IN THE SUPREME COURT OF FLORIDA

NO._____

EDWARD J. ZAKRZEWSKI,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

On January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and while addressing Florida's capital sentencing statutes, wrote: "We hold this sentencing scheme unconstitutional." The decision in *Hurst* establishes that Mr. Zakrzewski was sentenced to death under an unconstitutional sentencing scheme. His death sentences stand in violation of *Hurst* and the Sixth Amendment principles set forth therein. In Claim I of this petition, Mr. Zakrzewski presents his constitutional challenges to his death sentences on the basis of *Hurst*, a challenge that could not be presented prior to January 12, 2016, the day on which *Hurst* issued.[1]

On March 7, 2016, Governor Rick Scott signed HB 7101 into law as Chapter 2016-13. Claim II arises from the enactment of Chapter 2016-13, which amended § 921.141, Fla. Stat. The Staff Analysis noted that one of the changes made to the statute was in the number of jurors who must vote in favor of a death sentence before a death recommendation can be returned:

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

[1]The State has maintained in other cases that a Rule 3.851 motion cannot be filed on the basis of *Hurst* until this Court has ruled that *Hurst* is retroactive under *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). Given the State's argument, Mr. Zakrzewski has decided to file his claim in this original petition for the reasons stated herein.

recommendation to the court.

§ 921.141(2)(c), Fla. Stat. (2016). Under this change, a jury's life recommendation is binding and occurs when three or more jurors formally vote in favor a life sentence:

> [(3)](a)If the jury has recommended a sentence of:
>
> 1. life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

§ 921.141(3)(a)1.

At the conclusion of Mr. Zakrzewski's penalty phase, on two counts the jury's recommendation was by a 7-5 vote, and on the third count the jury's recommendation was by a 6-6 vote. Under the new § 921.141, the jury's verdict requires the imposition of life sentences on all three counts. The March 7th enactment of Chapter 2016-13 gives rise to Claim II of this Petition - a claim that could not have been presented to this Court, or any court, before March 7, 2016.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

On November 19, 1994, Edward Zakrzewski was indicted in Okaloosa County, for the first degree murder of his Korean wife and two children (R. 15-16). Mr. Zakrzewski pled guilty to the charges, and the court accepted the plea (T. 451). A penalty phase before a jury was conducted. The State relied upon three

aggravators (T. 1259-61). As this Court later noted:

> Zakrzewski presented two statutory mitigators: (1) no significant prior criminal history and (2) the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. Zakrzewski also presented twenty-four nonstatutory mitigators.

Zakrzewski v. State, 717 So. 2d 488, 491 (Fla. 1998).

The jury was instructed at the close of the penalty phase:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that I will now give you and to render to the Court an **advisory sentence** as to each of the three counts 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**.

(T. 1259) (emphasis added).[2] *See also* T. 1261.

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[2]Earlier at the beginning of the jury selection, the venire had been similarly instructed:

> The final decision as to what punishment shall be imposed rests solely with me, the Judge of this Court; however, the law requires that in a case of this nature the Court empanel a jury of twelve person to render to the Court **an advisory opinion** as to which punishment should be imposed upon the defendant. **The Court is not required to follow the jury's recommendation**, but the Court is required and will give the recommendation of the jury very great weight and consideration. The law requires that in cases of first degree murder **the death penalty is reserved for those special cases with sufficient aggravating circumstances to justify the imposition of a penalty of death and without sufficient mitigating circumstances to outweigh any aggravating circumstances found to exist**.

(T. 14) (emphasis added).

The jury, by a vote of 7-5, recommended a death sentence Mr. Zakrzewski's wife and 7-year old son (R. 263-64). By a vote of 6-6, the jury recommended a life sentence as to his 5-year old daughter (R. 263-64). The judge overrode the life recommendation and imposed death sentences on all three counts (R. 298-304).

On direct appeal, Mr. Zakrzewski raised the following: (1) the trial court erred by finding HAC; (2) the trial court erred by finding CCP; (3) the death sentence was not proportionately warranted; (4) the trial court erred in overriding the jury's life recommendation as to Mr. Zakrzewski's 5-year old daughter; (5) the trial court admitted prejudicial photographs of the victims; (6) the trial court permitted the State's mental health expert to testify about Nietzsche and his views on Christianity; (7) the trial court permitted the State's mental health expert to testify when the testimony did not rebut Mr. Zakrzewski's mental health expert; (8) the trial court did not instruct the jury as to the substantially impairment mitigator; and (9) the trial court failed to instruct the jury on each of Mr. Zakrzewski's nonstatutory mitigating factors. This Court affirmed the death sentences with three justices dissenting.[3] *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998), rehearing denied September 9, 1998. A petition for writ of certiorari was denied on January 25, 1999.

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[3]This Court did find error in the HAC finding as to Mr. Zakrzewski's wife, although a majority of this Court found the error to be harmless.

Zakrzewski v. Florida, 525 U.S. 1126 (1999).

