IN THE SUPREME COURT OF FLORIDA

NO._____

MARK JAMES ASAY,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

On March 7, 2016, Governor Rick Scott signed House Bill 7101 into law. The final Staff Analysis of the Criminal Justice Subcommittee accompanying House Bill 7101 explained: "The bill amends Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling" in *Hurst v. Florida*, 136 S.Ct. 616 (2016). As the staff analysis noted, amendment of Florida capital sentence scheme was necessary because: "the United States Supreme Court held Florida's capital sentencing scheme unconstitutional."[1]

The Staff Analysis noted that one of the changes made by House Bill 7101 was in the number of jurors who must vote in favor of recommending a death sentence in order for a death recommendation to be returned:

> To recommend a sentence of death, a minimum of 10 jurors must concur in the recommendation. If fewer than 10 jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court.

Another change made in House Bill 7101 was in the legal effect to be accorded a jury's life recommendation, which results when three or more jurors vote in favor of recommending a life sentence:

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[1]House of Representatives Final Bill Analysis to HB 7101, at 1 (March 17, 2016), https://www.flsenate.gov/Session/Bill/2016/7101/Analyses/h7101z.CRJS.PDF.

> If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence.

As a result, a death sentence cannot legally be imposed when three or more jurors vote to recommend the imposition of a life sentence at the conclusion of a penalty phase proceeding in Florida.

At the conclusion of Mr. Asay's penalty phase, the jury's recommendation was by a 9-3 vote, with three jurors voting in favor of a life sentence for Mr. Asay. Under House Bill 7101, such a verdict at the conclusion of a penalty phase requires the imposition of a life sentence. At issue herein is: 1) whether Mr. Asay is entitled to the retrospective benefit of the language in House Bill 7101 that requires the imposition of a life sentence when three jurors vote against imposing a death sentence, and/or 2) whether House Bill 7101 established an Eighth Amendment consensus that a death sentence may not be carried out when three jurors at the conclusion of the penalty phase formally voted against the imposition of a death sentence, and instead in favor of the imposition of a life sentence.

The March 7th enactment of House Bill 7101 gives rise to this Petition and the claims presented here - claims that could not have been presented to this Court, or any court, prior to

March 7, 2016.[2]

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Asay respectfully requests oral argument.

PROCEDURAL HISTORY

Mark James Asay was indicted on two counts of first degree premeditated murder on August 20, 1987, in Duval County, Florida. Trial commenced September 26, 1988, and Mr. Asay was convicted as charged. The jury recommended death by votes of 9-3 on both counts, and the trial court imposed sentences of death. Mr. Asay appealed his convictions and sentences, which were affirmed. *Asay v. State*, 580 So. 2d 610 (Fla. 1991). The United States Supreme Court denied Mr. Asay's petition for writ of certiorari on October 7, 1991. *Asay v. Florida*, 502 U.S. 895 (1991).

On March 16, 1993, Mr. Asay filed a Rule 3.850 motion in the circuit court. The motion was amended on November 24, 1993. On

[2]Because House Bill 7101 had not been enacted when Mr. Asay filed his habeas petition on January 19, 2016, in Case No. SC16-102, Mr. Asay could not therein plead his claims arising from its enactment. Similarly, House Bill 7101 had not been enacted when Mr. Asay appealed the denial of a Rule 3.851 motion to this Court on February 5, 2016, in Case No. SC16-223. Mr. Asay did file a motion on March 22, 2016, asking the opportunity to brief the impact of House Bill 7101 on his pending *Hurst* claim in Case No. SC16-223. On March 29, 2016, this Court denied the motion. Herein, Mr. Asay presents his claim that under House Bill 7101, his death sentences cannot stand. This claim is separate and apart from his *Hurst* claim that was presented to this Court in Case No. SC16-223.

March 19, 1996, the circuit court entered an order denying relief on some claims and granting an evidentiary hearing on other claims.

The evidentiary hearing was conducted on March 25-27, 1996. On April 23, 1997, the circuit court issued an order denying relief. On appeal, this Court affirmed the circuit court's denial of Rule 3.850 relief. *Asay v. State*, 769 So. 2d 974 (Fla. 2000). Rehearing was denied on October 26, 2000.

On October 25, 2001, Mr. Asay filed a petition for writ of habeas corpus in this Court. Subsequent to briefing and oral argument, this Court denied Mr. Asay's petition on June 13, 2002. *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002). Rehearing was denied on October 4, 2002.

On October 17, 2002, Mr. Asay filed a successive Rule 3.851 motion in the circuit court in which he contended that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied on February 23, 2004. Mr. Asay appealed, and this Court affirmed the circuit court's denial of relief. *Asay v. State*, 892 So. 2d 1011 (Fla. 2004).

On August 15, 2005, Mr. Asay filed a federal habeas petition in the Middle District of Florida. Though his federal habeas counsel untimely filed the petition, equitable tolling of the

federal clock was granted.[3] However, Mr. Asay's petition was ultimately denied on April 14, 2014. Mr. Asay subsequently moved to withdraw his notice of appeal, which the Eleventh Circuit Court of Appeals granted on July 8, 2014.

