IN THE SUPREME COURT OF FLORIDA

Case Number SC16-547

L.T. Case Number 5D16-516

LARRY DARNELL PERRY

Petitioner,

v.

STATE OF FLORIDA

Respondent.

_____/

On Review of Certified Question

AMICUS CURIAE BRIEF OF WILLIAM WOODWARD

/s/ Robert Berry

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STATEMENT OF INTEREST

Although appearing here as amicus, William Woodward is one of the parties discussed in the case before this Court. The Fifth District Court of Appeal combined Larry Darnell Perry's case (5D16-516) with Mr. Woodward's case (5D16-543). Mr. Woodward filed a motion for rehearing based on concerns regarding factual errors in the original version of the opinion, filed on March 16, 2016. The Fifth District issued a "corrected opinion" on April 20, 2016 and Mr. Woodward sought to invoke this Court's jurisdiction. He has furthermore asked to have Mr. Perry's case and his joined. That motion was denied by this Court. *See* SC16-696.

More generally, Mr. Woodward is the subject of a pending felony prosecution in Brevard County, Florida that includes two counts of first degree premeditated murder and the State has indicated its desire to pursue the death penalty. Because he chose to seek rehearing based on factual errors in the Fifth District's opinion and Mr. Perry did not, Mr. Woodward ironically appears as amicus in his own case.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal certified two questions to this Court in *Perry/Woodward v. State*, 2016 WL 1573767 (Fla. 5th DCA 2016).

The first question is whether the death penalty is unconstitutional and the answer is "no" since, as phrased, it appears to be an Eighth Amendment question and *Hurst* does not implicate the Eighth Amendment.

The answer to the second certified question regarding retroactive application of Chapter 2016-13, Florida Statutes is also "no" for more complex reasons. *Chapter 2016-13*, Laws of Florida is either procedural/remedial or substantive

Justice Pariente, writings for this Court in *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d 494 (Fla. 1999) provided an excellent framework for analyzing the issue of whether 2016-13 should be applied retroactively. Under the *Chase Federal* analysis, the first inquiry is into what the legislature said. The Legislature said "[t]his law shall take effect upon becoming a law." The 160-member Florida Legislature did not express an intent to retroactively apply the statute and in fact set an effective date of when the act is signed into law. Finally, the legislation itself contains a notice requirement that logically can only be applied prospectively. Chapter 2016-13, Laws of Florida §2.

Moreover, under the Florida Constitution's separation of powers clause, the legislature has no authority over the creation of criminal rules of procedure, so if the legislation is procedural, then it is unconstitutional, as

the legislature has no authority to make such a rule in the first place. *Article II, Section 3, Florida Constitution.*

Even if this Court found the legislature intended to retroactively apply the changes demanded by Hurst, despite overwhelming evidence to the contrary, such an application would violate 1) the United States Constitution's ban on *ex post facto* laws[1], 2) the Florida Constitution's ban on *ex post facto* laws[2], and 3) the Florida Constitution's provision in Article X, Section 9 that "repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." One of many examples of this can be found in the U.S. Supreme Court decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004) where the court held its decision in *Ring v. Arizona*, the case from which *Hurst* arises, should not to be retroactively applied.

Both certified questions should be answered in the negative.

ARGUMENT: CHAPTER 2016-13, LAWS OF FLORIDA DOES NOT APPLY TO PENDING PROSECUTIONS FOR CAPITAL OFFENSES THAT OCCURRED PRIOR TO MARCH 7, 2016.

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[1] Article 1, Section 10, clause 1, United States Constitution
[2] Article 1, Section 10, Florida Constitution

The Fifth District Court of Appeal certified two questions to this Court in *Perry/Woodward v. State*, 2016 WL 1573767 (Fla. 5th DCA 2016):

> "1) DID *HURST V. FLORIDA*, 136 S. CT. 616 (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?"

To the extent the first question posed by the Fifth District asks whether there is an Eighth Amendment component to the *Hurst* decision, the answer is obvious to the point that it borders on being rhetorical. The *Hurst* majority does not find Florida's death penalty scheme a cruel or unusual punishment. Rather, it finds the statutory scheme unconstitutional because it denies the accused his or her right to trial by jury.

