**IN THE SUPREME COURT OF FLORIDA**

Case No.: SC16-547

LARRY DARNELL PERRY

Petitioner,

v.

STATE OF FLORIDA

Respondent

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**On Discretionary Review from the District Court of Appeal of the State of Florida, Fifth District**
**Case No.: 5D16-516**

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# PETITIONER'S REPLY BRIEF ON THE MERITS

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### A. Florida's death-penalty statute was held unconstitutional in *Hurst v. Florida*, requiring that the death-penalty provision be severed and life imprisonment is the maximum sentence.

The state concedes that the Supreme Court "ruled that the state's sentencing scheme violated the Sixth Amendment," (Answer Brief ("AB") at 6), but attempts to distinguish this holding from a holding that the death penalty is unconstitutional. *Id.* The state is of course right that the ruling in Hurst v. Florida, 136 S. Ct. 616 (2016), did not abolish the death penalty for all time. But neither did Furman v. Georgia, 408 U.S. 238 (1972), abolish the death penalty. And yet this Court, when confronted with Furman's holding "invalidating the death penalty as now legislated," Donaldson v. Sack, 265 So.2d 499, 505 (Fla. 1972), determined that the only proper remedy was to apply the rule of severability and sever the death-penalty provision from the statute, leaving life imprisonment as the maximum sentence. *Id.* at 503. That is the precise remedy appropriate now, with the distinction that under the current statutory scheme, life imprisonment precludes any possibility of ever being released.

### B. Constitutionality of § 921.141 (2)(c), Fla. Stat. (2016).

In his initial brief, Petitioner argued that Chapter 2016-13 could not be retroactively applied to offenses committed prior to March 7, 2016, the date upon which it was signed into law. This Court, on May 5, 2016, directed the Parties to

address whether the provision within § 921.141(2)(c), Florida Statutes (2016), requiring that at least 10 jurors determine that the defendant should be sentenced to death, is unconstitutional under the Florida and United States Constitutions. Accordingly, without waiving the arguments advanced in the initial brief, Petitioner will address the validity and construction of section 921.141(2)(c).

**1. The version of § 921.141 at issue in *Hurst.***

At issue in Hurst was the version of § 921.141 that was in effect prior to the enactment of Chapter 2016-13. According to Hurst, that version of the statute defined facts that were required to be found before Florida law authorized a judge to impose a death sentence on a defendant who had been convicted of first-degree murder:

> As described above and by the Florida Supreme Court, the Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) . The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see Steele, 921 So.2d at 546. "[T]he jury's function under the Florida death penalty statute is advisory only." Spaziano v. State, 433 So.2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring[[1]] requires.

[1] *Ring v. Arizona,* 536 U.S. 584 (2002).

*Id.* at 622 (emphasis in original).[2] Under the old version of the statute, the judge had to issue written findings of fact in which she was required to identify what aggravators and mitigators had been established, find that sufficient aggravators existed, and find insufficient mitigators existed to outweigh the aggravators. See Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) ("Our state courts continue to experience difficulty in uniformly addressing mitigating circumstances under section 921.141(3), Florida Statutes (1985), which require 'specific written findings of fact based upon [aggravating and mitigating] circumstances.'") (brackets in original).[3]

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[2] *Hurst* cited to Florida law that the judge *alone* had to issue written findings: "*State v. Steele*, 921 So.2d 538, 546 (Fla. 2005) ('[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely')." *Hurst*, 136 S. Ct. at 622. In *Steele*, this Court explained: "The trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each." *Steele,* 921 So. 2d at 546.

[3] Former § 921.141(3) provided:

> (3) Findings in support of sentence of death. –Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That **sufficient aggravating circumstances exist as enumerated in subsection (5), and**
> > (b) That there are **insufficient mitigating circumstances to outweigh the aggravating circumstances.**

As explained in Hurst, Florida's capital sentencing scheme did not authorize a death sentence upon a conviction of first-degree murder unless additional facts were found *by the judge* and set forth *in writing*; indeed,

> [a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona. Walton v. Arizona, 497 U.S. 639, 648 (1990); *accord* State v. Steele, 921 So.2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

Hurst, 136 S.Ct. at 622. Thus, in Florida, without the judge's written findings of the requisite facts, a death sentence could not be imposed on the basis of a unanimous jury verdict finding the defendant guilty of first-degree murder. The additional facts that had to be found by the judge were: 1) the existence of "sufficient aggravating circumstances" justifying a death sentence; and 2) the absence of "sufficient mitigating circumstances to outweigh the aggravating

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> In each case in which the court imposes the death sentence, **the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6)** and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence** within 30 days after rendition of the judgment and sentence, **the court shall impose a sentence of life imprisonment** in accordance with § 775.082.

