IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-547

LARRY DARNELL PERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT
Case No. 5D16-516

BRIEF OF AMICI CURIAE, WHICH DOES NOT SUPPORT THE POSITION TAKEN BY EITHER PARTY AS TO WHAT FACTS ARE NECESSARY UNDER CHAPTER 2016-13 TO AUTHORIZE THE IMPOSITION OF A DEATH SENTENCE

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PRELIMINARY STATEMENT

McClain & McDermott, P.A., the Law Offices of Todd G. Scher, P.L. and the Law Offices of John Abatecola are law firms that specialize in the representation of capital defendants in collateral proceedings. They currently represent many death-sentenced defendants challenging their convictions and death sentences on numerous bases. Any relief that issues from this Court or any other court implicates the two questions at issue here: what law governs as to the appropriate remedy, and if the remedy includes a resentencing what governs as to the manner in which the resentencing is conducted.

Even though the statutorily defined facts at issue in *Hurst v. Florida*, 136 S. Ct. 616 (2016), have been retained in Chapter 2016-13 and still must be found before a death sentence can be imposed, the parties to this discretionary appeal both maintain that Chapter 2016-13 authorizes imposition of a death sentence upon a finding that one of sixteen statutory aggravators exists.

Amici believe it is essential for this Court to hear the contrary argument not being presented by the parties. The statutory language contained in Chapter 2016-13 must be read in conjunction with *Hurst*, *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). When Chapter 2016-13 is properly read and construed to be compliant with *Hurst* and the Sixth Amendment, there must still be factual findings that: 1) sufficient aggravators exist to justify a death sentence; and 2) the aggravators outweigh any and all mitigators that also exist.

QUESTIONS AT ISSUE CERTIFIED TO BE OF

GREAT PUBLIC IMPORTANCE

The Fifth District Court of Appeal certified the following questions at issue herein to be of great public importance:

> 1) DID HURST V. FLORIDA, --- U.S. ----, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL?
>
> 2) IF NOT, DOES CHAPTER 2016-13, LAWS OF FLORIDA, APPLY TO PENDING PROSECUTIONS FOR CAPITAL OFFENSES THAT OCCURRED PRIOR TO ITS EFFECTIVE DATE?

As to Question 1, amici generally agree with Petitioner's position as set forth in his merits brief. Indeed, amici's counsel have repeatedly argued to this Court that *Hurst* had declared Florida's death penalty statute unconstitutional.[1] Accordingly, amici will not further address question 1.

The focus of this brief is on Question 2 and the statutory construction issues intertwined therein, *i.e.* what are the facts that must be found under Chapter 2016-13 to authorize a death sentence, and are the changes to the statute substantive or procedural. In addressing only Question 2, amici do not abandon arguments made in other cases that the proper relief for *Hurst* error is the imposition of a life sentence. However, should this Court reject Petitioner's arguments as to Question 1 and take up Question 2, amici's position is that Chapter 2016-13 should apply to cases involving homicides committed before March 7, 2016, including in a retrial or a resentencing, and that the jury in

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[1] *See, e.g. Lambrix v. State*, No. SC16-8 (Fla. 2016); *Knight v. State*, No. SC14-1775 (Fla. 2016); *Asay v. State*, No. SC16-223 (Fla. 2016); *Phillips v. State*, No. SC12-876 (Fla. 2016). Amici have also submitted briefing to this Court in numerous other pending cases regarding *Hurst*'s impact.

those proceedings must be instructed that all facts necessary to authorize a death sentence must be found by the jury unanimously.

SUMMARY OF ARGUMENT

To authorize a death sentence, Chapter 2016-13 still requires factual findings that: 1) sufficient aggravators exist to justify the imposition of a death sentence; and 2) the sufficient aggravators found to exist outweigh the mitigating circumstances found to be present. Because these are the same facts previously required to authorize a death sentence as explained in *Hurst*, the enactment of Chapter 2016-13 did not result in a substantive change in the law. Chapter 2016-13 was intended to fix the statute declared unconstitutional in *Hurst*. The resulting changes were procedural. Because Chapter 2016-13 did not make a substantive change as to the facts necessary to authorize a death sentence, its retroactive application does not violate the Ex Post Clause of the United States Constitution.

