assistance of a competent psychiatrist.

> BASFORD: While looking through these certified copies this morning I have one that came in with the probation officer's report, and then I had some others from the actual counties where he had been convicted. I came across a psychological evaluation in that file. I provided that to Mr. Smith. I had not seen it before this morning and, you know, whether or not it had been given in discovery, I don't know. I can't represent that to the court. But I have provided that to Mr. Smith this morning.
>
> THE COURT: Mr. Smith, any problems?
>
> MR. SMITH: Well, I did receive it. I had not seen it before. I was expressing my frustration over

obtaining records from other states. This is a case where we request them, we don't necessarily get them and we don't really know who to ask for them. This apparently was in another court file up in Georgia where he was evaluated on a drug charge. And it came back with some possible psychological diagnosis that could potentially be helpful in a penalty phase. I was generally aware of these things from other documents. I didn't have this actual report **so I haven't been able to give it to a psychologist** here. But I had sort of made the determination sometime ago that I would not pursue those two mitigating factors, you know, extreme emotional disturbance, and I forget the verbiage on the other one, because it was sort of a -- I might be able to get something good out, but also some bad may come out. So that was sort of the tact. I don't think it changes the complexion here. We're ready to proceed and I will be offering sane testimony, along the general lines of substance abuse and anger control issues and possible psychological issues when he was younger. And I'll get that through his parents, just sort of a social history on him, that will come up.

But -

THE COURT: But you've chosen not to use any sort of defense of-

MR. SMITH: Right, right. Because it would cancel it out, I think, the good and the bad probably would have cancelled out. **In my opinion jurors don't put a whole lot of credence in psychological evaluations anyway.** So that was sort of the tact that I took sometime ago. And the revelation of this actual **psychological evaluation that I didn't have,** apparently Mr. Basford didn't know that he had, doesn't really change much. I was generally aware that these issues existed throughout his life but -

THE COURT: Have you had him evaluated?

MR. SMITH: Yeah, he's been evaluated. And what record they did have **have been reviewed** and we have a general idea of what his history is, what his psychological problems have been and I tend, it is my intent to go about it through lay testimony as opposed to having an expert come in and testify about it.

THE COURT: But you have reviewed it with an expert and made this choice -

MR. SMITH: Right.

THE COURT: -- as a strategy?

MR. SMITH: Right.

(R V22 784-786)(Emphasis added). Smith's answer to the court regarding evaluation of the defendant for mitigation was disingenuous at best because no mitigation evaluation had been conducted and no records had been obtained. In addition, Smith's reference is to a psychologist and not a psychiatrist.

There are many references in the record to indicate that Caylor had no assistance of a mental health expert. The PSI report (V2 184-204), references only the psychological report from 2001, discussed above by Mr. Basford. If there had been a recent evaluation or report, the PSI would have referenced it rather than a 2001 report.

In addition, at the *Spencer* hearing (V23 R902) Mr. Smith asked Mr. Caylor about the 2001 psychological report. There was no mention whatsoever regarding any current psychologist or psychiatrist's evaluation or report.

Further, Florida Rules of Criminal Procedure 3.202 (b), (c), and (d) set out the requirements if the defense is going to utilize an expert at the penalty phase of the trial. Neither the defense nor the state filed any documents pursuant to Rule 3.202. In addition, the State

filed ten discovery exhibits. None of them listed an expert in psychology or psychiatry. Further, the docket indicates on September 9, 2009, a pretrial order was entered ordering the defense to file its witness list by Monday. No witness list appears to have ever been filed by the defense, even though four witnesses testified at the penalty phase trial.

There was clear information within the record to support an *Ake* claim on direct appeal. Yet, appellate counsel failed to raise the issue as fundamental error.

The evidentiary hearing supported this claim. Mr. Smith testified at the evidentiary hearing that he requested records, but obtained few, in any.

> Q. Okay. Were you aware prior to trial that the Defendant had some mental health problems or issues, sir?
>
> A. He told us about, you know, being in rehab, being treated. We sent away for records. As far as I recall we didn't get any. We sent away for them and never got any. I knew he had a troubled childhood, troubled adolescence, been in and out of the criminal justice system, so I assumed there were records out there but as I recall we got very few by requesting them.

(PC V24 1513-1514). At the evidentiary hearing, Smith acknowledged he hadn't hired an expert for mitigation and made his decisions without the benefit of expert consultation or records.

> Q. She didn't perform any tests that you are aware of, do you know?

A. You know, I don't know. I think she just talked to him and I guess just touched the various factors for competency, can you display appropriate courtroom decorum; and do you understand the adversarial nature of the legal system. I assume that's the kind of conversation she had with him. (PC V24 1552)

* * *

Q. Okay, as of October 30th, just before the penalty phase, you had not hired any mental health expert to evaluate Mr. Caylor for mitigation, is that correct?

A. That's correct. (PC V24 1556).

* * *

Q. So you made that determination without a psychological report, without a psychological evaluation, without medical records, without school records, without other than Department of Correction records, without any work records of any kind?

A. Right. (PC V24 1562)

Mr. Caylor is making a similar claim to that found in *Hodges v. State*, 885 So.2d 338 (Fla. 2004), wherein this Court stated:

> Hodges' *Ake* claim lacks merit. Hodges does not argue that he was denied access to mental health professionals or that these professionals failed to conduct the appropriate examinations. Indeed, any such claim would run contrary to Dr. Maher's testimony that he conducted a standard psychiatric evaluation of Hodges prior to trial. Hodges had access to multiple mental health experts prior to trial, and the experts performed all of the essential tasks required by *Ake.* Thus, Hodges fails to establish a violation of the *Ake* rule. *Id.* at 353.

However, Caylor does argue that he was denied access to mental health professionals who could have conducted the appropriate examinations. The evidence was clear on the direct appeal record and at the evidentiary hearing: Mr. Caylor was deprived his due process right pursuant to *Ake*.

Marshall v. State, 854 So.2d 1235 (Fla. 2003); *Moore v. State*, 820 So.2d 199 (Fla. 2002); *Cherry v. State*, 781 So.2d 1040, 1047 (Fla. 2000); *Floyd v. State*, 18 So.3d 432 (Fla. 2009); and *Davis v. State*, 928 So.2d 1089 (Fla. 2006), all indicate that an *Ake* claim should be raised on direct appeal.

In *Davis* and *Floyd*, this Court stated that the *Ake* claim was barred in postconviction. However, they further stated that notwithstanding the procedural bar, both defendants had competent professionals appointed and they had testified. That did not happen here. There was no testimony at trial or at the evidentiary hearing by Dr. Rowan as to what she did or what she was asked to do. However, Smith testified that she was not hired for mitigation and he did not know what she did when she allegedly spoke with Mr. Caylor.

There is no question that Mr. Smith had made up his mind long before this case got to trial: he had no intention of hiring a psychiatrist or psychologist to

examine or evaluate Caylor for any mental health issues other than competency.

As a result, Caylor was deprived of his right to due process pursuant to *Ake*, which was fundamental error, and appellate counsel was ineffective in failing to raise the issue.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authorities, the Petitioner respectfully asks this Court to grant habeas relief.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant State Attorney Patrick Delaney at: patrick.delaney@myfloridalegal.com, and mailed to Matthew Caylor, Q23494, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 6th day of March, 2016.

/s/Michael P. Reiter
Michael P. Reiter

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12-point font.

/s/Michael P. Reiter
Michael P. Reiter