On January 8, 2016, Governor Rick Scott signed a death warrant scheduling Mr. Asay's execution for March 17, 2016. On January 13, 2016, the circuit court appointed undersigned counsel as Mr. Asay's registry counsel. On January 19, 2016, Mr. Asay filed a petition for a writ of habeas corpus with this Court. *See* Case No. SC16-102. On January 27, 2016, Mr. Asay filed a consolidated 3.851/3.800(a) motion. An amendment to the motion

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[3]As to Mr. Asay's habeas petition, the federal district court granted equitable tolling due to misconduct by Mr. Asay's federal habeas counsel. The district court explained:

> The terms "bad faith" or "dishonesty" capture Ms. Bonner's conduct and are the type of egregious conduct that rises well above professional negligence or even gross negligence. Combining this with Ms. Bonner's already noted mental impairments during this time and giving some credence to the state's view that Ms. Bonner deliberately chose to miss the limitation deadline (even against her client's expressed wishes), thereby creating "divided loyalty" between Mr. Asay and Ms. Bonner, and even the high bar set by *Holland* is met. Recognizing that equitable tolling applies "only in truly extraordinary circumstances" and "is typically applied sparingly," [citation omitted] the circumstances that this Petitioner has proven, which will hopefully be rare, meet this test. Moreover, it is hard to imagine how a Petitioner could be more diligent in the pursuit of a timely federal habeas filing.

Asay v. McNeil, Case No. 3:05-cv-00147 (M.D. Fla), Order dated February 10, 2009 (Doc. 112 at 37-38).

was filed on January 31, 2016. The circuit court denied relief on February 3, 2016. Mr. Asay then filed an appeal to this Court. Case No. SC16-223. Briefing followed, and this Court heard oral argument on March 2, 2016. Later that same day, this Court entered a stay of Mr. Asay's execution. Both Case No. SC16-102 and Case No. SC16-223, remain pending before this Court.

It was several days after this Court stayed Mr. Asay's execution that the Governor signed House Bill 7101 into law on March 7, 2016.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. The petition presents issues which directly concern the continued viability and constitutionality of Mr. Asay's death sentences. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Asay's right under the Florida Constitution to be free from cruel or unusual punishment

and it has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994)(holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 397 So. 2d 910 (Fla. 1981)(holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So. 2d 1109 (1986)(noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978).

This Court must protect Mr. Asay's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights - whether state or federal - of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to exercise its independent power of judicial review. *Ford v.*

Wainwright, 477 U.S. 399 (1986).

At issue is the legality of Mr. Asay's death sentences under newly enacted House Bill 7101. This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital post-conviction proceedings. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995). This petition presents substantial statutory and constitutional questions concerning the administration of capital punishment in this State consistent with the United States and Florida Constitutions. The circumstances detailed herein warrants habeas relief. *See Wilson*, 474 So. 2d at 1163; *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The reasons set forth herein demonstrate that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is warranted in this proceeding.

GROUNDS FOR HABEAS CORPUS RELIEF

UNDER HOUSE BILL 7101, MR. ASAY'S DEATH SENTENCES MUST BE CONVERTED TO LIFE SENTENCES; TO RULE OTHERWISE WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.[4]

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[4]To be clear, Mr. Asay's claim in this petition is premised entirely upon House Bill 7101. He has previously presented this Court with his claim that his death sentences stand in violation of the *Hurst v. Florida*, 136 S.Ct. 616 (2016). *See* Case No. SC16-

A. INTRODUCTION

At the conclusion of the penalty phase of Mr. Asay's 1988 capital trial, three jurors voted in favor of recommending the imposition life sentences. House Bill 7101 now provides that when three or more jurors vote against recommending a death sentence and in favor of recommending life sentences, the jury's verdict constitutes a life recommendation. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying House Bill 7101, p. 1. ("If fewer than 10 jurors concur [with a death recommendation], a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court."). House Bill 7101 further provides that when a life recommendation is returned by a jury, the sentencing judge "must" impose a life sentence. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying House Bill 7101, p. 1 ("If the jury recommends life imprisonment without the possibility of parole, the judge **must** impose the recommended sentence.") (emphasis added).

Under House Bill 7101, Mr. Asay's death sentences must be vacated in favor of life sentences. Certainly, principles of statutory construction support this. But, this result is also required by the Eighth and Fourteenth Amendments. Not only does

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223. Mr. Asay stands by the arguments that he made as to *Hurst* in the briefing provided to this Court in Case No. SC16-223. Presented here are Mr. Asay's separate and distinct arguments arising from the enactment of House Bill 7101.

House Bill 7101 conclusively show that death sentences premised upon a jury's majority vote recommending a death sentence violate the Eighth Amendment's evolving standards of decency, granting other similarly situated individuals the benefit of House Bill 7101 while depriving Mr. Asay its benefit would leave his death sentences dependent upon the arbitrary application of House Bill 7101 in violation of Eighth Amendment principles, as well as the Due Process and Equal Protection principles.

B. UNDER HOUSE BILL 7101, A JURY'S VERDICT SHOWING A 9-3 VOTE IN FAVOR OF A DEATH RECOMMENDATION IS NOW A BINDING LIFE RECOMMENDATION THAT PRECLUDES A JUDGE FROM IMPOSING A DEATH SENTENCE.

As the Staff Analysis of the Criminal Justice Subcommittee accompanying House Bill 7101 makes clear, its adoption was intended to cure the constitutional defect in Florida's capital sentencing scheme that was identified in *Hurst. See* Staff Analysis of the Criminal Justice subcommittee at 8 ("The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court's holding that a jury, not a judge, must find each fact necessary to impose a sentence of death.").