Mr. Zakrzewski filed a Rule 3.851 motion (PCR. 3-6). It was later amended (PCR. 192-251). In his amended Rule 3.851 motion, Mr. Zakrzewski challenged his death sentences on the basis of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court denied relief (PCR. 576-84). On appeal, Mr. Zakrzewski argued that his death sentences stood in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court denied the *Apprendi/Ring* claim, citing its earlier decision in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). This Court wrote: "the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty." *Zakrzewski v. State*, 866 So. 2d 688, 697 (Fla. 2003). Mr. Zakrzewski's *Apprendi/Ring* claim was denied by this Court on the merits.[4]

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[4]In its opinion, this Court identified the 24 nonstatutory mitigator circumstances that the trial judge had found had been presented in addition to two statutory mitigators:

> The nonstatutory mitigators considered, found, and weighed by the trial court were: (1) the defendant is an exceptionally hard worker (significant weight); (2) the defendant was on the Dean's List in his third year of college (significant weight); (3) the defendant served in an exemplary manner in the United States Air Force (significant weight); (4); the defendant showed severe grief and remorse (substantial weight); (5) the defendant was a loving husband and father until the offense (substantial weight); (6) the defendant turned himself in (little weight); (7) the defendant pled guilty (little weight); (8) the defendant was under great stress due to work, college, child care,

Mr. Zakrzewski filed a petition for a writ of habeas corpus in federal court. When the petition was denied, Mr. Zakrzewski appealed. The Eleventh Circuit affirmed the denial of habeas relief. *Zakrzewski v. McDonough*, 455 F.3d 1254 (11th Cir. 2006).

Mr. Zakrzewski filed a Rule 60(b) motion in federal court seeking to reopen proceedings on his habeas petition. The motion was denied, and Mr. Zakrzewski appealed. The Eleventh Circuit

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> housework, and lack of sleep (little weight); (9) the defendant is a patient and humble man (little weight); (10) the defendant was raised without his natural father in his home (little weight); (11) the defendant had a lack of prior domestic relationships (little weight); (12) the defendant received little religious upbringing (little weight); (13) the defendant has embraced the Christian faith since the offense (little weight); (14) the defendant exhibited good behavior while hiding for an extended period of time under an assumed name (slight weight); (15) the defendant was a hyperactive child and was medicated on Ritalin (no weight); (16) the defendant has a long term adjustment disorder (no weight); (17) the defendant was suffering from a major depressive episode (no weight); (18) the defendant has potential for rehabilitation (no weight); (19) the defendant's role in his marriage was passive in a union dominated by his wife (no weight); (20) the defendant was a loving and good son (no weight); (21) the defendant is intelligent (no weight); (22) the defendant is well thought of by friends, neighbors, and coworkers (no weight); (23) the defendant was impaired by alcohol at the time of the offense (no weight); and (24) the defendant is not a psychopath (no weight).

Zakrzewski v. State, 866 So. 2d at 691 n.2. Five jurors voted to recommend a life sentence for each homicide. A sixth juror joined those five as to one of the three homicides. It is unknown whether those jurors found insufficient aggravating circumstances existed to justify a death sentence or if they found that the aggravating circumstances did not outweigh the multitude of mitigating circumstances presented by the defense.

reversed and remanded for reconsideration. *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007). On remand, the federal district court again denied the motion. Mr. Zakrzewski appealed. The Eleventh Circuit then affirmed the denial of the Rule 60(b) motion. *Zakrzewski v. McNeil*, 573 F.3d 1210 (11th Cir. 2009).

In May of 2007, Mr. Zakrzewski filed a second Rule 3.851 motion challenging Florida's lethal injection protocol in light of the Angel Diaz execution. After the circuit court denied relief, Mr. Zakrzewski unsuccessfully appealed to this Court. *Zakrzewski v. State*, 13 So. 3d 1057 (Fla. 2009).

On November 29, 2010, Mr. Zakrzewski filed a third Rule 3.851 motion premised upon the decision in *Porter v. McCollum*, 558 U.S. 30 (2009). After the circuit court entered an order denying the Rule 3.851 motion (3PC-R. 257), Mr. Zakrzewski unsuccessfully appealed to this Court (3PC-R. 354). *Zakrzewski v. State*, 115 So. 3d 1004 (Fla. 2012).

On March 19, 2013, Mr. Zakrzewski filed another Rule 3.851 motion that was premised upon new evidence. After the motion was denied, Mr. Zakrzewski unsuccessfully appealed to this Court. *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014) (Table).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. The petition presents issues

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

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Zakrzewski's right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that his rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994)(holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 397 So. 2d 910 (Fla. 1981)(holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So. 2d 1109 (1986)("[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of

either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978). This Court must protect Mr. Zakrzewski's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights - whether state or federal - of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. This Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

Also at issue is the legality of Mr. Zakrzewski's death sentences under newly enacted Chapter 2016-13, which reflects a consensus that a death sentence cannot be imposed if 3 or more jurors formally vote to recommend a life sentence. This shows that Mr. Zakrzewski's death sentences now violate the evolving standards of decency of the Eighth Amendment. This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital post-conviction proceedings. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995). The reasons set forth herein

show that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

THE CAPITAL SENTENCING STATUTE UNDER WHICH ZAKRZEWSKI WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL - HIS DEATH SENTENCES STAND IN VIOLATION OF THE SIXTH AMENDMENT.[5]

A. *HURST V. FLORIDA*

On January 12, 2016, the United States Supreme Court rendered its 8-1 decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and found that Florida's capital sentencing statute is unconstitutional. The Court ruled, "[t]he 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." *Id.* The *Hurst* opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

> The State fails to appreciate the central and singular role the judge plays under Florida law. 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) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating**

[5]Mr. Zakrzewski presents his *Hurst* claim in this habeas petition because the State has argued in other cases that until this Court determines that *Hurst* is retroactive under *Witt v. State*, the claim cannot be presented in a Rule 3.851 motion.

> **circumstances to outweigh the aggravating circumstances.**" § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622 (emphasis added) (citations omitted).

