Filing # 42783967 E-Filed 06/15/2016 02:46:28 PM

IN THE SUPREME COURT OF FLORIDA

NO. ______________________

ERNEST D. SUGGS,
Petitioner,

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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RECEIVED, 06/15/2016 02:48:39 PM, Clerk, Supreme Court

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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 found Florida's capital sentencing scheme unconstitutional. The decision in *Hurst* established that Mr. Suggs was sentenced to death under an unconstitutional sentencing scheme that violates the Sixth Amendment. In this petition, Mr. Suggs presents his constitutional challenges to his death sentence on the basis of *Hurst*, a challenge that could not be presented prior to January 12, 2016, the day on which *Hurst* was issued.

Citations to the record on appeal from Mr. Suggs' original trial are made with the letters "TR," followed by the record volume number, followed by a "p," followed by the volume page number or numbers.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

Petitioner, Ernest Suggs, was indicted by a Walton County grand jury for one count of first-degree murder, robbery and kidnapping. He was convicted at trial. After the jury returned guilty verdicts, the trial court conducted a penalty phase at which the jury recommended a death sentence on the count of first-degree murder by a vote of 7 to 5. The trial court conducted an independent sentencing

and imposed a death sentence on July 15 1992, finding seven aggravating factors[1], one statutory mitigating factor and three nonstatutory mitigating factors[2]. On direct appeal, Mr. Suggs raised the following claims: (1) the trial court erred in permitting a judge to testify on behalf of the State without first conducting a *Richardson* hearing; (2) the trial court by denying Suggs' motion to suppress the evidence found at his house; (3) the trial court erred by denying his motion for a mistrial based on the prosecutor's comment during opening statement that Suggs had been in prison in Alabama; (4) the cumulative effect of the improper arguments and tactics of the prosecutor deprived him of a fair trial; (5) the evidence was insufficient to support his conviction for kidnapping; (6) the trial court erred in denying Suggs' motion to preclude the in-court identification of Suggs by Ray Hamilton; (7) the trial court erred in admitting into evidence the book entitled *Deal the First Deadly Blow*; (8) the trial court erred in allowing the jury to consider evidence of non-statutory aggravating circumstances and in

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[1] The trial court found the following aggravating factors: (1) Mr. Suggs was under sentence of imprisonment; (2) he had been previously convicted of a violent felony; (3) the murder was committed in the course of a kidnapping robbery and sexual battery; (4) the murder was committed to avoid arrest; (5) the murder was especially heinous, atrocious or cruel; and (6) the murder was committed in a cold, calculated and premeditated manner.

[2] The trial court found the following nonstatutory mitigating factors: (1) Mr. Suggs was raised in a drug-ridden, crime-infested neighborhood; (2) his mother was mentally ill; (3) he suffered various childhood traumas, including the loss of one eye in a BB gun accident; (4) he had been gainfully employed and had good work habits; and (5) he assisted police in locating the victim's body.

instructing the jury on aggravating circumstances that were not established beyond a reasonable doubt. This Court affirmed Mr. Suggs' conviction and death sentence. *Suggs v. State*, 644 So. 2d 64 (Fla. 1994). The United States Supreme Court denied certiorari review on April 24, 1995. *Suggs v. Florida*, 115 S. Ct. 1794 (1995).

Mr. Suggs filed a motion in circuit court under Rule 3.851, Fla. R. Crim, P. It was later amended. In his amended Rule 3.851 motion, Mr. Suggs raised the claim that Florida's capital sentencing scheme violated his due process rights and failed to adequately channel the jury's discretion as required by United States Supreme Court precedent. Following the evidentiary hearing on January 23 and 24, 2003, the postconviction court denied all relief on all outstanding claims. Mr. Suggs filed an appeal of the denial of his postconviction motion to this Court on February 16, 2004. As a result of the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002), Mr. Suggs also filed a Petition for Writ of Habeas Corpus on February 16, 2004. On appeal, this Court denied Mr. Suggs' claim regarding Florida's unconstitutional capital sentencing scheme, citing numerous United States Supreme Court decisions upholding Florida's death penalty statute in *Hildwin v. Florida,* 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134

(1983); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). This Court also denied Mr. Suggs' petition for habeas corpus relief. *Suggs v. State,* 923 So. 2d 419 (Fla. 2005). The mandate was issued November 17, 2005.