The second question is by no means rhetorical. It in fact goes to very fundamental aspects of our state and federal constitutions. As is clearly demonstrated below, the answer to the question "does Chapter 2016–13, Laws of Florida, apply to pending prosecutions for capital offenses that occurred prior to its effective date" is unequivocally "no."

To address the Fifth District's second certified question, we must first examine Chapter 2016-13, Laws of Florida. Chapter 2016-13 amends multiple criminal statutes, two of which are key as establishing that the

amendments qualify as substantive "criminal statutes." First, §775.082(1)(a), Florida Statutes, the substantive provision which actually establishes the penalty of death, is amended by substituting "a determination" for "findings by the court." Second, §921.141, Florida Statutes, which sets forth the death-penalty scheme, is substantially amended to provide for multiple substantive changes. The burden of proof has been inverted (aggravating factors must outweigh mitigating circumstances under the amended section 921.141(2)(b)1b; the jury must return findings identifying each aggravating factor found to exist, and a unanimous vote is now required under §921.141(2)(b)2.; death eligibility is modified so that a defendant becomes "eligible for a sentence of death" once the jury unanimously finds "at least one aggravating factor" under §921.141(2)(b)2.; the jury death verdict requires a vote of at least 10 jurors under §921.141(2)(c); and a verdict of life is now binding under §921.141(3)(a)1, Florida Statutes. With those changes in mind, we can turn to the Fifth District's view those changes can be applied retroactively, based largely on a misreading of the U.S. Supreme Court's decision in *Dobbert, infra.*

Justice Pariente, writing for this Court in *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d 494 (Fla. 1999), discussed the two "interrelated inquires" arising when determining whether

it is lawful to retroactively apply a statute. The first question is whether there is "clear evidence of legislative intent to apply the statute retrospectively." Id. at 499. Second, "if the legislation clearly expresses an intent that it apply retroactively" the question turns to whether the "retroactive application is constitutionally permissible." Id.

Arguably there is an inquiry that must be made prior to the two interrelated inquiries outlined in *Chase Federal*. The issue that must first be addressed is whether the statute at issue is substantive or procedural/remedial. The *Chase Federal* court makes clear the entire discussion of retroactive application assumes the change is substantive and indicates the presumption against retroactive application is inapplicable if the statute is procedural/remedial. See 737 So.2d at 500 fn.9.

Therefore we turn to whether Ch. 2016-13, Laws of Florida is remedial, procedural, or substantive. This Court equated procedural and remedial laws in *State v. Garcia*, 229 So.2d 236 (Fla. 1969), when it said "[p]rocedural law is sometimes referred to as 'adjective law' or 'law of remedy' or 'remedial law' and has been described as the legal machinery by which substantive law is made effective." 229 So.2d at 238. The *Garcia* Court defined substantive law as "that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to

administer." More famously, the *Garcia* court stated: "substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." Id. In *In Re: Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972), Justice Adkins, concurring, discussed the difference between substantive and procedural law this way:

> "The entire area of substance and procedure may be described as a 'twilight zone' and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term 'practice and procedure.'
>
> "Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof."

This dichotomy creates a separate constitutional problem for the Court under our state constitutional scheme. Under the Florida Constitution's separation of powers clause, the legislature has no authority over the creation of criminal rules of procedure, so if the legislation is procedural, then it is unconstitutional, as the legislature has no authority to make such a rule in the first place. *Article II, Section 3, Florida*

Constitution. This Court has hegemony over the creation of rules of procedure, while the legislature may strike those rules upon a two-thirds vote of both legislative chambers. *Article V, Section 2, Florida Constitution.* In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), this Court held the legislature violated the constitution's separation of powers clause when it enacted the Death Penalty Reform Act in 2000. *See also Taylor v. State*, 969 So.2d 583 (Fla. 4th DCA 2007)(Florida legislature could repeal old closing argument rule, but only the Florida Supreme Court could approve new rule).