Under Florida's statute, a death sentence is not authorized unless two statutorily defined facts are found. A verdict finding the defendant guilty of first degree murder by itself does not authorize a death sentence. The two statutorily defined facts required to authorize the imposition of a death sentence on an individual convicted of first degree murder are 1) the existence of "sufficient aggravating circumstances"[6] and 2) the absence of

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[6]It is worth noting that the statutory requirement that "sufficient aggravating circumstances" be found to exist was adopted to insure compliance with *Furman v. Georgia*, 408 U.S. 238 (1972), and the narrowing principle adopted therein. *Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975). The Supreme Court has explained the *Furman* narrowing requirement:

> 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." *Atkins*, *supra*, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428–429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 568 (2005).

When Florida's capital sentencing scheme was adopted after *Furman*, there were 8 aggravating circumstances in the statute. See *State v. Dixon*, 283 So. 2d 1, 5-6 (Fla. 1973). In the years since, the list of aggravators has doubled to 16. But even with

"sufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3), Fla. Stat. (1992); *Hurst*, 136 S.Ct. at 622. These two statutorily defined facts constitute elements of capital first degree murder, i.e. first degree murder plus the statutorily defined elements that authorize the imposition of a greater punishment than that authorized solely on the basis of a first degree murder conviction.

Because the statute did not require a jury to return a verdict finding that these two statutorily defined facts had been proven by the State beyond a reasonable doubt, Florida's capital sentencing statute violated the Sixth Amendment. *Hurst v. Florida*, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of

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the 8 that existed at the time, this Court in *Dixon* stated:

> [Jurors] must 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.

Id. at 8 (emphasis added). This requirement was specifically noted in *Proffitt v. Florida*, 428 U.S. 242, 248 (1976), when the United States Supreme Court found the statute complied with *Furman* on its face:

> At the conclusion of the hearing the jury is directed to consider "(w)hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . (b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." ss 921.141(2)(b) and (c)(Supp.1976-1977).

death. A jury's mere recommendation is not enough.").

B. RETROACTIVITY OF *HURST V. FLORIDA*

In his first collateral appeal, Mr. Zakrzewski challenged his death sentences on the basis of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, (2000). *Zakrzewski v. State*, 866 So. 2d at 697. This Court addressed Mr. Zakrzewski's claim on the merits relying on *Duest v. State*, 855 So. 3d 33, 49 (Fla. 2003), and *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). In those cases, this Court had "decline[d]" to find *Ring v. Arizona* applicable to Florida's capital sentencing scheme. *Bottoson*, 833 So. 2d at 695.

In *Hurst*, the Supreme Court concluded that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 136 S.Ct at 621-22. The Supreme Court specifically addressed this Court's ruling in *Bottoson*:

> As the Florida Supreme Court observed, this Court "repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Bottoson v. Moore, 833 So.2d 693, 695 (2002) (per curiam) (citing Hildwin, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728; Spaziano, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340). "In a comparable situation," the Florida court reasoned, "the United States Supreme Court held:
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> > 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " Bottoson, 833 So.2d, at 695 (quoting Rodriguez de

> Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); see also 147 So.3d, at 446–447 (case below).
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> We now expressly overrule Spaziano and Hildwin in relevant part.
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> Spaziano and Hildwin summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin, 490 U.S., at 640–641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with Apprendi. Indeed, today is not the first time we have recognized as much. In Ring, we held that another pre-Apprendi decision—Walton, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511—could not "survive the reasoning of Apprendi." 536 U.S., at 603, 122 S.Ct. 2428. Walton, for its part, was a mere application of Hildwin's holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.

Hurst, 136 S.Ct. at 623.

At issue in *Hurst v. Florida* was this Court's decision in *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). There, this Court was presented with Hurst's Sixth Amendment challenge to his death sentence on the basis of *Ring*. And this Court, just like in Zakrzewski's first collateral appeal, rejected his argument on the basis of *Bottoson v. Moore*:

> Hurst recognizes that our precedent has repeatedly held that Ring does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that Ring applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

Hurst, 147 So. 3d at 445-46.

Hurst was convicted of a 1998 murder. He was tried and sentenced to death in 2000. His death sentence was affirmed by this Court in 2002. *Hurst v. Florida*, 819 So. 2d 689 (Fla. 2002).[7] Subsequently, this Court granted Hurst collateral relief on an ineffective assistance of counsel claim. *Hurst v. State*, 18 So. 3d 975 (Fla. 2009). Only because this Court ordered a new penalty phase, was Hurst able to present his Sixth Amendment challenge to Florida's capital sentencing scheme a second time in his second direct appeal. When the United States Supreme Court granted certiorari review, Hurst's Sixth Amendment challenge, which was the same challenge that Mr. Zakrzewski presented in his collateral appeal in 2003, was found meritorious.

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[7]In his 2002 direct appeal, Hurst argued that his death sentence stood in violation of the Sixth Amendment principles enunciated in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). This Court rejected the claim saying:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the Apprendi case applies to Florida's capital sentencing scheme. See Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); Mann v. Moore, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the Mills decision and find that Apprendi does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the Mills decision, and thus we reject Hurst's final claim.

Hurst v. State, 819 So. 2d at 703.

To deny Mr. Zakrzewski the benefit of the ruling in *Hurst v. Florida*, while Hurst gets the benefit, would mean that all that separates Hurst prevailing on the Sixth Amendment claim from Mr. Zakrzewski not prevailing is the ineffectiveness of Hurst's trial attorney at his 2000 trial. Such a distinction would be wholly arbitrary in violation of *Furman v. Georgia*, and unfair within the meaning of *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)(emphasis added) (quotations omitted):

> Considerations of fairness and uniformity make it very "**difficult to justify depriving a person of** his liberty or **his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.**"

In *Witt v. State*, this Court concluded:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications.** Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief **is necessary** to **avoid individual instances of obvious injustice.**

Witt, 387 So. 2d at 925 (emphasis added). Thus, the *Witt* standard for retroactive application is a yardstick for determining when "[c]onsiderations of fairness and uniformity" trump "[t]he doctrine of finality." *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that

potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.").