In addition, the Staff Analysis also addressed the fact that the Petitioner in *Hurst* had argued that a simple majority vote by the jury was not enough to satisfy the demands of the United States Constitution. *See* Staff Analysis of the Criminal Justice subcommittee at 7 ("The Court's opinion did not address Hurst's contention that a jury's advisory verdict must be greater

than a simple majority in order to comport with the Sixth and Eighth Amendments."). The Staff Analysis did observe that only two other states, Alabama and Delaware, allowed the imposition of death sentences with less than unanimous support from the jury. Though the Staff Analysis acknowledged that United States Supreme Court did not specifically address Hurst's argument on that point, it did acknowledge that House Bill 7101 required at least ten jurors to vote to recommend a death sentence before the sentencing judge was authorized to impose a death sentence.[5] *See* Staff Analysis of the Criminal Justice subcommittee at 8 ("To recommend a sentence of death, a minimum of 10 jurors must concur

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[5]Before the jury votes on what sentence to recommend, House Bill 7101 provides:

> The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
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> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

Section 921.141(2)(b). Of course, these questions that the jury is required to consider are questions of fact. Unless "sufficient aggravating factors exist" and "unless aggravating factors exist which outweigh the mitigating circumstances," the jury cannot recommend a death sentence. And unless the jury returns a death recommendation, the judge is not authorized to impose a death sentence. Thus, the questions of fact that the jury is required to assess are still facts which must be found to exist before a death sentence can be imposed. Under *Hurst*, the Sixth Amendment right to a jury determination of those facts is required. And as explained *infra*, under well-established Florida law a Florida jury must unanimously find those facts before making its sentencing recommendation.

in the recommendation. If fewer than 10 jurors concur, a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court. If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence.").

The expressed intent to make the capital sentencing scheme compliant with *Hurst v. Florida* suggests that House Bill 7101 was intended to make the statutory procedures comfort with the dictates of *Hurst*. The discussion of Hurst's argument in *Hurst*, contending that a mere majority vote in favor of a death sentence was an insufficient basis for the imposition of a death sentence under the Sixth and Eighth Amendments, also suggests the requirement that 10 jurors must concur with a death recommendation was a procedural change removing an argued constitutional defect in Florida's capital sentencing scheme. The changes in House Bill 7101 were procedural fixes.

C. FLORIDA JURISPRUDENCE REGARDING RETROSPECTIVE APPLICATION OF LEGISLATION.

This Court has long recognized that while penal laws are to be strictly construed, ambiguity in a statute "operates in favor of life or liberty":

> The established rule is that a penal law must be construed strictly, and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature. And where a statute of

> this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, **that which operates in favor of life or liberty is to be preferred**.

Ex parte Bailey, 23 So. 552, 555 (Fla. 1897) (emphasis added).

In *State v. Llopis*, 257 So. 2d 17, 18 (Fla. 1971) (emphasis added), this Court explained that under *Bailey*, "penal statutes are to be **strictly construed in favor of the person against whom the penalty is sought to be imposed**." In *Dotty v. State*, 197 So. 2d 315, 318 (Fla. 4th DCA 1967), a case cited approvingly by this Court in *Rudd v. State ex rel. Christian*, 310 So. 2d 295 (Fla. 1975), and *Reino v. State*, 352 So. 2d 853 (Fla. 1977), the court explained Florida law as follows:

> Consistent with the intent of the legislature, laws which are penal in nature should be strictly construed while laws that are remedial in nature should be construed liberally. [citation]. A statute is penal in nature if it imposes punishment for an offense committed against the state and its term includes all statutes which command or prohibit acts and establishes penalties for their violations to be recovered for the purpose of enforcing obedience to the law and punishing its violation. However, **a statute relating to procedure is remedial** in nature in that it gives a remedy and **tends to abridge some defect** or superfluities of the common law.

(Emphasis added).

In *Sims v. State*, 754 So. 2d 657, 663-65 (Fla. 2000), this Court rejected a claim that a change in the method of execution violated Art. 10, § 9, of the Florida Constitution:

> Sims raises several arguments pertaining to the recent legislative amendments to the method of execution

statute. First, he claims that the amended law cannot be retroactively applied to him because he was expressly sentenced to be executed by electrocution; he was not sentenced to die by lethal injection and he was not sentenced to be executed by a choice of methods. He claims therefore, that under the Ex Post Facto clauses of the state and federal constitutions and under article X, section 9 of Florida's constitution, the new law may not be applied to him for a crime that was committed prior to the law's enactment. We disagree.

The United States Supreme Court has held that changes in criminal **statutes which do not alter the definition of the crime of which the defendant was convicted or make the punishment more burdensome are not ex post facto**. *See Collins v. Youngblood*, 497 U.S. 37, 52, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). In *Malloy v. South Carolina*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915), the United States Supreme Court held that procedural changes in the method of execution did not constitute an ex post facto law even if applied to offenses committed prior to such law's enactment. *See* id. at 185, 35 S.Ct. 507.13 The Court reasoned that:

> The statute under consideration did not change the penalty—death—for murder, but only the mode of producing this together with certain non-essential details in respect of surroundings. The punishment was not increased and some of the odious features incident to the old method were abated.
> *Id.* at 185, 35 S.Ct. 507. Accordingly, the Court held that the amended law would not violate the Ex Post Facto Clause, even though the defendant committed the crime prior to the passage of the new law. *See id.* at 185, 35 S.Ct. 507.14

In this case, we find that the Legislature intended to apply the new law retroactively to persons already under sentence of death. However, we do not believe that retroactive application of the new law would violate Sims' constitutional rights under the Ex Post Facto clause. The new law does not affect the penalty for first-degree murder, which has remained the same (i.e., death). Further, the legislative switch to lethal injection merely changes the manner of imposing the sentence of death to a method that **is arguably more humane**. The fact that the new law gives inmates the option of choosing the method of execution does not, we

> believe, violate any constitutional rights of the prisoner under sentence of death. *See Poland*, 117 F.3d at 1105. Thus, we conclude that the retroactive application of the legislative changes to the statute to persons already under sentence of death does not violate the Ex Post Facto clauses of the state and federal constitution.

(Emphasis added).