On June 7, 2006, Mr. Suggs filed a petition for a writ of habeas corpus in the United States Supreme Court for the Northern District of Florida. On October 11, 2007, Mr. Suggs filed an Amended Motion for Writ of Habeas Corpus. This Amended Petition was denied on March 26, 2009, the court finding that Mr. Suggs was not entitled to relief on any of his claims.

On April 16, 2009, Suggs filed a motion to amend his federal habeas petition based on new information he received on March 23, 2009, from another litigant's collateral proceedings. This motion to amend was denied, the court finding that "granting leave to amend would be futile" since his state claims had not yet been exhausted.

On April 26, 2009, Suggs filed a Motion to Authorize Court-Appointed Counsel to Exhaust Claims in the Course of his Federal Habeas Representation. In this pleading, McClain sought permission to exhaust state claims, since Suggs' federal habeas petition had been denied for the failure to do so. This motion was denied by the court on July 3, 2009.

The Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Mr. Suggs' petition for habeas corpus in *Suggs v. McNeil*, 609 F.3d 1218

(11th Cir. 2010), and the petition for writ of certiorari was denied by the United States Supreme Court. *Suggs v. Buss*, 131 S. Ct. 1809 (2011).

It was at this time that McClain became aware that Suggs was without collateral representation in state court.[3] On August 27, 2012, he filed a motion seeking to be appointed as Suggs' state court registry counsel. On February 15, 2013, the state circuit court ruled that Suggs was not entitled to collateral representation. As *pro bono* counsel, McClain appealed this decision on Suggs' behalf. The Florida Supreme Court affirmed the denial of Suggs' motion, reasoning that since Attorney Moldof, who represented Suggs during his initial postconviction proceedings and appeal, had not filed a motion to withdraw from the case, he was still representing Mr. Suggs. *See Suggs v. State*, 152 So.3d 471 (2014). This holding ignored the reality that Suggs was effectively without state collateral counsel since 2006, when he and Moldof ended their contractual relationship, and Suggs was unable to investigate and pursue claims with regard to new issues that had arisen since that time.

Meanwhile, on May 21, 2013 the Public Defender for the First Judicial Circuit was appointed to represent Mr. Suggs in his postconviction clemency process.

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[3] Mr. Moldof, who had previously served as retained collateral counsel, was by agreement of Mr. Moldoff and Mr. Suggs, no longer retained to serve as counsel. In fact Moldof had not represented Suggs since his 3.851 appeal and state habeas petitions were denied in 2006.

On May 27, 2014, Suggs filed a Motion for Relief from Judgment Denying a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to the United States Supreme Court's decision in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). (3:06-cv-111-RH). This motion was denied on October 21, 2014, and a subsequent Motion to Alter or Amend was denied on November 19, 2014.

Finally, on September 11, 2014, Moldof was permitted to withdraw from the case, and the Capital Collateral Regional Counsel – North was appointed on October 28, 2014.

On October 27, 2015, undersigned counsel filed a Successive Rule 3.851 Motion based upon newly discovered evidence. This motion was denied on February 29, 2016. Thereafter, a notice of appeal was filed, and the appeal is currently pending before this Court. (SC16-576).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Rule 9.100(a) of the Florida Rules of Appellate Procedure. *See* Art. 1, Sec. 13, Fla. Const. ("The writ of habeas corpus shall be grantable of right, freely and without cost."). The petition presents issues which directly concern the continued viability and constitutionality of Mr. Suggs' death sentence. This Court has jurisdiction to entertain a petition for writ of habeas corpus, an original proceeding governed by Rule 9.100(a), and original jurisdiction

under Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure and Article V, § 3(b)(9) of the Florida Constitution.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Suggs' right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at the time of the crime); *see also Makemson v. Martin County*, 491 So. 2d 1109, 1113-14 (Fla. 1986) (noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions...the unconstitutionality of a statute may not be overlooked or excused for reasons of inconvenience."). This Court has explained "[i]t 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 actions on the part of the court." *Rose v. Palm Beach County*, 361 So. 2d 135, 137 n.7 (Fla. 1978).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985).