Under *Witt*, Mr. Zakrzewski cannot be treated differently than Hurst. Uniformity and fairness demand that they both receive the benefit of the Supreme Court's ruling in *Hurst v. Florida*.

C. *HURST* ERROR AT ZAKRZEWSKI'S TRIAL

Mr. Zakrzewski's jury was repeatedly told and instructed that its penalty phase verdict was advisory. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Though it was told that it was to consider whether sufficient aggravating circumstances existed to justify the imposition of a death sentence and whether the mitigating circumstances outweighed the aggravation, the jury did not return a verdict setting forth its findings. The jury was instructed that its recommendation was to be by a majority vote, and it returned two death recommendations by a vote of 7-5, and one life recommendation by a vote of 6-6. Because the jury did not return a unanimous verdict finding the presence of the facts necessary under Florida law to authorize the imposition of death sentences, Mr. Zakrzewski's death sentences stand in violation of the Sixth Amendment under *Hurst v. Florida*.

Hurst held that "[t]he 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." *Hurst*, 136 S.Ct. at 619. Here, the jury found none of the facts "necessary

to impose a sentence of death." The judge found 3 aggravating circumstances as to each homicide, one of which this Court struck on direct appeal as to one of the homicides. *Zakrzewski v. State*, 717 So. 2d at 492-93. Mr. Zakrzewski's death sentence violates the Sixth Amendment. *Hurst v. Florida*.

D. AVAILABILITY OF HARMLESS ERROR ANALYSIS

As noted previously, *Hurst v. Florida* held that "[t]he 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." *Id* at 619.[8] *Hurst* identified the statutorily defined facts that Florida law requires to be found before a death sentence may be authorized: "'**[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances**.'" *Id*. at 622 (emphasis added). Under Florida's governing statute and under *Hurst*, it is not a question of whether an aggravating circumstance is present; there must be a finding of fact by a jury that sufficient aggravators exist to justify a death sentence, and a finding of fact that mitigators are insufficient to outweigh the aggravators.

Mr. Zakrzewski recognizes that the issue of the availability

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[8] *Hurst*'s holding is broader than this Court's previously expressed understanding of the holding in *Ring* because Florida's statute requires findings of fact before a death sentence can be imposed that Arizona law did not require.

of harmless error was mentioned in *Hurst* although the United States Supreme Court did not resolve its applicability:

> **Finally, we do not reach the State's assertion that any error was harmless. See Neder v. United States, 527 U.S. 1, 18–19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless**). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring, 536 U.S., at 609, n.7, 122 S. Ct. 2428.

Hurst v. Florida, 136 S.Ct. at 624 (emphasis added). Obviously, the Supreme Court in *Hurst* left the State's assertion that any error was harmless for this Court to address in the first instance. In so doing though, the Supreme Court referred this Court to *Neder v. United States*, 527 U.S. 1 (1999), noting parenthetically that the failure to instruct on an **uncontested element** in that case had been found harmless.[9]

The citation to *Neder* was not a ruling that *Hurst* error can be found harmless. In *Neder*, an extended discussion appears as to when constitutional error can be found harmless. *Neder* discussed when it may be inappropriate to consider constitutional error subject to harmless error analysis. It is Mr. Zakrzewski's position that the *Hurst* error in his case is structural error

[9]Here, Mr. Zakrzewski contested the presence of the statutorily defined facts. This takes Mr. Zakrzewski's case outside the scope of *Neder*.

that can never be found harmless under *Neder*.[10]

But assuming arguendo that *Hurst* error is subject to harmless error analysis, the *Hurst* error present on the face of the trial record shows that the State cannot prove that the error was harmless beyond a reasonable doubt, certainly not in Mr. Zakrzewski's case where five jurors voted in favor of a life sentence on all three counts, and a sixth juror joined those five

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[10]Unlike the circumstances in *Neder*, the element at issue under *Hurst* is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in *Neder* where the presence of the element was not contested, Mr. Zakrzewski did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover, a reversal in Mr. Zakrzewski's case on the basis of *Hurst* would not by itself require a retrial of his guilt of first degree murder. It would either require the imposition of life sentences or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Mr. Zakrzewski would contest the existence of those facts. This distinguishes *Neder* and demonstrates that the error should be found structural and not subject to harmless error.

Of course at his penalty phase, Mr. Zakrzewski did not have notice that the statutorily defined facts were elements that under the Sixth Amendment a jury was required to find proven beyond a reasonable doubt. Due process demands reasonable notice which was not given here. This Court cannot rely on counsel's actions or inactions to find errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions as to the importance of its role as to the sentence that would be imposed would have to comply with *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The full ramifications of *Hurst* on Florida capital trials at the moment can only be guessed.

in recommending life on one of the counts.[11] Since Florida law requires unanimity as to elements, it is not possible to find that Mr. Zakrzewski's jury if properly instructed (that its determination of the statutorily defined facts would be binding on the judge) would have unanimously found the statutorily defined facts necessary to authorize a death sentence.[12]

E. CONCLUSION

Under *Hurst*, Mr. Zakrzewski's death sentences cannot stand. A jury did not unanimously find the existence of the statutorily defined facts necessary to authorize a death sentence. At a minimum, this Court should hold *Hurst* retroactive and authorize Mr. Zakrzewski to present his *Hurst* claim in a Rule 3.851 motion.