(Emphasis supplied).

circumstances. See Hurst, 136 S. Ct. at 622.[4] In assessing whether these facts were established, the judge had to make detailed written factual findings as to what aggravators and mitigators were established and part of the sentencing calculus. Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986) ("A court's written findings of fact as to aggravating and mitigating circumstances constituted an integral part of the court's decision; they do not merely serve to memorialize it."); *see* Bouie v. State, 559 So. 2d 1113, 1116 (Fla 1990) (death sentence reduced to life because judge's findings gave "no indication of which aggravating circumstances, if any, were deemed applicable.").

Florida's statute at issue in Hurst required the judge to make all of the requisite findings of fact. It provided that unless the judge entered written factual findings, a death sentence could not be imposed. See Layman v. State, 652 So.2d 373, 375-76 (Fla. 1995) (death sentence reduced to life where judge "failed to make specific findings" on the aggravating and mitigating circumstances prior to pronouncing sentence.).

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[4] This Court has always treated the weighing of the aggravators against the mitgators as a factual issue that had to be supported by sufficient competent evidence. *Campbell v. State*, 571 So. 2d at 420 ("To be sustained, the trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record.") (citation and inner quotation marks omitted). Unless the judge entered adequate written findings, she was statutorily precluded from imposing a death sentence.

As a result, the pre-Chapter 2016-13 version of the statue violated the Sixth Amendment. Hurst, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."). *See also id.* at 622 ("As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment").

**2. The enactment of Chapter 2016-13.**

In Hurst's aftermath, the fact-finding that had previously been assigned to the judge has now been assigned to the jury. The new statute requires that the jury identify all of the aggravating factors that it unanimously finds to have been proven beyond a reasonable doubt. See § 921.141(2)(b)(2). Should the jury unanimously find at least one aggravating factor proven, the jury is then required to make a sentencing "recommendation," based upon a weighing of all of the following: (a) whether sufficient aggravating factors exist; (b) whether aggravating factors exist which outweigh the mitigating circumstances, and (c) based on considerations (a) and (b) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. § 921.141(2)(b)(2) (a), (b), (c).

While the revised statute used the word "recommendation" to describe the jury's penalty phase verdict, this is a misnomer because if three or more jurors vote to "recommend" life, the judge is now required to impose a life sentence. Thus, under the revised statute, the jury is now essentially the sentencer. The factual findings that under the former statute were made by the judge and set forth in his written findings are now to be made by the jury pursuant to the statutory revisions contained in Chapter 2016-13. In other words, it is now for the *jury* to: 1) identify the aggravating factors; 2) determine whether any such factors found to exist are sufficient to justify a death sentence; 3) identify the mitigating factors that exist; and 4) determine whether the aggravating factors outweigh the mitigating factors.[5]

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[5] In *Campbell*, 571 So. 2d at 419, this Court set forth the findings that a judge had to make to impose death under the former statute. The new statute no longer places the burden upon the judge to make findings of fact. The judge merely addresses those matters that the jury was required to find under § 921.141(2) in order to return a death verdict. The jury is now charged with finding and identifying the aggravators that it has unanimously found. But the new statute does not specifically address the jury's duty to make written findings on the mitigation, which the judge had to make under the former statute. Because of the critical importance of the jury's findings on mitigation both to its sentencing calculus and to this Court's subsequent review, the statute, as will be discussed *infra*, if constitutional, must be construed to require the jury to identify the aggravators **and** the mitigators (and vote thereon) that the jurors found and weighed. *See Van Royal*, 497 So. 2d at 630 (Ehrlich, J., concurring) ("the trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable . . . that any meaningful weighing process can take place otherwise."). Of course, the jury's consideration of mitigation must comport with *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (a state may not require the jury to find a mitigator unanimously before jurors may consider it in its sentencing calculus).

### 3. The provision requiring a death recommendation to be returned by a 10-2 vote by the jury violates Florida law and is unconstitutional under the Florida and federal Constitutions.

If the 10-2 provision in §921.141(2)(c) is construed as relating back to the factual issues that are now assigned to the jury to resolve under § 921.141(2)(b), it violates Hurst. The facts that must be found in order to authorize a death sentence are elements that are subject to the Sixth Amendment right to trial by jury under Hurst. Florida law has long held that a jury must find elements of a criminal offense unanimously. Since before statehood, Florida juries have been required to find elements of a criminal offense unanimously, a requirement that 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). Indeed, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Id.* at 714.[6]

Under Hurst, all factual findings that are necessary under §921.141(2)(b) for imposing a death sentence are elements that are subject to the Sixth Amendment right to trial by jury. Under Florida law, the jury must unanimously find factual elements. It would be unconstitutional to construe the 10-2 provision as applicable to the factual findings identified in §921.141 (2)(b).