This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital post-conviction proceedings. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995). This petition presents substantial constitutional questions concerning the administration of capital punishment in this State consistent with the United States and Florida Constitutions. The fundamental error challenged herein warrants habeas relief. *See Wilson,* 474 So. 2d at 1163.

This Court must protect Mr. Suggs' Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights – whether state or federal – of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to exercise its independent power of judicial review. *See Ford v. Wainwright*, 477 U.S. 399 (1986). The reasons set forth herein demonstrate that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

THE CAPITAL SENTENCING STATUTE UNDER WHICH SUGGS WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL AND HIS DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT.

A. *HURST V. FLORIDA*

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court held that a Florida jury, *rather than a judge alone*, must find the facts necessary for imposition of a death sentence. The Supreme Court identified the fact findings in Florida's capital sentencing statute which should have been found by Mr. Suggs' jury:

> 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).

Hurst, 136 S. Ct. at 622.

Mr. Suggs' jury was instructed that it could consider the seven aggravating circumstances that the State asserted it had established, and it was instructed it could consider the non-statutory mitigating circumstances argued by the defense. TR28, pp. 4721-4722.

In conformity with the statutory language quoted in *Hurst*, Mr. Suggs' jury was instructed on these elements of capital murder. TR27, pp. 4511-14. However, the jury was also instructed that its penalty phase verdict was merely a "recommendation" or an "advisory verdict" to be returned by majority vote, and that "the final decision as to what punishment shall be imposed is the responsibility of the judge." TR28, pp. 4720-4721. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The jury returned a recommendation for a death sentence on a form titled "Penalty Phase Jury Recommendation" which stated: "A majority of the Jury, by a

vote of 7 of 5, advise and recommend to the court that it impose the death penalty upon Ernest Donald Suggs." TR10, p. 1756.

The jury's recommendation failed to identify whether the jurors found sufficient aggravating circumstances existed and if they found any statutory mitigating circumstances. The recommendation also failed to indicate if the jury members found the mitigating circumstances insufficient to outweigh the aggravating circumstances. The advisory jury's findings of facts simply do not exist because Mr. Suggs' advisory jury made not one single finding of fact.

The statute under which Mr. Suggs was sentenced to death authorized a death sentence only when the sentencer found two facts to have been established: (1) "[w]hether sufficient aggravating circumstances exist to justify the imposition of the death penalty" and (2) "[w]hether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." Fla. Stat. § 921.141; *Hurst*, 136 S. Ct. at 622. These factual findings are the "functional equivalent" of elements which separate first-degree murder from capital first-degree murder. *Hurst*, 136 S. Ct. at 620 (under Florida law, "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment."); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)...). As elements of a criminal

offense, these facts *must* be found by a jury to have been proven by the State beyond a reasonable doubt.

For the first fact finding in § 921.141(3), the sentencer must not only find whether individual aggravating circumstances have been proved beyond a reasonable doubt, but *also* must find "whether sufficient aggravating circumstances exist" to justify the imposition of the death penalty beyond a reasonable doubt. *Hurst* requires, "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." (quoting *Ring*, 536 U.S. 584, 602 (2002)).