The legislative determination that judges are not authorized to impose a death sentence after three or more jurors formally vote to recommend the imposition of a life sentence is no different than the change in method of execution at issue in *Sims*. The statutory change works in favor of Mr. Asay. It seeks to abridge a defect in the statute that had been argued in *Hurst*. Its purpose is to insure that the statute comports with Eighth Amendment principles.

Further, the State in its Supplemental Initial Brief which was filed in *Jackson v. State*, Case No. SC13-1232, on April 4, 2016, argues that House Bill 7101 was intended to apply retrospectively. In its brief in *Jackson*, the State relied on the legislative history as demonstrating that House Bill 7101 was meant to apply to homicides committed before its enactment on March 7, 2016:

> Chapter 2016-13, Laws of Florida, took effect upon becoming law, as opposed to taking effect at a later date such as July 1, 2016, or October 1, 2016. Ch. 2016-13, § 7, Laws of Fla. In fact, a February 25, 2016, Senate amendment to the proposed legislation deleted the following language: "The amendments made by this act to ss. 775.082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts

> that occur on or after the effective date of this act." This revision further reinforces the Legislature's clear intent that the amended statute be applied to pending cases. Fla. SB 7068, Amend. 163840 (Feb. 25, 2016).

State's Supplemental Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10.

D. PROHIBITION AGAINST EX POST FACTO LAWS.

States are prohibited from enacting ex post facto laws by Art. I, Sec. 10 of the United States Constitution. The "prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981). This precludes a change in a criminal law from being applied "to events occurring before" the change was enacted when the change would work to the detriment of the criminal defendant. *Id.* at 29.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the United States Supreme Court was presented with an ex post facto challenge to a Texas statute. Youngblood, a Texas criminal defendant, had been convicted of aggravated sexual abuse in 1982. The jury sentenced him to life imprisonment, and imposed a fine of $10,000. At the time, a fine in addition to imprisonment was not authorized by the Texas Code of Criminal Procedure. Case law developed in 1983 that a jury's verdict imposing both a sentence of imprisonment and a fine was unauthorized and thus void.

Because "[t]he authority of a court on appeal to reform the judgment and sentence does not extend to the situation," the verdict had to be set aside and a new trial ordered. *Bogany v. State*, 661 S.W.2d 957, 958 (Tex. Cr. App. 1983). On the basis of *Bogany*, Yougblood sought a new trial. However in 1985, legislation had been enacted and "provide[d] a vehicle by which an improper verdict could be reformed." *Ex parte Youngblood*, 698 S.W.2d 671, 672 (1985). On the basis of the 1985 legislation, the Texas courts reformed the jury's verdict by deleting the fine and denied Youngblood's request for a new trial. Subsequently, the United States Supreme Court was called upon to address whether the 1985 legislation which was applied to the 1982 jury verdict constituted ex post facto law and violated the Ex Post Facto Clause of the United States Constitution.

In *Collins v. Youngblood*, the Supreme Court observed: "it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." 497 U.S. at 41. Accordingly, "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Id.* at 43. As to the Texas statute at issue, the Supreme Court wrote:

> The new statute is a procedural change that allows reformation of improper verdicts. It does not alter the definition of the crime of aggravated sexual abuse, of which Youngblood was convicted, nor does it increase

> the punishment for which he is eligible as a result of that conviction.

Id. at 44. As to what the word "procedural" meant, the Supreme Court explained: "it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45.

The Supreme Court concluded that the statute at issue in *Collins v. Youngblood* did not violate the Ex Post Facto Clause. *Id.* at 52 ("The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Art. I, § 10.").

When House Bill 7101 is applied to the 9-3 jury vote at the conclusion of the penalty phase in Mr. Asay's case, it requires the 9-3 jury vote to be treated as a life recommendation that is binding and precludes the imposition of death sentences in Mr. Asay's case. Applying House Bill 7101 in this fashion does not violate the Ex Post Facto Clause for the reasons explained in *Collins v. Youngblood*.

E. RECENT BRIEFING OF HOUSE BILL 7101 BY THE APPELLANT IN

***JACKSON V. STATE* AND THE ISSUES RAISED THEREIN.**

On March 15, 2016, this Court entered an order in a capital direct appeal in *Jackson v. State*, Case NO. SC13-1232. The order issued there provided:

> The parties in the above case are directed to file supplemental briefs regarding the procedures to be followed in the event that this Court remands this matter for resentencing pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The parties are directed to discuss whether the procedures detailed in section 921.141, Florida Statutes, (2007), as supplemented by jury instructions compliant with *Hurst*, or the procedures detailed in House Bill 7101 as signed by Governor Scott on March 7, 2016, govern. The parties are further directed to discuss any constitutional issues that may arise in this context. This order is not to be understood as determinative of the merits of any of the issues heretofore raised by the parties. Both parties are directed to file initial supplemental briefs, which are not to exceed twenty-five pages, filed by Monday, April 4, 2016. Both parties are then directed to file supplemental answer briefs, which shall not exceed fifteen pages, by Thursday, April 14, 2016.

Order issued 3-15-16, *Jackson v. State*, Case No. SC13-1232.[6]

Pursuant to this Court's order, a Supplemental Initial Brief was filed on behalf of Mr. Jackson on April 4, 2016. In this brief, assertions were made regarding the retrospective

[6]Mr. Asay read this order as directing the parties to assume for argument sake that this Court orders a resentencing on the basis of *Hurst*, and then asked the parties to address the law and procedure which should govern the resentencing. Mr. Asay asked for a similar briefing opportunity in his pending appeal in Case No. SC16-223. However, this Court denied his motion on March 29, 2016. Mr. Asay discusses the resulting briefs in *Jackson* as they relate to House Bill 7101. Again, this petition is premised solely upon House Bill 7101 and presents his arguments that pursuant to House Bill 7101, his death sentences cannot stand.

application of House Bill 7101 that Mr. Asay believes are incorrect. While the argument made against retrospective application of House Bill 7101 were not made by the State, they are before the Court and contradict Mr. Asay's position herein.