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[6] 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 order to comply with Hurst, this Court would have to construe the 10-2 provision as inapplicable to the factual findings that the jury must make under the revised § 921.141(2)(b). The jury must resolve those factual findings unanimously. See Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

It is necessary to consider this Court's role in construing statutory provisions consistent with Florida and federal law, and the question whether the new statute is procedural or substantive is pertinent to this analysis.

**4. The New Statute Has Both Substantive and Procedural Components and the Court Should Interpret the Statute Consistent with Rules of Court and the State and Federal Constitutions.**

The state's overriding argument, that the new statutory scheme set forth in Chapter 2016-13, Laws of Florida, is procedural (AB at 7, 10, 11, 12, 15), and "only changes the procedure that would be followed in determining how a person convicted of a capital crime would be sentenced" (AB at 15), does not conclusively undermine Petitioner's ex post facto argument. See, e.g., Carmell v. Texas, 529 U.S. 513, 522 (2000) (procedural laws that alter the legal rules of evidence can be subject to ex post facto proscription); but see Dobbert v. Florida, 432 U.S. 282, 293 (1977) (Ex Post Facto Clause does not limt legislative control of remedies and

procedures); Batch v. State, 405 So. 2d 302, 304 (Fla. 4th DCA 1981) (procedural statutory changes apply to pending cases); State v. Pizarro, 383 So. 2d 762, 763 (Fla. 4th DCA 1980) (Article X, Section 9, does not apply to procedural or remedial statutes).[7] But this characterization of the new statute as procedural would call into question the validity of the statute. Article V, Section 2(a) of the Florida Constitution provides that this Court shall adopt the rules for the "practice and procedure in all courts," and Article II, Section 3 provides that "powers constitutionally bestowed upon the courts may not be exercised by the legislature." State v. Raymond, 906 So. 2d 1045, 1048 (Fla. 2005). Thus, if the state is correct and the statute was purely procedural, "it is an unconstitutional invasion of this Court's rulemaking authority conferred by the Florida Constitution, and it is invalid." *Id.* at 1049.

The better view of the statute is that it creates procedural provisions that are incidental to the substantive rights created, and thus a proper exercise of the legislative power. Knealing v. Puleo, 675 So. 2d 593, 596 (Fla. 1996). This Court then is charged with the obligation to construe the statute, including any potential procedural flaws, consistent with the state and federal constitutions if at all

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[7] The obstacle posed by the Ex Post Facto Clauses and Article X, Section 9 might be avoided by a holding that the new statute is largely "procedural, and on the whole ameliorative." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977) (footnote omitted), and, as this Court has explained: "if th[e] state constitutional provision were to apply, . . . the requirements of the federal constitution must trump those of our state constitution." *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).

possible. See, e.g., State v. Harris, 356 So. 2d 315, 317 (Fla. 1978) (Legislature had the right to create substantive offense, but Court has the right to dictate the procedure employed to implement it); Smetal Corp. v. W. Lake Inv. Co., 126 Fla. 595, 628, 172 So. 58, 72 (1936) (statute should, if possible, be construed so as not to conflict with the constitutional guarantee of due process). In the past, this Court has been particularly vigilant in enforcing procedural fixes in the death-penalty context to overcome perceived constitutional defects. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (Court crafted a "great weight" standard, requiring that "the facts suggesting a sentence of death [be] so clear and convincing that virtually no reasonable person could differ" to limit the sentencing judge's otherwise unfettered discretion to override a jury's life recommendation); Songer v. State, 365 So. 2d 696, 700 (Fla. 1978) (statute construed to permit mitigation not limited to seven statutory mitigators.)

**5. This Court should declare the amended statute unconstitutional, or in the alternative, construe it consistent with the Florida and federal Constitutions.**

**a. The jury's factual findings must be unanimous.**

It has been established that the prerequisite findings—that the aggravating factors are sufficient and that they outweigh the mitigation—must be unanimously found, exactly as is already required for the finding of aggravating circumstances under §921.141(2)(b). The Sixth Amendment and Florida law permit no

distinction. See, e.g., Ring v. Arizona, 536 U.S. 584, 610 (Scalia, J., concurring) (referring to the elements "that a unanimous jury must find beyond a reasonable doubt"). This Court must either declare the statute unconstitutional because of the failure to require unanimity on these findings or construe the statute to require unanimous jury findings beyond a reasonable doubt. See Tedder v. State, supra; Songer v. State, supra.