In addition to *Hurst*'s requirement that a jury find the elements of capital first-degree murder, those findings, equivalent to elements under *Hurst, Apprendi* and *Ring,* must be unanimous under Florida law. "[T]he [unanimity] requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So. 2d 693, 714 (Fla. 2002) (Shaw, J., concurring). Likewise, the requirement that Florida juries find elements unanimously has been an "inviolate tenet of Florida jurisprudence since the State was created." *Id.* at 714. Indeed, the Florida Criminal Rules of Procedure and Florida Standard Jury Instructions both clearly state that verdicts must be unanimous. Rule 3.440 of the Florida Rules of Criminal Procedure clearly provides, "[n]o verdict may be rendered unless all of

the trial jurors concur in it;" *see* Fla. Std. Jury Instr. (Crim.) 3.10(6) ("Whatever verdict you render must be unanimous, that is each juror must agree to the same verdict."). In combination with the holding in *Hurst* and other precedent, Florida Criminal Rules of Procedure and Florida Standard Jury Instructions state that it is imperative that a jury find the facts necessary to impose a death sentence and that these facts findings must be *unanimous*. It would be absurd to allow a jury to not find the facts necessary to impose a death sentence when both Florida and federal law require the fact findings in other cases to be unanimous.

Two other significant consequences of *Hurst* are (1) the finding of the prior violent aggravating circumstance does not equate to a finding of sufficient aggravating circumstances and does not cure *Hurst* error and (2) similarly the finding of the felony murder aggravating circumstance does not equate to a finding of sufficient aggravating circumstances and does not cure *Hurst* error. Rather, a jury must find "sufficient aggravating circumstances to justify the imposition of the death penalty." Thus, in Mr. Suggs' case, the jury did not make a unanimous finding that sufficient aggravating circumstances existed. Under *Hurst*, this was constitutional error.

The jury also did not make a unanimous finding that the State had proven that the mitigating circumstances were insufficient to outweigh the aggravating circumstances. Under *Hurst*, this was constitutional error.

B. RETROACTIVITY OF *HURST V. FLORIDA*

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 Supreme Court held:
>
> > '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).
>
> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *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 640-41, 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* 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*. This Court 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).[4] Subsequently, this Court granted Hurst collateral

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[4] 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 the capital sentencing schemes. Having

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 direct appeal. When the United States Supreme Court granted certiorari review, Hurst's Sixth Amendment challenge was found meritorious.

To deny Mr. Suggs the benefit of the ruling in *Hurst*, while Hurst gets the benefit, would mean that all that separates Hurst prevailing on the Sixth Amendment claim from Mr. Suggs 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."

Hurst is clearly retroactive under Florida's test. In *Witt,* this Court concluded:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity

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> 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, 819 So. 2d at 703.

> 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 the individual instances of obvious injustice.

Witt, 387 So. 2d at 925. Under *Witt,* this Court applies new decisions favorable to criminal defendants retroactively when those decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (citing *Witt*, 387 So. 2d at 931). *Hurst* satisfies all three *Witt* factors.

As to the first *Witt* factor, *Hurst* is a decision of the United States Supreme Court. As to the second factor, *Hurst*'s holding is constitutional in nature as it holds that the Sixth Amendment forbids a capital sentencing scheme that requires judges, as opposed to juries, to conduct the fact-finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)." *Falcon*, 162 So. 3d at 961 (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted). Retroactivity would ensure that the Sixth Amendment rights of individuals like Mr. Suggs are protected, and is in keeping with this Court's understanding that

"[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or life under a process no longer considered acceptable and no longer applied in indistinguishable cases.'" *Falcon*, 162 So. 3d at 962 (quoting *Witt*, 387 So. 2d at 929).

Although Mr. Suggs' sentence became final before *Ring* was issued, *Witt* does not recognize the concept of partial retroactivity, and this Court has never held that a new Supreme Court decision is retroactive but then refused to allow some individuals to benefit because they were sentenced before some earlier predicate Supreme Court decision. *See Falcon v. State*, 162 So. 3d 954 (Fla. 2015).