CLAIM II

UNDER § 921.141, FLA. STAT. (2016), MR. ZAKRZEWSKI'S DEATH SENTENCES MUST BE CONVERTED TO LIFE SENTENCES; TO RULE OTHERWISE WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

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[11]This is without regard to the relevant non-record evidence regarding how the pre-*Hurst* law impacted and changed strategic decisions made in the course of the trial which should also be considered before constitutional error is determined to be harmless. *Meeks v. Dugger,* 576 So. 2d 713 (Fla. 1991).

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

A. INTRODUCTION

At the conclusion of the penalty phase of Mr. Zakrzewski's 1996 penalty phase, five jurors formally voted in favor of recommending the imposition life sentences on all three counts, and a sixth juror formally voted in favor of life on one of the three counts. The new § 921.141 now provides that when three or more jurors vote against recommending a death sentence and in favor of recommending life sentences, the jury's verdict constitutes a life recommendation. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101, p. 1. ("If fewer than 10 jurors concur [with a death recommendation], a sentence of life imprisonment without the possibility of parole will be the jury's recommendation to the court."). The new statute further provides that when a life recommendation is returned by a jury, the sentencing judge "must" impose a life sentence. *See* Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101, p. 1 ("If the jury recommends life imprisonment without the possibility of parole, the judge **must** impose the recommended sentence.") (emphasis added).

Under the new statute, Mr. Zakrzewski's death sentences must be vacated in favor of life sentences. Certainly, principles of statutory construction support this. This result is also required by the Eighth and Fourteenth Amendments. The new § 921.141 not only conclusively shows that death sentences premised upon a

jury's simple majority vote recommending a death sentence violate the Eighth Amendment's evolving standards of decency and constitutes cruel and unusual punishment, but it also shows that granting other similarly situated individuals the benefit of the new statute while depriving Mr. Zakrzewski of its benefit would leave his death sentences dependent upon the arbitrary application of the new statute in violation of the Eighth Amendment, as well as Due Process and Equal Protection Clauses of the Fourteenth Amendment.

B. UNDER THE NEW § 921.141, A JURY'S VERDICT SHOWING A 7-5 VOTE IN FAVOR OF A DEATH RECOMMENDATION, AS WELL AS A 6-6 VOTE IN FAVOR OF A LIFE RECOMMENDATION, IS NOW A BINDING LIFE RECOMMENDATION THAT PRECLUDES A JUDGE FROM IMPOSING A DEATH SENTENCE.

The new § 921.141 enacted HB 7101 as Chapter 2016-13. 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 that was identified in *Hurst. See* Staff Analysis of the Criminal Justice Subcommittee at 8 ("The bill amends ss. 921.141 and 921.142, F.S., to comply with the United States Supreme Court's holding that a jury, not a judge, must find each fact necessary to impose a sentence of death.").

In addition, the Staff Analysis also addressed the fact that the Petitioner in *Hurst* had argued that a simple majority vote by the jury was not enough to satisfy the demands of the United

States Constitution. *See* Staff Analysis of the Criminal Justice subcommittee at 7 ("The Court's opinion did not address Hurst's contention that a jury's advisory verdict must be greater than a simple majority in order to comport with the Sixth and Eighth Amendments."). Though the Staff Analysis acknowledged that the United States Supreme Court did not specifically address Hurst's argument on that point, it did acknowledge that HB 7101 required at least ten jurors to vote to recommend a death sentence before the sentencing judge was authorized to impose a death sentence.[13] *See* Staff Analysis of the Criminal Justice subcommittee 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

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[13]Before the jury votes on what sentence to recommend, the new § 921.141 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.

Section 921.141(2)(b). Of course, these questions that the jury is required to consider are questions of fact. Unless "sufficient aggravating factors exist" and "unless aggravating factors exist which outweigh the mitigating circumstances," the jury cannot recommend a death sentence. And unless the jury returns a death recommendation, the judge is not authorized to impose a death sentence.

court. **If the jury recommends life imprisonment without the possibility of parole, the judge must impose the recommended sentence.**") (emphasis added).

The expressed intent to make the capital sentencing scheme compliant with *Hurst v. Florida* suggests that Chapter 2016-13 was intended to make the statute *Hurst* compliant. The discussion of Hurst's argument in *Hurst*, contending that a mere majority vote in favor of a death sentence was an insufficient basis for the imposition of a death sentence under the Sixth and Eighth Amendments, also suggests the requirement that 10 jurors must concur with a death recommendation was a change designed to remove an argued constitutional defect in Florida's capital sentencing scheme. The changes provided by Chapter 2016-13 were intended as procedural fixes.[14]

C. THE NEW § 921.141 APPLIES RETROSPECTIVELY TO MR. ZAKRZEWSKI.

The legislative determination in the new § 921.141 that judges are not authorized to impose a death sentence after three or more jurors have formally voted to recommend a life sentence is a statutory change regarding the procedure for the adjudication of whether sufficient aggravators exist that outweigh the mitigators, and the change works in Mr. Zakrzewski's

[14]Even the provision that Chapter 2016-13 becomes law upon its enactment shows that it was adopted as a procedural fix to apply immediately to ongoing proceedings. There is no indication that any substantive changes in criminal law were intended.

favor. The change seeks to make the statute *Hurst* compliant and to pro-actively defeat any arguments that the statute did not comport with the Eighth Amendment, arguments that *Hurst* had made.