Certainly, the aspect of House Bill 7101 that was the basis for Mr. Jackson's argument is a different provision than the one on which Mr. Asay relies in this petition. However, the provision that was the focus of Mr. Jackson's argument and the provision that is the focus of this petition are both set forth in § 921.141(2), as modified by House Bill 7101. Accordingly, the modified version of § 921.141(2) either is or is not retroactive. It cannot be both, and thus, Mr. Jackson's position in his brief and Mr. Asay's position herein are in conflict. Accordingly, Mr. Asay is compelled to address Mr. Jackson's argument.

Mr. Jackson's concern apparently arises from the portion of §921.141 that provides:

> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death.

Before March 7, 2016, § 921.141 did not include a requirement that the jury unanimously and expressly determine what aggravating circumstances existed. Instead, the version of § 921.141 in effect merely provided:

> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Of course to consider "[w]hether sufficient aggravating circumstances existed as enumerated in subsection (5)" under the old version of the statute, the jury was implicitly required to evaluated whether the State had proven any of the aggravating circumstances. In fact, Florida's standard jury instructions provided for the jury to be instructed on the aggravating circumstances at issue and the State's burden of proof as to the aggravating circumstance on which it relied. As a result, it is Mr. Asay's position that the modification of the statute

contained in House Bill 7101 simply changes procedure, i.e. the jury must unanimously find the aggravating circumstances and identify them in a verdict.

Focusing solely on the new language enacted as part of House Bill 7101, Mr. Jackson argues in his supplemental initial brief that House Bill 7101 made a substantive change to § 921.141:

> HB 7101 did more than make procedural changes in an attempt to make Florida's death penalty constitutional after Hurst. Now a defendant is necessarily eligible for the death penalty if the jury unanimously finds at least one aggravating factor. This is a substantive change that broadens the field of death eligible defendants without narrowing the lengthy list of aggravating factors.

Appellant's Supp. Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10. Mr. Asay strenuously disagrees with Mr. Jackson's argument in this regard.[7]

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[7]Mr. Jackson's brief also includes the erroneous claim that: "Prior to HB 7101, Florida was a weighing state where there was not an initial eligibility determination made by the jury." Appellant Supp. Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10-11. Mr. Jackson seems to believe this claim, which simply is not true, supports his contention that House Bill 7101 was a substantive change in Florida law. However, his assertion actually shows a failure to understand the weighing-nonweighing dichotomy that the United States Supreme Court used to distinguish the capital sentencing schemes adopted by different states. The difference between the two types of schemes had to do with whether the jury in the course of the sentencing determination was limited to weighing on the death side of the scale only the statutorily defined aggravating circumstances used by the state to satisfy the Eighth Amendment's death eligibility requirements. *See Stringer v. Black*, 503 U.S. 222, 229-30 (1992) ("Under Mississippi law, after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence. By contrast,

Certainly, one of the changes to § 921.141 by House Bill 7101 is the insertion of language that the jury return a unanimous verdict finding at least one aggravating factor and identifying all aggravating factors found to exist. And, it is true that as part of the change in the statute, House Bill 7101 provides that the jury's determination that one aggravating factor exists renders the defendant "eligible" for a death sentence: "**If the jury . . . Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death** . . . ." H.B. 7101, at 6, lns. 145-49, Chapter No. 2016-13 (March 7, 2016) (emphasis added).[8] Certainly, this change in §

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in Georgia the jury must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case."). Under House Bill 7101, the jury is still limited to weighing the statutorily defined aggravating circumstances in making its recommendation. Thus, House Bill 7101 does nothing to alter Florida's status as a weighing state for Eighth Amendment purposes.

Florida's status as weighing state has nothing to do with the Sixth Amendment principles at issue in *Hurst*. As the Supreme Court explained in *Brown v. Sanders*, 546 U.S. 212, 218 (2006), the significance of the distinction between weighing and nonweighing concerns the use of "different rules governing the consequences of an invalidated eligibility factor in a non-weighing State" from the rules used for evaluating the harm from the use an invalidated aggravating circumstance in a weighing state. *Id*. at 218. The distinction only matters as to the harmless error standard to be used when an improper or invalid aggravating circumstance was used at the penalty phase.

[8]The word "eligibility" is fraught with ambiguity. The word "eligible" has been used both in Sixth Amendment cases and Eighth Amendment cases, but in different ways. For Sixth Amendment purposes, the question of eligibility has to do with what facts

921.141, is the change made by House Bill 7101 most at issue in the briefing in Mr. Jackson's case.

However for the change to be substantive as Mr. Jackson argues in his brief, it must actually change the elements that must be proven in order to authorize an increase in punishment. The legislature's use of the word "eligibility" in House Bill 7101 is not determinative of what is or is not an element that is subject to the Sixth Amendment right to a jury trial. In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that legislative labels do not govern as to what statutorily defined fact or facts must be found by the jury to authorize the imposition of a death sentence:

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

Ring, 536 U.S. at 602. In other words, for Sixth Amendment purposes it is not a question of legislative labeling.[9] What

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must be established in order for an increase in punishment to be authorized. Under the Sixth Amendment, the legislature's labeling is not determinative of what facts are elements necessary to authorize the increase in punishment. Instead, courts must look to the operative effect of the statutory language. Meanwhile, for Eighth Amendment purposes, eligibility has to do with narrowing the class of individuals who are death eligible as required by case law.