ARGUMENT

BECAUSE CHAPTER 2016-13, LAWS OF FLORIDA, MUST BE READ IN CONJUNCTION WITH *HURST V. FLORIDA* AND IN A FASHION THAT IS CONSTITUTIONAL, IT MUST BE READ AS REQUIRING FACTUAL DETERMINATIONS THAT SUFFICIENT AGGRAVATORS EXIST AND THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS BEFORE A DEATH SENTENCE IS AUTHORIZED. SUCH A READING MEANS THAT THE CHANGES WITHIN CHAPTER 2016-13 ARE PROCEDURAL AND APPLY TO CASES INVOLVING CAPITAL OFFENSES COMMITTED BEFORE ITS EFFECTIVE DATE.

A. Legislative History of Chapter 2016-13.

Chapter 2016-13 began as HB 7101. As the Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101 (Chapter 2016-13) makes clear, its adoption was intended to cure the constitutional defect in Florida's capital sentencing scheme

identified in *Hurst. See* House of Representatives Final Bill Analysis, H.B. 7101, at 8 (Fla. 2016) ("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.").[2]

The Staff Analysis also discussed that the Petitioner in *Hurst* had argued that a simple majority vote by the jury violated the United States Constitution. *See id.* 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."). Though the Staff Analysis acknowledged that the Supreme Court did not specifically address Hurst's argument, it noted HB 7101's requirement that at least ten jurors vote to recommend death before a judge was authorized to impose a death sentence. *See id.* at 8 ("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. If the jury recommends

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[2] Before the jury votes on what sentence to recommend, the new § 921.141 now provides:

> 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.

§ 921.141(2)(b)(2). These 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.

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* suggests that HB 7101 (enacted as Chapter 2016-13) was intended to make the statute *Hurst* compliant. The discussion of Hurst's argument in *Hurst*, 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 formally vote in favor of a death was included in order to remove a potential constitutional defect. The changes enacted in Chapter 2016-13 were procedural fixes in the wake of *Hurst*.

B. Chapter 2016-13 Only Made Procedural Changes To § 921.141 And Did Not Change The Elements Necessary To Authorize A Death Sentence.

The new § 921.141 includes a new subsection (2) describing the jury's function in a capital penalty phase:

> (2) Findings and recommended sentence by the jury.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (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. 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.

§ 921.141(2), Fla. Stat. (2016).

The revised statute contains the same substantive elements required to authorize a death sentence under the old statute identified in *Hurst*. Under the new statute (as under the old statute) the jury must find each aggravator before determining "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." These were the elements which *Hurst* held must be found by a jury under the old version of § 921.141. *Hurst*, 136 S. Ct. at 622 ("the facts" the sentencer must find are "[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances"(quoting § 921.141(3), Fla. Stat. (2010)).

Before the jury makes these factual findings, the revised § 921.141 does now explicitly require the jury to unanimously find that the State has proven one of the sixteen statutorily

defined aggravators. The jury must then identify each aggravator it unanimously finds proven. The requirement that the jury unanimously first find one aggravator, and then proceed to identify each aggravator unanimously, did not appear in the old statute. But to consider "[w]hether sufficient aggravating circumstances existed" under the old statute, the jury was implicitly required to determine what aggravators the State had proven. In fact, Florida's standard jury instructions required a jury instruction on each of the aggravators at issue and on the State's burden to prove them beyond a reasonable doubt. The jury was then told that its recommendation was to be "based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." *See In re Standard Jury Instructions in Criminal Cases*, 22 So. 3d 17, 28 (Fla. 2009) (Instruction "7.11 Penalty Proceedings-Capital Cases").