Similarly, in the context of capital punishment, this Court rejected the dubious "partial retroactivity" approach after the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which held that trial courts in capital cases are prohibited from instructing juries to consider only statutorily enumerated mitigating circumstances. *See, e.g., Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987). The Court permitted all impacted individuals to seek *Hitchcock* relief by filing a post-conviction motion in the trial court. The Court did not truncate the retroactivity of *Hitchcock* by limiting to those whose death sentences were "finalized" after *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), or *Skipper v. South Carolina*, 471 U.S. 1 (1986), upon which *Hitchcock* relied. The

concept of "partial retroactivity" is recognized as uncommon and has been criticized as antithetical to basic notions of fairness.

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

C. *HURST* ERROR AT SUGGS' TRIAL

Mr. Suggs' jury was repeatedly told and instructed that its penalty phase verdict was advisory. 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 a death recommendation by a vote of 7 to 5. 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. Suggs' death sentence stands in violation of the Sixth Amendment under *Hurst.*

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." Mr. Suggs' death sentence violates the Sixth Amendment.

D. AVAILABILITY OF HARMLESS ERROR ANALYSIS

Mr. Suggs recognizes that the issue of the availability 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, 136 S. Ct. at 624.

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.[5] The citation to *Neder* contains an extended discussion of when harmless error may be available as to constitutional error and when it may not be appropriate to consider constitutional

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

error subject to harmless error analysis. It is Mr. Suggs' position that the *Hurst* error in his case is structural error that can never be found harmless under *Neder.*[6]

Hurst requires a jury to find the elements of capital first-degree murder beyond a reasonable doubt. There is no such jury verdict in Mr. Suggs' case. Mr. Suggs' jury was not instructed that *any* aspect of its sentencing recommendation would be binding on the sentencing judge as required by *Caldwell.* Mr. Suggs' jury did not specify which, if any, aggravating circumstances it found unanimously. Nor did the jury return a unanimous verdict finding "sufficient aggravating

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[6] 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. Suggs did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover, a reversal in Mr. Suggs' 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 a life sentence 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. Suggs was 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. Suggs 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 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.

circumstances exist[ed] to justify the imposition of the death penalty." Finally, the jury did not return a unanimous verdict finding insufficient mitigating circumstances existed to outweigh the aggravating circumstances. Since Florida law requires unanimity, there is no way to conclude beyond a reasonable doubt that if Mr. Suggs' jury had been properly instructed that its determination of the statutorily defined facts would be binding on the judge it would have unanimously found the statutorily defined facts necessary to authorize a death sentence. Under *Hurst*, Mr. Suggs' death sentence cannot stand.

In this situation, "there has been no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no object...upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. 275, 290 (1993). "[T]o hypothesize a guilty verdict that never in fact rendered—no matter how inescapable the findings to support the verdict might be—would violate the jury-trial guarantee." *Id.* at 279. The deprivation of the jury-trial guarantee, as in Mr. Suggs' case, has "consequences that are necessarily unquantifiable and indeterminate" and therefore "unquestionably qualifies as 'structural error.'" *Id.* at 281-82.

Even assuming for the sake of argument that *Hurst* error is subject to harmless error analysis, the *Hurst* error present on the face of the trial record demonstrates that the State could never prove that the error was harmless beyond a reasonable doubt, and certainly not in Mr. Suggs' case where 5 jurors voted in

favor of a life sentence. 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. *See Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991). Certainly, before this Court could make a finding that the *Hurst* error is harmless, it must afford Mr. Suggs an opportunity to present evidence at a hearing regarding the impact pre-*Hurst* law had on defense counsel, just as this Court did in *Meeks.*[7]

E. CONCLUSION

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

CLAIM II

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

[7] In *Meeks*, this Court, while considering a habeas petition raising a *Hitchcock* claim, determined that the petitioner was entitled to an evidentiary hearing as to the issue of harmless error, and it relinquished jurisdiction to the trial court to conduct such a hearing. On the basis of *Meeks*, this Court can similarly remand Mr. Suggs' case to the trial court should it determine that an evidentiary hearing is warranted on any State argument that the *Hurst* error in Mr. Suggs' case is harmless.