**1. The jury's verdict must be unanimous.**

**a. Florida law requires that jury verdicts be unanimous**

Under the Florida Constitution, in all criminal cases, "the verdict of the jury must be unanimous." Jones v. State, 92 So.2d 261 (Fla. 1957). "Although neither the Sixth nor Fourteenth Amendments to the federal constitution require unanimous jury verdicts in noncapital state trials, the 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), citing Motion to Call Circuit Judge to Bench, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"). And, as previously noted, this requirement, with roots in the Florida Constitution, is incorporated into the Florida Rules of Criminal Procedure. See Fla. R. Crim. P. 3.440 ("No verdict may be rendered unless all of the trial jurors concur in it"). Therefore, within this State, any jury verdict that is a constitutional prerequisite to a death sentence must be

unanimous. The Court should either hold the statute unconstitutional[8] or construe the procedural provisions of the statute consistent with the Florida Constitution as well as the Rules of Court, and require unanimity, severing that portion that would permit a death verdict upon a vote of only 10 jurors. See, e.g., TGI Friday's Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995) (procedural portions of statue would be superseded by Rule of Civil Procedure); State ex rel. Boyd v. Green, 355 So. 2d 789, 794 (Fla. 1978) (unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions).

**b. The Eighth Amendment requires that jury verdicts in capital cases be unanimous.**

The federal Constitution requires that jury verdicts in capital cases be unanimous. Under Eighth Amendment analysis, it is necessary to consider the evolving standards of decency enshrined in that 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**

[8] On May 9, 2016, in *State v. Karon Gaiter,* Case No. F01-128535, Judge Milton Hirsch, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, held the statute unconstitutional under Article I, Section 22 of the Florida Constitution for its failure to require unanimity.

> **evolving standards of decency** that mark the progress of a maturing society." Id., at 100–101, 78 S.Ct. 590.

(Emphasis added). Accord Roper v. Simmons, 543 U.S. 551, 561 (2005). The Supreme Court has explained that evolving standards of decency are "determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 **but by the norms that 'currently prevail**.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (emphasis added).

Currently, there is a national consensus that when the jury acts as sentencer in a capital case, its decision to impose a death sentence must be unanimous. The Supreme Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" Atkins, 536 U.S. at 312. The Staff Analysis of the Criminal Justice Subcommittee in its review of House Bill 7101 (subsequently enacted as Chapter 2016-13) indicated that only two States besides Florida allow a jury to return a death sentence upon less than a unanimous basis:

> Alabama's capital sentencing scheme allows the imposition of the death penalty with a 10-2 jury sentencing recommendation. Similarly, Delaware requires unanimity regarding the finding of aggravating factors, but does not require unanimity in a sentencing recommendation.

Staff Analysis of the Criminal Justice Subcommittee at 7 (footnotes omitted).[9] The Staff Analysis noted "Florida is currently one of 31 states that impose the death penalty." Id. at 2. Given that Florida is one of three of the 31 States with capital punishment that permits a less than unanimous jury verdict to result in a death sentence, the 10-2 provision violates the Eighth Amendment's evolving standards of decency.

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[9]The capital sentencing statutes in Delaware and Alabama are currently under substantial constitutional attack. The Delaware Supreme Court has stayed all pending death prosecutions while it considers the constitutionality of the state's death penalty statute under *Hurst v. Florida*. Tom McParland, "All Del. Capital Cases Stayed Pending High Court Ruling," Delaware Law Weekly (Feb. 1, 2016), available at http://www.delawarelawweekly.com/id=1202748516955/All-Del-Capital-Cases-Stayed-Pending-High-Court-Ruling?slreturn=20160207124245.

In 1995, Alabama's capital sentencing scheme was upheld against an Eighth Amendment challenge in *Harris v. Alabama*, 513 U.S. 504 (1995), largely on the basis of *Spaziano v. Florida*, 468 U.S. 447 (1984), a decision that was expressly overruled in *Hurst*, 136 S. Ct. at 624. On May 2, 2016, the Supreme Court granted certiorari in a case challenging the constitutionality of Alabama's death penalty, vacated the petitioner's death sentence, and remanded to the Alabama Court of Criminal Appeals for further consideration in light of *Hurst*. *Johnson v. Alabama*, 2016 WL 1723290, 136 S. Ct. __ (May 2, 2016). Even before the Supreme Court's action in *Johnson*, a trial court judge had ruled on the basis of *Hurst* that Alabama's death penalty was unconstitutional in a pending murder case. Kent Faulk, "JeffCo judge: Alabama death penalty sentence scheme unconstitutional," Al.com (March 3, 2016), available at http://www.al.com/news/birmingham/index.ssf/2016/03/jeffco_judge_rules_alabama_dea.html. *See also Woodward v. Alabama*, 134 S.Ct. 405 (2013)(Sotomayor, J., dissenting from denial of certiorari); *Brooks v. Alabama*, 136 S.Ct. 708 (2016)(Sotomayor, J. and Ginsburg, J. concurring in denial of certiorari) and (Breyer, J., dissenting from denial of certiorari).