The United States Supreme Court, in *Dobbert v. Florida*, 432 U.S. 282 (1977) found that the post *Furman v. Georgia*[3] revision of Florida's death penalty statute was procedural. 432 U.S. at 293. If this Court accepts that premise without further analysis, then 2016-13 is unconstitutional because of the legislature's usurpation of this Court's constitutional authority over rulemaking and procedure. Moreover, this Court does not have in place rules of procedure that comply with the dictates of *Hurst.* Amendment of court rules is governed by *Fla. R. Jud. Admin 2.140.* "Amendment" in the context of *2.140* would be a broad use of that term, as there is no procedure for conducting a penalty phase proceeding beyond the brief treatment of the issue contained in *Fla. R. Crim. P. 3.780* which all but

[3] 408 U.S. 238 (1972)

cedes this court's procedure-making obligation to the legislature. Therefore there is no death penalty statute or rule of procedure in Florida that meets constitutional muster in the aftermath of *Hurst*. The *Dobbert* court would not have had to address that issue because it is strictly a Florida constitutional law question.

All of this argument about procedure aside, Amicus would argue *Dobbert* requires a further and different analysis in light of the *Hurst* decision. The *Dobbert* court found there was no change in the quantum of punishment, only the method by which the punishment was arrived at. *Dobbert*, 432 U.S. at 293. Amicus will concede, for purposes of this portion of the argument, that *Dobbert* is correct on the facts and statutes as they existed when it was decided.

This Court itself has receded from the suggestion in *Dobbert* that the changes made were purely procedural. In both *Vaught v. State*, 410 So.2d 147 (Fla. 1982) and *Morgan v. State*, 415 So.2d 6 (Fla. 1982), this Court held the aggravating "circumstances" were substantive, while other aspects of the sentencing process were procedural. In fact, the *Vaught* court rejected the notion that *Dobbert* should be viewed as a "shibboleth" in dictating the resolution of the substantive/procedural question under *Article II, Section 3*.

Vaught, 410 So.2d at 149. Thus, the Fifth District's reliance on *Dobbert* is misplaced.

The type of change in the law required by *Hurst* is different than the type of change required by *Furman*. The aggravating "circumstances" discussed in *Dobbert* are now mitigating "factors" possessing the status of elements of the offense. This change takes *2016-13* out of the realm of procedure and places it firmly on substantive ground, because we are now discussing findings of fact beyond a reasonable doubt affecting the "quantum" of punishment. The *Hurst* court reminded us that in *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury." *Hurst*, 136 S.Ct. at 621. What the *Hurst* court is saying is that for a death penalty statute to pass constitutional muster, it must be written in such a way as to make aggravating considerations full fledged elements of the offense, provable individually to the satisfaction of a jury beyond a reasonable doubt.[4] The scheme approved in *Dobbert* did not

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[4] This Court had previously rejected this notion of a unanimous jury requirement on aggravating "circumstances." See, e.g., Miller v. State, 42 So.3d 204 (Fla. 2010)("[t]his Court has repeatedly rejected the assertion that *Apprendi* and *Ring* require that aggravating and mitigating circumstances be found individually by an unanimous jury.")

require new elements be proven, but rather altered the procedure for determining whether death or mercy was appropriate. The scheme required by *Hurst* demands a jury make findings that directly affect whether a higher quantum of punishment is available to the government. Therefore, there is nothing inconsistent between a finding by the *Dobbert* court that the 1972 change in 921.141[5] was procedural and a finding the change required in light of *Hurst* is necessarily substantive. This court, in *State v. Hootman*, 709 So.2d 1357 (Fla. 1998), *abrogated as to the use of it as precedent for accepting jurisdiction in State v. Matute-Chirinos*, 713 So.2d 1006 (Fla. 1998), stated, at footnote 5, "[b]y giving the jury an additional *factor* to consider in making its determination, the legislature sufficiently increased the risk that Hootman will receive a sentence harsher than life imprisonment." [emphasis added]. The use of the word "factor" is significant in that it is the same term used in the *2016-13* revision of the aggravation list. The prior statute referred to aggravators as "circumstances." They are now referred to as "factors." Again turning to Justice Pariente's discussion of retroactivity for this Court in *Chase Federal*, she notes at footnote 9:

> "For this reason, this Court has stated that the presumption in favor of prospective application generally does not apply to

[5] Laws of Florida 1972-724

> "remedial" legislation; rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose. Arrow Air, 645 So.2d at 425. *However, if a statute accomplishes a remedial purpose by creating new substantive rights or imposing new legal burdens, the presumption against retroactivity would still apply.* [emphasis added].