Chapter 2016-13 inserted into the statute the steps the jury had been required to follow under the standard jury instruction in making the "determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." *Id. at 28*. In operation, the old statute required jurors to find an aggravator existed, determine whether the State had proven other aggravators, and then consider "whether sufficient aggravating circumstances exist[ed] to justify the imposition of the death

penalty." *Id.*

The elements under the new statute and under the old statute are not different. What *is* different: (1) requiring the jury to be **unanimous** in determining what aggravators the State has proven, beyond a reasonable doubt, and (2) mandating requiring the jury to **identify** the aggravators unanimously found to be established. Also different, after considering "[w]hether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist," at least ten jurors must vote in favor of recommending death before the judge is permitted to impose death.[3]

As a result, amici submit that the new statute sets out procedural changes that benefit of the capital defendant. The jury must unanimously find and identify the aggravators. And a majority vote in favor of one or more aggravators is no longer enough.[4] These are procedural changes to comply with *Hurst* and longstanding Florida law that elements of a criminal offense must be found unanimously. As to the jury's consideration of "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist," the new statute seems to say that the jury does not have to be unanimous as to whether these facts have been proven.

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[3] Chapter 2016-13 mandates that a binding life recommendation is returned if three or more jurors formally vote to recommend a life sentence and forbids a judge from overriding a life recommendation and impose death.

[4] *See State v. Steele,* 921 So.2d 538, 545 (Fla. 2006) ("Nothing in [Florida law] . . . requires a majority of the jury to agree on which aggravating circumstances exist.").

The new statutory language provides for a death recommendation authorizing the judge to impose death when ten jurors formally vote to recommend death.[5] But this does not comport with *Hurst* and longstanding Florida law. They required the jury to be unanimous as to "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist."[6]

Petitioner's merits brief argues that the changes are substantive, *see* Petitioner's Initial Brief at 10, *Perry v. State*, No. SC16-547 (Fla. 2016); the most noteworthy of which is the provision that if the jury "[u]nanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death," § 921.141(2)(b)(2), Fla. Stat. (2016).[7] Others, too, have argued this. In *Jackson v. State*, No. SC13-1232, the appellant

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[5] This Court has long held that jurors are still free to recommend a life sentence even if the aggravation are sufficient and outweigh the mitigation. *See Cox v. State*, 819 So.2d 705, 717 (Fla. 2002) (per curiam); *see also Gregg v. Georgia*, 428 U.S. 153, 203 (1976) (plurality).

[6] To the extent that Chapter 2016-13 permits these facts to be found by a less than a unanimous vote, it violates *Hurst* and Florida law requiring elements of a crime to be unanimously found. As explained *infra*, this Court in construing Chapter 2016-13 can create a procedural fix making the statute constitutional by requiring juries to be unanimous as to whether sufficient aggravators exist that outweigh the mitigators.

[7] Petitioner's merits brief also argues, albeit in summary fashion, that the provision in the new statute requiring a 10-2 jury recommendation for the imposition of a death sentence is also a substantive change that cannot be applied retroactively. *See* Petitioner's Initial Brief at 9-10, *Perry*, No. SC16-547. Petitioner also argues that the legislature's inversion of the burden of proof effected a substantive change. *Id.* Amici disagree with these assertions for the same reasons set forth *infra* with regard to the procedural nature of the changes made by the legislature's enactment of the new § 921.141.

similarly argued:

> 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.

Second Supp. Initial Brief of Appellant at 10, *Jackson v. State*, No. SC13-1232 (Fla. 2016).[8]

As noted *supra*, the new statute added language that the jury's determination that one aggravating factor exists renders the defendant "eligible" for a death sentence. *See* § 921.141(2), Fla. Stat. (2016).[9] However, for the change to be substantive, as

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[8] Mr. Jackson's brief also argues that "Prior to HB 7101, Florida was a weighing state where there was not an initial eligibility determination made by the jury." Second Supp. Initial Brief of Appellant at 10-11, *Jackson*, No. SC13-1232. This reflects a misunderstanding of the weighing-nonweighing dichotomy that the Supreme Court has 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 its sentencing determination was limited to weighing on the death side of the scale only statutorily defined aggravators also used 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, 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."). Chapter 2016-13 still limits the jury to the statutorily defined aggravators. Florida remains a weighing state. In any event, the significance of the distinction between weighing and nonweighing states only matters as to the harmless error standard to be used when an improper or invalid aggravator was used at the penalty phase. *Brown v. Sanders*, 546 U.S. 212, 218 (2006).