This Court has long recognized that while penal laws are to be strictly construed, the preferred construction of ambiguity in a statute is "that which operates in favor of life or liberty." *Ex parte Bailey*, 23 So. 552, 555 (Fla. 1897). Under *Bailey*, "penal statutes are to be **strictly construed in favor of the person against whom the penalty is sought to be imposed**." *State v. Llopis*, 257 So. 2d 17, 18 (Fla. 1971) (emphasis added). Thus, the Court has explained, "Consistent with the intent of the legislature, laws which are penal in nature should be strictly construed while laws that are remedial in nature should be construed liberally." *Dotty v. State*, 197 So. 2d 315, 318 (Fla. 4th DCA 1967).[15] While a penal statute "imposes punishment for an offense committed against the state," "**a statute relating to procedure is remedial** in nature in that it gives a remedy and **tends to abridge some defect** or superfluities of the common law." *Id.* (emphasis added).

Based on these considerations, in *Sims v. State*, 754 So. 2d 657, 663-65 (Fla. 2000), this Court rejected a claim that a

[15]The Court has cited *Dotty* approvingly in *Rudd v. State ex rel. Christian*, 310 So. 2d 295 (Fla. 1975), and *Reino v. State*, 352 So. 2d 853 (Fla. 1977).

change in the method of execution violated Art. 10, § 9, of the Florida Constitution because "changes in criminal statutes which do not alter the definition of the crime of which the defendant was convicted or make the punishment more burdensome are not ex post facto." 754 So. 2d at 664 (citing *Collins v. Youngblood*, 497 U.S. 37, 52 (1990)). The Court pointed out that in *Malloy v. South Carolina*, 237 U.S. 180 (1915), the Supreme Court "held that procedural changes in the method of execution did not constitute an ex post facto law even if applied to offenses committed prior to such law's enactment" because the law "did not change the penalty—death—for murder, but only the mode of producing this. . . . The punishment was not increased and some of the odious features incident to the old method were abated." *Sims*, 754 So. 2d at 664 (quoting *Malloy*, 237 U.S. at 185). The Court thus held that retroactive application of the new method of execution did not violate the Ex Post Facto clause where the law did not affect the penalty for first degree murder but "merely changes the manner of imposing the sentence of death to a method that **is arguably more humane**." *Sims*, 754 So. 2d at 665.

The Court addressed the retrospective application of a new sentencing statute most recently in *Horsley v. State*, 160 So. 3d 393 (Fla. 2015), where the Court held that a new juvenile sentencing statute, enacted in light of the decisions in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct.

2455 (2012), applied to all juvenile offenders with unconstitutional sentences. *Horsley*, 160 So. 3d at 405-06. The Court recognized that the Legislature enacted the statute in direct response to *Graham* and *Miller* and that the statute "appears to be consistent with the principles articulated in those cases." *Id.* at 406. The Court held that the "Savings Clause" found in article X, section 9, of the Florida Constitution was no impediment to retrospective application of the new statute because "**the requirements of the federal constitution must trump those of our state constitution.**" *Horsley*, 160 So. 3d at 406 (emphasis added). Thus, the Court ruled, "fashioning a remedy that complies with the Eighth Amendment must take precedence over a state constitutional provision that would prevent this Court from effectuating that remedy." *Id.*[16]

[16]In a supplemental brief in *Jackson v. State*, Case No. SC13-1232, the State argues that the new § 921.141 should be applied retrospectively. In *Jackson*, the Court directed the parties to file supplemental briefs addressing "the procedures to be followed in the event that this Court remands this matter for resentencing pursuant to *Hurst v. Florida*," including "whether the procedures detailed in § 921.141, Florida Statutes, (2007), as supplemented by jury instructions compliant with *Hurst*, or the procedures detailed in HB 7101 as signed by Governor Scott on March 7, 2016, govern." *Jackson v. State*, SC13-1232 (Fla. Mar. 15, 2016). The State's Supplemental Initial Brief argued that the new statute was intended to apply to cases in which a homicide was committed before March 7, 2016. *Jackson v. State*, SC13-1232, State's Supplemental Initial Brief at 10. The State contended the Legislature's intent was to apply the new statute to pending cases in order to avoid automatic imposition of life sentences and the Legislature had in fact removed language from the

Just as the new juvenile sentencing statute was enacted by the Legislature to remedy *Graham* and *Miller* violations, the new § 921.141 was enacted to remedy the holding in *Hurst* that Florida's capital sentencing scheme was unconstitutional. The procedural modifications made by Chapter 2016-13 were for the purpose of compliance with the reasoning set forth in *Hurst* (discussed *infra*). Chapter 2016-13's purpose is to remedy the Sixth Amendment violation identified in *Hurst*. To that end, the statute provides procedural changes which inure to the benefit of Mr. Zakrzewski and which further establish his entitlement to life sentences under the Eighth Amendment.

D. THE EX POST FACTO CLAUSE DOES NOT PREVENT APPLICATION OF THE NEW § 921.141 TO MR. ZAKRZEWSKI.

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

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legislation stating the legislation "shall apply only to criminal acts that occur on or after the effective date of this act." *Id.* The State also relied on *Horsley*. *Id.*

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, a Texas criminal defendant, had been convicted of aggravated sexual abuse in 1982. The jury sentenced him to life imprisonment, and imposed a fine of $10,000. At the time, a fine in addition to imprisonment was not authorized by the Texas Code of Criminal Procedure. Case law developed in 1983 holding that a jury's verdict imposing both a sentence of imprisonment and a fine was unauthorized and thus void. Because "[t]he authority of a court on appeal to reform the judgment and sentence does not extend to the situation," the verdict had to be set aside and a new trial ordered. *Bogany v. State*, 661 S.W.2d 957, 958 (Tex. Cr. App. 1983). On the basis of *Bogany*, 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 (1985). On the basis of the 1985 legislation, the Texas courts reformed the jury's verdict by deleting the fine and denied Youngblood's request for a new trial. The Supreme Court addressed whether the 1985 legislation which was applied to the 1982 jury verdict constituted an ex post facto law and was unconstitutional.