[9]Certainly, the legislature cannot label legislation as constitutional and thereby preclude judicial review of the constitutionality of the legislation.

matters is how the statutory scheme functions, i.e. what are the facts that must be found before a death sentence can actually be imposed. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court explained: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of **effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict**?" *Apprendi*, 530 U.S. at 494 (emphasis added).[10]

Despite the language in House Bill 7101 asserting death eligibility arises from the finding of just one aggravating circumstance, **a death sentence cannot in fact be imposed without a factual determination that "there are sufficient aggravating factors to warrant the death penalty," and a factual finding that "the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.**" *See* § 921.141(2)(b)(2), page 6 of House Bill 7101.

On the face of House Bill 7101, if 3 jurors conclude either that there are insufficient aggravators or that the aggravators

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[10]In his concurrence in *Apprendi*, Justice Scalia wrote: "And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,' has no intelligible content unless it means that **all the facts which must exist** in order to subject the defendant to a legally prescribed punishment **must be found by the jury.**" *Apprendi*, 530 U.S. at 498 (emphasis added).

do not outweigh the mitigators, a death sentence is not authorized and cannot be imposed. Since under House Bill 7101 sufficient aggravators must be found as a matter of fact and they must also be found to outweigh the mitigators in order for a death sentence to be permissible, those are the facts that constitute the elements to which the Sixth Amendment's jury trial right attaches under *Hurst* and *Ring*. Accordingly to comply with *Hurst* and longstanding Florida law,[11] this Court must construe House Bill 7101 as first requiring the jury to unanimously find, not just be a 10-2 vote, as a matter of fact that: 1) sufficient aggravators exist to justify a death sentence, and 2) the aggravators outweigh the mitigating circumstances found to exist. This Court has not hesitated in the past to make procedural fixes to Florida's death penalty scheme when necessary to circumvent and/or overcome perceived constitutional defects in the statute.

In 1973 in the wake of *Furman v. Georgia*, Florida's capital sentencing scheme was enacted. With two justices dissenting, this Court found it constitutional in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973),[12] even though the statute limited the mitigating

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[11]Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 715 (Fla. 2002) (Shaw, J., concurring).

[12]In *Dixon*, this Court explained that the post-*Furman* statute required the jury to "consider from the facts presented to them-facts in addition to those necessary to prove the commission of the **crime-whether the crime was accompanied by**

circumstances that could be considered by the jury and the judge to a list of seven. *Id*. at 7 ("Mitigating circumstances shall be the following"); *Id*. at 17 (Ervin, J., dissenting) ("Under the Florida death penalty statute the lists of aggravating and mitigating circumstances are provided as the only circumstances which the trial judge and the jury are to consider in making their decisions.").[13] The statute was approved as written even though it provided the sentencing judge unfettered discretion to disregard the jury's recommendation and impose either a life or a death sentence. *Id*. at 26 (Boyd, J., dissenting) ("Regardless of the jury's recommendation, however, the judge may, in his discretion, impose a sentence of death or life. In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.").[14]

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aggravating circumstances sufficient to require death, or **whether there were mitigating circumstances which require a lesser penalty**." *State v. Dixon*, 283 So. 2d at 8 (emphasis added).

[13]Justice Ervin's dissent was premised in part upon the statutory limitation of mitigating circumstances to a list seven *Id*. at 17 ("by limiting the circumstances which the trial judge and the jury must consider, a new problem arises: the impossibility of listing all of the aggravating and mitigating circumstances which should be considered in deciding whether or not to impose the death penalty.").

[14]Justice Boyd's dissent was premised in part upon the statutory language giving the judge's discretion to disregard the jury's recommendation. *Id*. at 26 ("Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of

Over two years after *Dixon*, this Court on its own limited the sentencing judge's discretion to disregard a jury's life recommendation. In *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), this Court was presented with an appeal from a judicially imposed death sentence that followed a jury's life recommendation. There, this Court concluded for the first time that a jury's life recommendation was entitled to great weight:

> With respect to the trial court's sentence, we agree with appellant that the death penalty was inappropriate and that a life sentence should have been imposed. A **jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.**

Tedder, 322 So. 2d at 910 (emphasis added). Thus, the great weight standard, also known as the *Tedder* standard, was crafted entirely by this Court, clearly to address the *Furman* concerns that Justice Boyd had first expressed in *State v. Dixon*.[15] *See Sullivan v. State*, 303 So. 2d 632, 636 (Fla. 1974) (Boyd, J., specially concurring) ("The recent law in the State of Florida leaves the discretion of granting life sentences instead of a death penalty to the judges and provides for appropriate review

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discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*.").

[15]Seven months after *Tedder* issued, the United States Supreme Court found Florida's capital sentencing scheme facially compliant with *Furman*, in part because of *Tedder* and the judicially adopted great weight standard. *Proffitt v. Florida*, 428 U.S. 242, 249 (1976).

of such sentences in this Court, with jury recommendations having no binding effect on judges."); *Sawyer v. State*, 313 So. 2d 680, 682-83 (Fla. 1975) (Ervin, J., joined by Boyd, J., dissenting) ("it appears to me that the trial judge, in overruling the jury's recommendation of life imprisonment and in sentencing appellant to death, took into consideration and relied upon" non-statutory aggravating circumstances).

As to the post-*Furman* statute's list of seven mitigating circumstances, this Court in *Cooper v. State*, 336 So. 2d 1133, 1139 (Fla. 1976), held that only mitigating evidence relating to the statutorily identified mitigating circumstances was admissible:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. **Evidence concerning other matters have no place in that proceeding** any more than purely speculative matters calculated to influence a sentence through emotional appeal.