[9] The term "eligibility" is used both in Sixth and Eighth Amendment cases but for different purposes. Sixth Amendment

Petitioner and Mr. Jackson argue, it must actually change the elements to be proven in order to authorize an increase in punishment. The use of the word "eligibility" in the new statute is not determinative of what is an element subject to the Sixth Amendment right to a jury trial. Legislative labels do not govern what statutorily defined fact(s)the jury must find to authorize a death sentence. *Ring*, 536 U.S. at 602 ("The dispositive question, we said, 'is one not of form, but of effect.'. . . 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.")(citation omitted). In other words, under the Sixth Amendment, it is not a question of legislative labeling[10] but rather how the statutory scheme actually functions, *i.e.* what facts must be found before a death sentence can actually be imposed. *Apprendi*, 530 U.S. at 494 ("[T]he 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**?")(emphasis added).[11] Despite language in

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"eligibility" has to do with what facts must be proven to authorize an increase in punishment and legislative labeling is not determinative of how the elements actually operate to increase punishment. Eighth Amendment "eligibility" refers to narrowing the class of individuals who are death eligible as required by case law.

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

[11] In his *Apprendi* concurrence, Justice Scalia wrote: "And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,' has no

the new §921.141 that death eligibility arises from the finding of just one aggravating circumstance, a death sentence cannot in fact be imposed without factual determinations that "sufficient aggravating factors exist" to warrant the death penalty and that "the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." *See* § 921.141(2)(b)(2).

On the face of the new statute, if 3 or more jurors conclude either that there are insufficient aggravators or that the aggravators do not outweigh the mitigators, a death sentence is not authorized and cannot be imposed. Under the new § 921.141, sufficient aggravators must be found as a matter of fact and they must be found to outweigh the mitigators before a death sentence is authorized. These are the elements to which the Sixth Amendment's jury trial right attaches. *Hurst*; *Ring*; *Apprendi*. The judge cannot impose death until there is a death recommendation, and there cannot be a death recommendation unless the jury determines that sufficient aggravators exist and that those aggravators outweigh the mitigators. The argument that the revisions to § 921.141 permit the imposition of a death sentence upon the finding of the presence of one aggravating factor by itself, is unsupported by the clear statutory language viewed through the prism of *Hurst*, *Ring*, and *Apprendi*. Amici respectfully submit that Petitioner's re-write of the new statute by removing the substantive provision requiring the jury to

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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 499 (some emphasis added) (Scalia, J., concurring).

determine whether sufficient aggravators exist and whether those aggravators outweigh the mitigators should be rejected.

Any reading of the statute as authorizing a death sentence once an aggravator is found by the jury would render the statute violative of the Eighth Amendment. The list of sixteen aggravators includes aggravators that, on their own, fail to sufficiently narrow the class of individuals who may be sentenced to death under the Eighth Amendment.[12] Reading the new statute to authorize a death sentence merely on the basis of a finding of one statutory aggravator that does not show "extreme culpability" would render the capital sentencing scheme unconstitutional. *See Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)("[O]ur 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.").[13]

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[12] *See 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.'" (citation omitteed)); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)("[T]he 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.").

[13] For example, one of the statutory aggravators applies if the defendant was on "felony probation" at the time of the homicide. Petitioner's construction of the statute would mean that a defendant who was on felony probation for the possession of ecstasy, a well known party drug, could be rendered death

To the extent possible, statutes must be construed in a way that ensures their constitutionality. *Sunset Harbor Condominium Ass'n v. Robbins*, 914 So. 2d 925, 929 (Fla. 2005)(per curiam); *Dep't of Legal Affairs v. Rogers*, 329 So.2d 257, 265 (Fla. 1976). To comply with the Eighth Amendment and *Hurst*, amici submit that the new § 921.141 must (and can only) be read as allowing a death sentence only after a jury has found as a matter of fact that sufficient aggravators exist to justify a death sentence and that those aggravators outweigh the mitigators. The new statute cannot properly be read as omitting those substantive elements that were specifically identified in *Hurst* and that the statute still requires to be found by the jury before it can return a death recommendation and authorize the judge to impose a death sentence. The changes in the new statute are procedural as explained in the following section.