A jury's less than unanimous vote in favor of a death sentence renders any resulting death sentence unconstitutional under the Eighth Amendment. Accordingly, should this Court determine that a life sentence, the only constitutional sentence under the statute in effect at the time of his offense, is not the proper remedy and that the new statute can be applied and the 10-2 unconstitutional provision severed, this Court should then mandate that any jury death verdict requires the vote of a unanimous jury. See State ex rel. Boyd v. Green, 355 So. 2d 789, 794 (Fla. 1978) (unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions).

**c. The Sixth Amendment requires that jury verdicts in capital cases be unanimous.**

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, also requires a unanimous sentencing verdict. The Sixth Amendment requires a unanimous jury verdict in all federal prosecutions. McDonald v. City of Chicago, Ill., 561 U.S. 742, 766 n.14. (2010)("the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials").

Petitioner acknowledges that current precedent has not yet fully incorporated that Sixth Amendment into the Fourteenth Amendment and made it applicable to the States. This is a result of the splintered rulings in Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972). Oregon law permitted

convictions by a 10-2 jury vote, and Louisiana required a vote of 9-3 in favor of guilt. *Id.*[10] But recently in McDonald v. City of Chicago, the Court called a less than full incorporation of the Sixth Amendment's right to a jury into question. The majority opinion[11] stated: "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765. It recognized that the Court had "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," noting that "it would be incongruous to apply different standards depending on whether the claim was

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[10]In *Apodaca*, eight Justices agreed that the right to a jury trial "applied identically" in federal and state cases. *McDonald*, 561 U.S. at 766 n.14 (citing *Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting in *Apodaca*)). But because those eight Justices were evenly divided on whether the Sixth Amendment required unanimity, Justice Powell's separate concurrence broke the tie, and he concluded that the Sixth Amendment requires unanimity in federal cases, but that the states' supermajority rule satisfied the Fourteenth Amendment. *Id.*; *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment in *Apodaca*); *id.* at 381-382 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 406 (plurality); *id.* at 414-415 (Stewart, J., dissenting). Even if *Apodaca* did not rest on a splintered ruling and since-discredited principles, the approval of non-unanimous verdicts in *Apodaca* addressed only **non-capital cases**. *Apodaca*'s narrow holding cannot be extended to approve the constitutionality of a less-than-unanimous verdict in a capital case.

[11]While some aspects of the Court's opinion in *McDonald* was not joined by a majority of the Court, this aspect of the opinion written by Justice Alito (delineated as "II D") was joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas.

asserted in a federal or state court." *Id.* at 765 (internal quotation marks and citation omitted). In his concurrence, Justice Thomas agreed that the Fourteenth Amendment makes applicable against the States all the "individual rights enumerated in the Constitution." *Id.* at 823 (Thomas, J., concurring).

Thus, the continued validity of Apodaca and Johnson is at best in doubt. The Sixth Amendment's right to a unanimous jury verdict should be fully incorporated into the Fourteenth Amendment and applied in state cases and require unanimous verdicts in state criminal proceedings. Accordingly, the 10-2 provision also violates the Sixth Amendment.

## CONCLUSION

Based upon the foregoing, the Court should declare that, due to the unconstitutionality of the prior death-penalty statute, the potential maximum sentence for Mr. Perry is lifetime imprisonment by severing the unconstitutional death sentence. If the Court determines that sentencing under the revised statute is possible, the Court should review the constitutionality of that statute and (1) hold it unconstitutional and life imprisonment the maximum sentence or (2) construe the statute to require unanimity on the jury's requisite factual findings and a jury death-penalty verdict in conformity with Florida law and the Florida and federal Constitutions.

## CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner certifies that this Initial Brief on the Merits is typed in 14 point Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.


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## CERTIFICATE OF SERVICE.

**I HEREBY CERTIFY** that I have electronically filed the foregoing with the Clerk of the Florida Supreme Court using the Court's E-File Portal which will send a notice of electronic filing to the Office of the Office of the Attorney General and the Office of the State Attorney, Ninth Judicial Circuit, and all counsel of record receiving service of documents via the E-File Portal this 11th day of May, 2016.


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