(Emphasis added). *See Meeks v. Dugger*, 576 So. 2d 713, 717 (Fla. 1991) (Kogan, J., specially concurring) ("In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975)."). Then in 1978, the United States Supreme Court issued *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and announced that:

> we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (footnotes omitted). The Supreme Court explained:

> a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Id. at 605. Accordingly, the Supreme Court in *Lockett* held: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608.

In the wake of *Lockett*, this Court was called upon to assess whether Florida's post-*Furman* statute was compliant with the Eighth Amendment principle set forth in *Lockett*. In *Songer v. State*, 365 So. 2d 696 (Fla. 1978), this renounced the *Cooper* reading of the statute and announced: "our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered." *Songer*, 365 So. 2d at 700. As Justice Kogan subsequently explained in his opinion in *Meeks v. Dugger*, in *Songer v. State*

"[w]e judicially expanded the list to conform to *Lockett*." *Meeks*, 576 So. 2d at 718.

Clearly, this Court has in the past made procedural changes to Florida's post-*Furman* capital sentencing scheme through case law. *See Tedder v. State; Songer v. State*. The judicially adopted changes occurred in order to insure compliance with the Eighth Amendment. Certainly, this Court can require juror unanimity, not just by a 10-2 vote, as to whether sufficient aggravators exist to justify a death sentence, and whether those aggravators outweigh the mitigating circumstances.

In any event, Mr. Jackson's Supplemental Initial Brief ignores the fact that the language relied upon in *Hurst* as establishing what must be found as a matter of fact before a judge was authorized to impose a death sentence are still in § 921.141(2)(b) after its modification by House Bill 7101:

> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. **The recommendation shall be based on a weighing of all of the following:**
>
> **a. Whether sufficient aggravating factors exist.**

> **b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.**
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.
>
> (c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Under the amended version of the statute, the judge is not authorized to impose a sentence of death until there has been a determination that sufficient aggravating circumstances exist that justify a death sentence, and that those aggravating circumstances outweigh the mitigating circumstances that are also found to exist. *See Hurst v. Florida*, 136 S.Ct. at 622 ("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.'").

Mr. Jackson's argument that a death sentence under House Bill 7101 can be imposed once one aggravating circumstance has been found by the jury is simply erroneous. Moreover, if the statute authorized the imposition of a death sentence merely upon the finding of one of the sixteen aggravating circumstances list

in the statute, the statute would violate the Eighth Amendment.[16] The list of sixteen aggravating circumstances includes aggravators that on their own clearly do not sufficiently narrow the class of individuals who may be sentenced to death under the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. *** [T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State"); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) ("the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."). Construing House Bill 7101 as

[16]In his Supplemental Initial Brief, Mr. Jackson does seemingly acknowledge that his reading of the effect of House Bill 7101 would render the statute unconstitutional. *See* Appellant's Supp. Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10 (" This is a substantive change that broadens the field of death eligible defendants without narrowing the lengthy list of aggravating factors. The present list of aggravating circumstances is so broad that almost every first degree murder has at least one aggravating factor."). However, he ignores the fact that to the extent possible, statutes should be construed in a way that ensures that they are constitutional. Instead, Mr. Jackson argues in his brief for an unconstitutional construction of House Bill 7101.

actually rendering a defendant death eligible on the basis a finding of one of the non-narrowing aggravators set forth in the statute would render the capital sentencing scheme unconstitutional under the Eighth Amendment. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

To the extent possible, statutes must be construed in a way that ensures that they are constitutional. *Dep't of Legal Affairs v. Rogers*, 329 So. 2d 257, 265 (1976) ("Generally, the legislature is presumed to have intended to enact a valid and constitutional law and as, aforestated, we will construe a statute, if possible, in such a manner as will be conducive to its constitutionality."); *Sunset Harbor Condominium Ass'n v. Robbins*, 914 So. 2d 925, 929 (Fla. 2005) ("it is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional"). To comply with the Eighth Amendment and with *Hurst*, House Bill 7101 should be construed as authorizing the imposition of a death sentence only when a jury makes the factual determinations that sufficient aggravating circumstance exist to justify a death sentence and that those aggravating circumstances outweigh the mitigating

circumstances.

Under *Hurst*, those facts are elements of the offense of capital first degree murder for Sixth Amendment purposes. While House Bill 7101 requires a jury to consider whether those facts were established, it does not require juror unanimity. House Bill 7101 merely requires ten jurors to find that sufficient aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances. Under longstanding Florida law, elements of a criminal offense must be unanimously found by a jury.[17]

Reading House Bill 7101 in this fashion means that the elements of what is, in essence, capital first degree murder has remained unchanged. As Mr. Asay already argued to this Court in his pending collateral appeal, the version of §921.141 in effect at the time of his trial and at issue in *Hurst* required factual findings that sufficient aggravators existed and insufficient mitigators existed to outweigh the aggravators. Thus when House Bill 7101 is properly read as required by *Ring* and *Hurst*, its enactment only made procedural changes, not substantive ones

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

which operate to Mr. Asay's detriment. *See Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Carmell v. Texas*, 529 U.S. 513 (2000). This means that if House Bill 7101 is read as Mr. Asay believes is required, it can and should be applied retrospectively, and the 9-3 jury vote in his case should be treated as a binding life recommendation that requires his death sentences to be vacate and life sentences imposed instead.

F. RECENT BRIEFING OF HOUSE BILL 7101 BY THE STATE IN *JACKSON V. STATE*.

In response to this Court's March 15th order in *Jackson v. State*, Case No. 13-1232, the State filed its Supplemental Initial Brief on April 4th and argued that House Bill 7101 was intended to apply to cases in which the homicide was committed before March 7, 2016, i.e. the date on which House Bill 7101 was enacted:

> In enacting Chapter 2016-13, Laws of Florida, the Legislature's intent was to keep open the option of the imposition of the death penalty in pending cases rather than having courts automatically impose a sentence of life in prison without further consideration. **As such, it is clear that the Legislature intended that the newly amended statute be applied to pending cases.**

State's Supplemental Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10 (emphasis added).