C. Ex Post Facto Jurisprudence.

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) (citation and footnote omitted). This precludes a change in a

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eligible solely on that basis. Felony probation for possession of ecstasy does not show "extreme culpability" as the Eighth Amendment requires. The requirement that the aggravators must be *sufficient* to justify death was put into the statute to comply with the Eighth Amendment.

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 Supreme Court was presented with an ex post facto challenge to a Texas statute. Youngblood was convicted of aggravated sexual abuse in 1982. The jury sentenced him to life imprisonment and imposed a $10,000 fine. At the time, a fine in addition to imprisonment was not authorized by the Texas law, and subsequent case law held that a jury's verdict imposing both a sentence of imprisonment and a fine was unauthorized. *See Bogany v. State*, 661 S.W.2d 957, 958 (Tex. Cr. App. 1983). On the basis of *Bogany*, Youngblood sought a new trial. However in 1985, legislation was enacted and "provide[d] a vehicle by which an improper verdict could be reformed." *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Cr. App. 1985)(en banc). 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. *Id.*

On certiorari review, the Supreme Court explained that "the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them" and that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Youngblood*, 497 U.S. at 43. The Supreme Court held the change in Texas law to be procedural because it did not "alter the definition of the crime of aggravated sexual abuse, of which Youngblood was convicted, nor [did] it increase the punishment

for which he is eligible as a result of that conviction." *Id*. at 44. The Court explained that the term "procedural" 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. Under this analysis, the Supreme Court concluded that the Texas statute did not violate the Ex Post Facto Clause. *Id*. at 52.

When the new Florida statute is properly read under *Ring* and *Hurst* and properly analyzed under *Youngblood,* its enactment only made procedural changes, not substantive ones. *See also Weaver,* 450 U.S. at 28; *Carmell v. Texas*, 529 U.S. 513 (2000). The changes in the new version of §921.141 are procedural because they concern how the case is adjudicated and therefore retroactive application of these provisions do not violate the Ex Post Facto Clause.

D. §921.141, Fla. Stat. (2016), Must Be Construed To Be Compliant With *Hurst*.

As noted above, while the new §921.141 is the Legislature's attempt to comply with *Hurst*, the statute maintains potential procedural flaws arising from ambiguity in its language. Subsection (2) requires that the jury unanimously find each aggravating factor. Although the new statute requires the jury to determine whether "sufficient aggravating factors" exist to support a death sentence, whether "aggravating factors exist which outweigh the mitigating circumstances found to exist" and whether "the defendant should be sentenced to life imprisonment without the possibility of parole or to death"--the facts *Hurst*

held must be found by a jury--the statute does not expressly require jury unanimity as to any of these factual questions. It merely says a death recommendation occurs when ten jurors vote to recommend death.

However, Florida law requires that the jury unanimously make these factual findings. "[T]he [unanimity] requirement was an integral part of all jury trials in the Territory of Florida in 1838 . . . ." *Bottoson v. Moore*, 833 So. 2d 693, 714 (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*. Rule 3.440. Fla. R. Crim. P, provides, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Florida juries are instructed, "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." Fla. Std. Jury Instr. (Crim.) 3.10.

In combination with *Hurst*'s requirement that a jury find the facts necessary to impose a death sentence, Florida law requires juror unanimity on those fact findings. To comply with *Hurst* and longstanding Florida law requiring juror unanimity on elements of a criminal offense, this Court should hold that the jury must unanimously find as a matter of fact that: 1) sufficient aggravators exist to justify a death sentence, and 2) the aggravators outweigh the mitigators found to exist.