In the immediately proceeding footnote, this Court points out that the rules generally prohibiting retroactive application of statutes are a limitation on governmental authority, as opposed to an affirmative individual right. 737 so.2d 494 at fn. 8. The new legal burden here is making the State prove elements going to the quantum of punishment beyond a reasonable doubt to a jury. The *ex post facto* clause in Florida's constitution is expressly a limitation on the types of laws that can be passed. Moreover, *Article X, Section 9, Florida Constitution* is a limitation on legislative authority as well. Interestingly, when *Article X, Section 9* was first added to the Florida Constitution in 1885, it was contained in the section of the Florida Constitution addressing the legislative branch. *See, Article III, Section 32, Florida Constitution* (1885).[6] It has never appeared in the declaration of

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[6] Additionally, in the original draft of Article III, Section 32, the language was limited to "trial and punishment" as opposed to the broader concept of "prosecution and punishment" to which it was ultimately amended. *See, Journal of the Proceedings of the Constitutional Convention of the State of Florida Which Convened at the Capitol at Tallahassee on June 9,* 1885, p. 261, p. 354-355

rights,[7] although it was moved out of the Article dealing with the legislative branch following the 1968 constitution revision.

Having addressed the fact the change is substantive, Amicus would now turn to the *Chase Federal* court's first question, to wit: does *Chapter 2016-13, Laws of Florida*, expressly assert a legislative intent it be applied retroactively? The Legislature, with the collective wisdom of 40 senators and 120 representatives, certainly was aware of the importance of including a clear statement of their intent this new death penalty statute be applied retroactively if indeed it was their intent. In fact, over a year ago, the Florida Senate considered legislation in anticipation of an adverse ruling in *Hurst*.[8] The staff analysis of that proposal included a discussion of the retroactivity issue. Id. at pages 11-12. [9] Those 160 elected representatives (plus the

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[7] The late Justice Antonin Scalia said this in 2015:

> "Every tin horn dictator in the world today, every president for life, has a Bill of Rights. That's not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn't want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word 'constitution;' it means structure."

http://dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/

[8] See, http://www.flsenate.gov/Session/Bill/2015/0664/Analyses/2015s0664.pre.cj.PDF

[9] Amicus is aware "[t]his Court is not unified in its view of the use of legislative staff analyses to determine legislative intent." *GTC, Inc. v. Edgar*, 967 So.2d 781, 789 n. 4 (Fla.2007). It is not being offered here as affirmative proof of legislative intent, but rather merely to show an

Governor who signed the legislation) certainly knew or were on constructive notice of the language in *Chase Federal* emphatically stating "[t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." 737 So.2d at 499. They knew this Court's first question would be "what did the Legislature say." Their only words on the subject came in the final section of their legislation: "This law shall take effect upon becoming a law." Other than that, they were silent. *Chapter 2016-13, §7, Laws of Florida*. Moreover, as Justice Pariente pointed out in *Chase Federal*, "the mere fact that retroactive application of a new statute would vindicate its purpose more fully…is not sufficient to rebut the presumption against retroactivity." *Id.* at 500 (*Citing Landgraf v. USI Film Products*, 511 U.S. 244 at 285-6 (1994)). Given the enormous stakes attaching to the Legislature's intent here, it is wholly appropriate to construe their silence regarding retroactive application as being probative of their intent. Finally, understanding at the outset this Court does not put much, if any, weight in staff analysis by the legislature, it is nonetheless telling that the staff analysis assumed no costs associated with this change.[10] Retroactive application

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awareness of the retroactivity issue, something they should be aware of anyway.