In arguing for retrospective application of House Bill 7101, the State argued that this was the legislative intent when enacting House Bill 7101:

> it is clear that the Legislature intended that the

> newly amended statute be applied to pending cases. Chapter 2016-13, Laws of Florida, took effect upon becoming law, as opposed to taking effect at a later date such as July 1, 2016, or October 1, 2016. Ch. 2016-13, § 7, Laws of Fla. In fact, a February 25, 2016, Senate amendment to the proposed legislation deleted the following language: "The amendments made by this act to ss. 775.082, 782.04, 921.141, and 921.142, Florida Statutes, shall apply only to criminal acts that occur on or after the effective date of this act." This revision further reinforces the Legislature's clear intent that the amended statute be applied to pending cases. Fla. SB 7068, Amend. 163840 (Feb. 25, 2016).

State's Supplemental Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10.

The State then argued:

> As this Court stated in Horsley, even if the Savings Clause were to apply, "**the requirements of the federal constitution must trump those of our state constitution**." *Horsley*, 160 So. 3d at 406 (citing Art. VI, cl. 2, U.S. Const.). Fashioning a remedy that complies with the Sixth Amendment "must take precedence over a state constitutional provision that would prevent this Court from effectuating that remedy." *Id.*

State's Supplemental Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10-11 (emphasis added). Thus, the State's position in its *Jackson* brief is that retrospective application of House Bill 7101 is required so long as it would not violate the Ex Post Facto Clause of the United States Constitution. *See State v. Perry*, 2016 WL 1061859 (5th DCA March 16, 2016).

As to the Ex Post Facto Clause, the State argued that the changes to Florida's capital sentencing scheme made by House Bill 7101 were procedural not substantive. Therefore, those changes

did not violate the Ex Post Facto Clause:

> Furthermore, "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

State's Supplemental Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 5.

Thus according to the State's position in its briefing in *Jackson*, the legislature did not intend to make any substantive changes to Florida's capital sentencing scheme when enacting House Bill 7101. This further supports Mr. Asay's argument that facts that were necessary to authorize the imposition of a death sentence before the adoption of House Bill 7101 are still the facts necessary after its adoption. Before a death sentence is authorized, it must be established as a matter of fact that sufficient aggravating circumstances exist and that those aggravating circumstances outweigh the mitigating circumstances.

G. THE PROVISION PROVIDING THAT A 9-3 JURY SENTENCING RECOMMENDATION IS A BINDING LIFE RECOMMENDATION CANNOT BE APPLIED ARBITRARILY IN SOME CAPITAL CASES, BUT NOT IN OTHER CAPITAL CASES UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Unless House Bill 7101 is applied retrospectively to all capital defendants, there is no question but that indistinguishable cases will receive the benefit of the provision requiring 9-3 jury recommendations to be treated as binding life recommendations simply because those cases are pending on direct appeal or are pending for a retrial or a resentencing. Those

receiving the benefit of this provision of House Bill 7101 include capital defendants who received death sentences long ago, but who have received collateral relief and are awaiting a new trial or a resentencing.

Under *Furman v. Georgia*, 408 U.S. 238 (1972), it is impermissible for Florida to permit capital defendants to be executed on the basis of arbitrary or capricious factors. To treat some 9-3 jury recommendations as death recommendations while treating other 9-3 jury recommendations as binding life recommendations is arbitrary. It violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

H. HOUSE BILL 7101 ESTABLISHES A CONSENSUS THAT A DEATH SENTENCE CANNOT BE IMPOSED WHEN THREE OR MORE JURORS FORMALLY VOTE TO RECOMMEND THE IMPOSITION OF A LIFE SENTENCE.

The enactment of House Bill 7101 has established a consensus under the Eighth Amendment that a defendant cannot be sentenced to death when three or more jurors have formally voted in his case in favor of recommending the imposition of a life sentence. Under House Bill 7101, at least 10 jurors must recommend that the defendant should be sentenced to death before a death sentence can be imposed. If 3 or more jurors formally vote against the imposition of a death sentence, the defendant cannot be sentenced to death. Again, House Bill 7101 demonstrates a consensus within the State of Florida and an absolute national consensus against

imposing a death sentence when 3 or more jurors vote against a death sentence. Accordingly, the imposition of death sentences in Mr. Asay's case, where 3 jurors voted against recommending the imposition of death sentences, violates the evolving standards of decency enshrine in the Eighth Amendment. In *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), the United States Supreme Court noted:

> As Chief Justice Warren explained in his opinion in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "**The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency** that mark the progress of a maturing society." Id., at 100-101, 78 S.Ct. 590.

(Emphasis added). *See Roper v. Simmons*, 543 U.S. 551, 561 (2005). In *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), the Supreme Court explained: "Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 **but by the norms that 'currently prevail.'**" (emphasis added). As House Bill 7101 establishes, the norms that "currently prevail" do not permit the imposition of a death sentence when three or more jurors have formally voted in favor of recommending a life sentence.[18]

Because three jurors in Mr. Asay's case formally voted to

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[18]In *Arbelaez v. Butterworth*, 738 So. 2d 326-27 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...".

recommend life sentences, his death sentences violate the Eighth Amendment. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection).

CONCLUSION

For all the reasons discussed herein, Mr. Asay respectfully urges this Court to vacate his death sentences and order the imposition of life sentences on the basis of House Bill 7101.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 12th day of April, 2016.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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