In the past, this Court has made procedural fixes to Florida's death penalty scheme through statutory construction when necessary to circumvent and/or overcome perceived

constitutional defects in the statute. Florida's capital sentencing scheme was enacted in 1973. With two justices dissenting, this Court found it constitutional in *State v. Dixon*, 283 So. 2d 1, 11 (Fla. 1973),[14] even though the statute limited the mitigating 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 . . . to [be] consider[ed] . . . .").[15] The statute was approved as written even though it gave 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. . . . [A] death sentence could be imposed although the entire twelve member jury had recommended a life sentence.").[16]

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

[15] Justice Ervin's dissent was premised in part upon the statutory limit on the mitigators to a list of seven. *Id.* at 17.

[16] Justice Boyd's dissent was premised in part upon the statutory language giving the judge discretion to disregard the jury's recommendation. *Dixon*, 283 So. 2d 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

Two years after *Dixon*, this Court construed the statute to limit the sentencing judge's discretion to override a jury's life recommendation in *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)(per curiam). In *Tedder*, the Court held for the first time that a jury's life recommendation was entitled to great weight and could not be overridden unless "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ." *Id.* at 910. The great weight standard (or the *Tedder* standard), was crafted by this Court and read into the statutory scheme to address the *Furman* concerns that Justice Boyd had first expressed in *Dixon*.[17] *See also Sawyer v. State*, 313 So. 2d 680, 682-83 (Fla. 1975)(Ervin, J., joined by Boyd, J., dissenting); *Sullivan v. State*, 303 So. 2d 632, 636 (Fla. 1974)(Boyd, J., specially concurring).

As to the post-*Furman* statute's list of seven mitigating circumstances, this Court held in *Cooper v. State*, 336 So. 2d 1133 (Fla. 1976), that only mitigating evidence relating to the statutorily identified mitigators was admissible: "Evidence concerning other matters have no place in that proceeding." *Id.* at 1139; *see also Meeks v. Dugger*, 576 So. 2d 713, 717 (Fla. 1991)(per curiam)(Kogan, J., specially concurring)("In the 1970s . . . this Court directly barred capital defendants from presenting any mitigating evidence other than that described in

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

[17] The Supreme Court later found the capital sentencing scheme facially compliant with *Furman* in part because of the *Tedder* standard. *Proffitt v. Florida*, 428 U.S. 242, 249 (1976).

the narrow list contained at that time in section 921.141(7), Florida Statutes (1975).").

Then, in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held that the Eighth Amendment precluded States from limiting the available mitigation to a statutory list. *Id.* at 608. In the wake of *Lockett*, this Court addressed whether Florida's post-*Furman* statute was compliant with *Lockett*. In *Songer v. State*, 365 So. 2d 696 (Fla. 1978)(per curiam), this Court renounced *Cooper*'s literal reading of the statute and concluded that capital defendants were not limited to presenting mitigating evidence relevant to one of the seven statutory mitigators. *Songer*, 365 So. 2d at 700.[18]

Thus, through statutory construction, this Court has historically made procedural changes to Florida's post-*Furman* statute in order to render it constitutional under the Eighth Amendment. In amici's view, this Court can and should construe the statute in a way that complies with *Hurst* by finding that juror unanimity is required as to whether sufficient aggravators exist to justify a death sentence, and whether those aggravators outweigh the mitigating circumstances.

CONCLUSION

The answer to Question 2 is yes. Chapter 2016-13 can be applied in cases in which the homicide was committed before March 7, 2016.

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[18] Justice Kogan acknowledged that in *Songer* "[w]e judicially expanded the list to conform to *Lockett*." *Meeks*, 576 So. 2d at 718.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief of amici curie has been furnished by email service to Assistant Attorney General, Vivian Singleton at her primary email address, Vivian.singleton@MyFloridaLegal.com, and to J. Edwin Mills at his primary email address, jemillslaw@hotmail.com, on April 29, 2016.

CERTIFICATE OF FONT

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

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