In *Collins v. Youngblood*, the Supreme Court observed: "it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes

which disadvantage the offender affected by them." 497 U.S. at 41. "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Id.* at 43. As to the Texas statute at issue, the Supreme Court wrote:

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

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

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

When the new § 921.141 is applied to the 7-5 and 6-6 jury verdicts at the conclusion of Mr. Zakrzewski's penalty phase, it

would appear to require the jury's 7-5, 7-5, and 6-6 votes be treated as life recommendations that are binding and preclude the imposition of death sentences. Applying the new § 921.141 in this fashion does not violate the Ex Post Facto Clause for the reasons explained in *Collins v. Youngblood*.[17] *See State v. Perry*, 2016 WL 1061859 (5th DCA 2016). In any event, this new provision as explained in *infra* also renders Mr. Zakrzewski's death sentences cruel and unusual within the meaning of the Eighth Amendment.

E. THE NEW § 921.141 MADE ONLY PROCEDURAL CHANGES AND DID NOT CHANGE THE ELEMENTS OF CAPITAL FIRST DEGREE MURDER.

The new § 921.141 contains 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.

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[17]The State's supplemental brief in *Jackson* argued that retrospective application of the new section 921.141 was required so long as it would not violate the Ex Post Facto Clause. The State argued that the changes made to section 921.141 were procedural not substantive and that those changes therefore did not violate the Ex Post Facto Clause. *Jackson v. State*, State's Supplemental Initial Brief at 5.

> 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 new statute contains the same substantive elements of capital first degree murder as set forth in the old statute. Under the new statute, the jury must unanimously find each aggravating factor and then must find "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." These are the elements which *Hurst* held must be found by a jury. *Hurst*, 136 S. Ct. at 622 (in deciding whether to impose life or death, "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 making these findings of fact, the new statute requires the jury to unanimously identify each aggravating factor that the State has proven beyond a reasonable doubt. This was not in the old statute. However, to consider "[w]hether sufficient aggravating circumstances existed as enumerated in subsection (5)" under the old statute, the jury was implicitly required to evaluate whether the State had proven any of the aggravators. In fact, Florida's standard jury instructions provided for the jury to be instructed on the aggravating circumstances at issue and the State's burden of proof as to those aggravators on which it relied. As a result, it is Mr. Zakrzewski's position that the new statute simply changes procedure, i.e. the jury must unanimously find the aggravating circumstances and identify them in a verdict before proceeding to find "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist."

The new statute also contains a statement that if the jury "[u]nanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death." Some capital defendants presenting *Hurst* arguments in this Court have argued that this is a substantive change in section 921.141.[18]

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[18]For example, in a supplemental brief filed in *Jackson v. State*, No. SC13-1232, the appellant argues:

> HB 7101 did more than make procedural changes in an

As noted, the new § 921.141 contains language that the jury

> 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.

Supplemental Initial Brief of Appellant at 10.

Mr. Jackson's brief also included the erroneous claim that: "Prior to HB 7101, Florida was a weighing state where there was not an initial eligibility determination made by the jury." Appellant Supp. Initial Brief, *Jackson v. State*, Case No. SC13-1232, at 10-11. This claim, which simply is not true, shows a misunderstanding of the weighing-nonweighing dichotomy that the Supreme Court used to distinguish the two types of capital sentencing schemes. The difference between the two types of schemes had to do with whether the jury in the course of the sentencing determination was limited to weighing on the death side only the statutorily defined aggravators used to meet the Eighth Amendment's death eligibility requirements. In non-weighing states, a totality of the circumstances analysis was employed instead of a weighing. *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 did nothing to alter Florida's status as a weighing state.

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

is to return a unanimous verdict finding at least one aggravating factor and identifying all aggravating factors found to proven. And, the new statute does also provide that the jury's determination that one aggravating factor exists renders the defendant "eligible" for a death sentence: "**If the jury . . . Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death . . . .**" § 921.141(2), Fla. Stat. (2016) (emphasis added).[19] But under the old version of the statute, it was the judge who made written findings identifying what aggravators had been established in his sentencing order, along with findings of fact that sufficient aggravators existed and the mitigators did not outweigh the aggravators. *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). The changes made in the new statutory language is the legislature's effort to comply with *Hurst* and to transfer what had been the judge's adjudicatory job to the jury in order to comply with *Hurst.*

For the change to be substantive, as some argue, it must actually change the elements that must be proven in order to

[19]The word "eligibility" is fraught with ambiguity. The word "eligible" has been used both in Sixth Amendment cases and Eighth Amendment cases, but in different ways. For Sixth Amendment purposes, the question of eligibility has to do with what facts must be proven in order for an increase in punishment to be authorized. Under the Sixth Amendment, the legislature's labeling is not determinative of what facts are elements necessary to authorize the increase in punishment. Instead, courts must look to the operative effect of the statutory language. For Eighth Amendment purposes, eligibility is about narrowing the class of individuals who are death eligible as required by case law.

authorize the increase in punishment, i.e. authorize a death sentence. The use of the word "eligibility" in the new statute is not controlling as to what is or is not an element and subject to the Sixth Amendment right to a jury. *Ring v. Arizona* held that legislative labels do not control as to what statutorily defined facts must be found by the jury to authorize a death sentence:

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

Ring, 536 U.S. at 602. In other words, for Sixth Amendment purposes it is not a question of legislative labeling.[20] What matters is how the statutory scheme functions. That is, what are the facts that must be found before a death sentence can actually be imposed? *Apprendi v. New Jersey* explained: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of **effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict**?" *Apprendi*, 530 U.S. at 494 (emphasis added).[21]

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

[21]In his concurrence in *Apprendi*, Justice Scalia wrote: "And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury,' has no intelligible content unless it means that **all the facts which**

Despite the language in the new § 921.141 asserting death eligibility arises from the finding of just one aggravating circumstance, **a death sentence cannot in fact be imposed unless the jury returned a death recommendation after determining as a matter of fact 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). The judge is precluded from imposing a death sentence without having first received a death recommendation from the jury.

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. Since under the new § 921.141, sufficient aggravators must be found as a matter of fact and they must also be found to outweigh the mitigators before a death sentence is authorized, those facts constitute the elements to which the Sixth Amendment's jury trial right attaches under *Hurst* and *Ring*. The new statute has not changed those substantive elements and has made only procedural changes regarding how those facts are adjudicated.

Reading the new statute in this fashion means that the

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must exist in order to subject the defendant to a legally prescribed punishment **must be found by the jury**." *Apprendi*, 530 U.S. at 498 (emphasis added).

elements of capital first degree murder have remained unchanged. As Mr. Zakrzewski already argued in Claim I, the version of §921.141 in effect at the time of his trial and at issue in *Hurst* required factual findings that sufficient aggravators existed and insufficient mitigators existed to outweigh the aggravators. When the new statute is properly read as required by *Ring* and *Hurst*, its enactment only made procedural changes, not substantive ones that operate to Mr. Zakrzewski's detriment. *See Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Carmell v. Texas*, 529 U.S. 513 (2000). This means that if the new statute is read as Mr. Zakrzewski believes is required, it can and should be applied retrospectively, and the 7-5 and 6-6 jury votes in his case must be treated as a binding life recommendations that require his death sentences to be vacated and life sentences imposed instead.

F. THE PROVISION THAT A 7-5 AND/OR 6-6 JURY SENTENCING RECOMMENDATION IS A BINDING LIFE RECOMMENDATION CANNOT BE APPLIED ARBITRARILY IN SOME CAPITAL CASES, BUT NOT IN OTHER CAPITAL CASES UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Unless the new § 921.141 is applied retrospectively to all capital defendants, it is clear that cases indistinguishable from Mr. Zakrzewski's will receive the benefit of the provision that when 3 or more jurors formally vote to recommend a life sentence, the verdict constitutes a binding life recommendation simply because a case is pending on direct appeal or is pending for a retrial or a resentencing. Those receiving the benefit of this provision include capital defendants who received death sentences

long ago, but who have received collateral relief and are awaiting a new trial or a resentencing.

Under *Furman v. Georgia*, 408 U.S. 238 (1972), it is impermissible for Florida to permit capital defendants to be executed on the basis of arbitrary or capricious factors. To treat some 9-3, 8-4, or 7-5 jury recommendations as death recommendations while treating other 9-3, 8-4, or 7-5 jury recommendations as binding life recommendations is arbitrary. It violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

G. SECTION 921.141, FLA. STAT. (2016), ESTABLISHES A CONSENSUS THAT A DEATH SENTENCE CANNOT BE IMPOSED WHEN THREE OR MORE JURORS FORMALLY VOTE TO RECOMMEND THE IMPOSITION OF A LIFE SENTENCE; MR. ZAKRZEWSKI'S DEATH SENTENCES ARE CRUEL AND UNUSUAL WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

The enactment of the new statute has established that Mr. Zakrzewski's death sentences constitute cruel and unusual punishment that violates the Eighth Amendment. Indeed, the new statute demonstrates a consensus under the Eighth Amendment that a defendant cannot be sentenced to death when three or more jurors have formally voted in favor of a life sentence. Under the new statute, at least 10 jurors must recommend that the defendant should be sentenced to death before a death sentence can be imposed. If 3 or more jurors formally vote against the imposition of a death sentence, the defendant cannot be sentenced to death. The new statute thus demonstrates a consensus within the State of

Florida and an absolute national consensus against imposing a death sentence when 3 or more jurors vote against a death sentence. The imposition of death sentences against Mr. Zakrzewski, where 5 jurors voted against recommending death sentences, violates the evolving standards of decency enshrined in the Eighth Amendment. In *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), the United States Supreme Court noted:

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

(Emphasis added). *See Roper v. Simmons*, 543 U.S. 551, 561 (2005). In *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), the Supreme Court explained: "Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 **but by the norms that 'currently prevail.'**" (emphasis added). As the new section 921.141 establishes, the norms that "currently prevail" do not permit the imposition of a death sentence when three or more jurors have formally voted in favor of a life sentence.

Because five jurors in Mr. Zakrzewski's case formally voted for life sentences, his death sentences violate the Eighth Amendment. *See Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) (because "the constitutional protection against double jeopardy

provides that if a defendant has been in effect 'acquitted' of the death sentence," a jury's vote in favor of a life recommendation has double jeopardy protection). To carrying out the death sentences in these circumstances would constitute cruel and unusual punishment and violate the Eighth Amendment.

CONCLUSION

For all the reasons discussed herein, Mr. Zakrzewski respectfully urges this Court to vacate his death sentences and order the imposition of life sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 2nd day of May, 2016.

CERTIFICATE OF FONT

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

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