[10] See, http://www.flsenate.gov/Session/Bill/2016/7101/Analyses/h7101z.CRJS.PDF

would cost more than prospective-only application where the pre-*Hurst* defendants would be sentenced to life.

But assuming for a moment the question of the legislature's intent is not resolved by their silence, a reader of *Chapter 2016-13* will quickly notice a clear and affirmative statement of the legislature's intent the law be only prospective in its application. Section 2 of *Chapter 2016-13, Laws of Florida*, adds the following language to 782.04(1)(b):

> "If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause."[11]

This requirement is prospective in its clear language since a post March 7, 2016 arraignment date is assumed. The only alternative reading is nonsensical: the statute is retroactive only to the extent the State is still within 45 days of arraignment as of March 7, 2016 (i.e. the statute is retroactive up to 44 days prior to the day Governor Scott signed the legislation).

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[11] This amendment invites the question of whether this constitutes a rule of procedure or a jurisdictional limitation. If it is the latter, it is substantive. It's language suggests this intent as its language seems to allow only for amendment of timely filed notices and that the 45 day is a hard limitation on the ability to seek the death penalty. Whether it is jurisdictional or merely constitutes a foreclosure does not change the effect of the language.

Finally, the legislature made the statute effective upon "becoming a law." *Chapter 2016-13, §7. Article 3, Section 9* of our state constitution provides a default effective date of the sixtieth day after "adjournment *sine die* of the session of legislature in which enacted." The effective date was thus clearly on the mind of the legislature.

One other aspect of the *Chase Federal* opinion is worth mentioning as to the first question Justice Pariente discusses. The *Chase Federal* court noted "when an amendment to a statute is enacted *soon after controversies as to the interpretation of the original act arise,* a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Id.* at 503. [emphasis added by Court]. *Hurst* goes far beyond being an interpretive issue. It is a finding by the nation's highest court that the statutory scheme is unconstitutional. By necessity, *Chapter 2016-13, Laws of Florida*, constitutes a wholesale reinvention of the death penalty scheme.

The threshold question outlined by Justice Pariente in *Chase Federal* should therefore be resolved against the State. The legislation should not be applied to Mr. Woodward or Mr. Perry.

If for some reason the court is of view the legislature did set forth an intent to legislate retroactively, despite overwhelming evidence to the

contrary, the analysis would then focus on whether the retroactive application of this statute is constitutionally barred. Three constitutional provisions are in play: 1) the United States Constitution's ban on *ex post facto* laws[12], 2) the Florida Constitution's ban on *ex post facto* laws[13], and 3) the Florida Constitution's provision in Article X, Section 9 that "repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

This question actually brings us full circle back to the substantive/procedural issue discussed earlier. Both the *ex post facto* laws and the Article X, Section 9, Florida Constitution turn on whether the new law is substantive or procedural. For example, this Court, in *Mathis v. State*, 12 So. 691; 31 Fla. 291 (Fla. 1893) held Article 3, §32, Florida Constitution (1893)(now Article X, §9, Florida Constitution) did not foreclose retroactive application of a change in law regarding peremptory challenges during jury selection, since the change was procedural as opposed to substantive. The Court held:

> "It is entirely clear that the right to peremptory challenges appertains to the remedy, the procedure under which prosecutions are conducted, and not to the essence of the offense itself. The legislature can at any time change the law in this respect, and such change will apply to prosecutions of

[12] Article 1, Section 10, clause 1, United States Constitution
[13] Article 1, Section 10, Florida Constitution

> offenses committed before, as well as those committed after, the change has been made. Such legislation is not ex post facto."

By contrast, for the reasons already set out, the kind of change required by *Hurst* is a substantive one since it goes directly to the elements of the offense.

Finally, in Mr. Woodward's case, Judge Earp correctly observed in his Order granting the defense motion to bar "death qualification" of the jury that "[t]he courts in Florida have long held that the statute in effect at the time of the commission of the offense controls, rather than at the time of sentencing." *Citing Vandor v. State*, 857 So.2d 323, 324 (Fla. 2d DCA 2003); *Ellis v. State*, 298 So.2d 527 (Fla. 2d DCA 1974); *Allen v. State*, 383 So.2d 674, 675 (Fla. 5th DCA 1980). *See also*, *Larkins v. State*, 739 So.2d 90, 96 n. 1 (Fla.1999). The *Ellis* case cites this Court's ruling in *Raines v. State*, 28 So. 57 (Fla. 1900), where Chief Justice Taylor wrote:

> "[S]ection 32 of article 3 of our constitution [states], 'That repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment,' prevents the said chapter 4728 from affecting either the prosecution or the prior prescribed penalties for any crime committed prior to the taking effect of such ex post facto law. The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have been already

> committed prior to the taking effect of such repealing or amending law. The crime of which the defendant was convicted in this case was committed prior to the taking effect of said chapter 4728, and such crime, therefore, stood for prosecution *and punishment* under the terms of the law that it violated at the time of its commission, notwithstanding the subsequent repeal or amendment of such law." [emphasis added].

The law cited by the trial judge in the Mr. Woodward's case has been ensconced in our state's jurisprudence for well in excess of a century. That ruling is consistent with the *ex post facto* provision of the Florida and federal constitutions as well as *Article X, Section 9* of the Florida Constitution.

Justice Lewis, writing for this Court in *Smiley v. State*, 966 So.2d 330 (Fla. 2007) addressed the issue of retroactive application of a statute creating an expanded right of self defense to citizens – Florida's "stand your ground" statute. *§776.013, Florida Statutes*. In *Smiley*, this court stated "a statute that achieves a 'remedial purpose by creating substantive new rights or imposing new legal burdens' is treated as a substantive change in the law." Id. at 334. *Citing Arrow Air, Inc. v. Walsh,* 645 So.2d 422 (Fla. 1994). Whatever remedial or procedural aspects may attach to 2006-13, it is at its core a statute imposing a new legal burden (of proof) on the State and it therefore must be treated as a substantive change in the law for *ex post facto* purposes.

Finally, the United States Supreme Court, in *Schriro v. Summerlin*, 542 U.S. 348 (2004) held *Ring v. Arizona*, the case from which *Hurst* arises, was not to be retroactively applied. Significantly, after the U.S. Supreme Court held in *Duncan v. Louisiana*[14] that citizens facing a 2-year sentence in a state court prosecution were entitled to trial by jury, the question then of course turned to retroactive application of that ruling. In *DeStefano v. Woods*, 392 U.S. 691 (1968), the court held the effective date of this new right to jury trial was May 20, 1968 – the date *Duncan* was decided. *DeStefano* was a court deciding about a rule announced by the Court itself – with no retroactive application. Here, the legislature likewise announced a commencement date – March 7, 2016 – with no retroactive application.

CONCLUSION

Amicus prays this Court find *Chapter 2016-13*, Laws of Florida cannot be applied retroactively.

[14] 391 U.S. 145 (1968)

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 5th day of May 2016, I electronically filed the foregoing with the Clerk of Court by using the e-portal system which will send notice of electronic filing to the following: Vivian Singleton, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, vivian.singleton@myfloridalegal.com, James D. McMaster, Assistant State Attorney, Office of State Attorney Eighteenth Judicial Circuit, BrevFelony@sa18.org, jmcmaster@sa18.org; the Honorable James Earp, Circuit Judge, Eighteenth Judicial Circuit, Brevard County Courthouse, 2825 Judge Fran Jamieson Way, Viera, Florida 32940, jim.earp@flcourts18.org, Tina Derwitsch, Judicial Assistant to the Honorable James Earp, Brevard County Courthouse, 2825 Judge Fran Jamieson Way, Viera, Florida 32940, tina.derwitsch@flcourts18.org , Frank Bankowitz, P.O. Box 2568, 215 E. Livingston Street, Orlando, Florida 32802-2568 keith@bankowitzlaw.com and J. Edwin Mills, P.O. Box 3044, Orlando, Florida 32802 jemillslaw@hotmail.com

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CERTIFICATE OF COMPLIANCE

This Brief was prepared using a Times New Roman 14 font and otherwise complies with the Florida Rules of Appellate Procedure formatting requirements.

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