A. INTRODUCTION

At the conclusion of the penalty phase of Mr. Suggs' trial, five jurors formally voted in favor of recommending the imposition of a life sentence on the count of first-degree murder. The new § 921.141 now provides that when three or more jurors vote against recommending a death sentence and in favor of recommending a life sentence, the jury's verdict constitutes a life recommendation. *See* Staff Analysis of the Criminal Justice Subcommittee accompany 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. Suggs' death sentence must be vacated in favor of a life sentence. 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. Suggs of its benefit would leave his death sentence 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, 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 arguments on that point, it did acknowledge that HB 7101 required at least 10 jurors to vote to recommend a death sentence before the sentencing judge was authorized to impose a death sentence.[8] *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 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* suggests that Chapter 2016-13 was intended to make the statute *Hurst*

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[8] 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.

§ 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. Unless the jury returns a death recommendation, the judge is not authorized to impose a death sentence.

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.[9]

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

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. Suggs' favor. The change seeks to make the statute *Hurst* compliant and to proactively 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

[9] 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.

operates in favor of life or liberty." *Ex parte Bailey*, 23 So. 552 (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, "[co]nsistent 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).[10] 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 change in the method of execution violated Article 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." *Sims,* 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

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[10] 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).

post facto law even if applied to the 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 . . . . [t]he 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. (emphasis added).

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 S. 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 "**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.*[11]

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.

[11] In a supplemental brief in *Jackson v. State*, Case No. 2013-1232, 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 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. *Id.*, 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 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.*

Suggs and which further establish his entitlement to a life sentence under the Eighth Amendment.

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

States are prohibited from enacting ex post facto laws by Article I, § 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 criminal law from being applied "to events occurring before" the change was enacted when the change would work to the detriment of the criminal defendant. *Id.* at 29.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Supreme Court was presented with an ex post facto challenge to a Texas statute. Youngblood, 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 a 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 disadvantages 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 jury verdict at the conclusion of Mr. Suggs' penalty phase, it would appear to require the jury's 7-5 vote be treated as a life recommendation that is binding and preclude the imposition of a death sentence. Applying the new § 921.141 in this fashion does not violate the Ex Post Facto Clause for the reasons explained in *Collins v. Youngblood.*[12]

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

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[12] 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 and 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.

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.

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 the 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 "[w]hether 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 issues and the State's burden of proof as to those aggravators on which it relied. As a result, it is Mr. Suggs' position that the new statute simply changes procedures, i.e.

the jury must unanimously find the aggravating circumstances and identify them in a verdict before proceeding to find "[w]hether sufficient aggravating factors exist" and "[w]hether aggravating circumstances 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 § 921.141.[13]

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[13] 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 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 weighing. *See Stringer v. Black*, 503 U.S. 222,

As noted, the new § 921.141 contains language that the jury is to return a unanimous verdict finding at least one aggravating factor and identifying all aggravating factors found to be proven. 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).[14] 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

229-30 (1992) ("Under Mississippi law, after a jury has found a defendant guilty of capital murder and found the existence of one aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence.

[14] 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 increases 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.

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 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 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.[15] 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, "[d]espite 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**

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

to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494 (emphasis added).[16]

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 by the jury.

On the face of the new statute, if three 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

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

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 elements of capital first-degree murder have remained unchanged. As Mr. Suggs 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. Suggs' 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. Suggs believes is required, it can and should be applied retrospectively, and the 7-5 jury vote in his case must be treated as a binding life recommendation that requires his death sentence to be vacated and a life sentence imposed instead.

F. THE PROVISION THAT A 7-5 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. Suggs will receive the benefit of the provision that when three 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 treat 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 Amendments.

G. § 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. SUGGS' DEATH SENTENCE IS CRUEL AND UNUSUAL WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

The enactment of the new statute has established that Mr. Suggs' death sentence constitutes 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 ten jurors must recommend that the defendant should be sentenced to death

before a death sentence can be imposed. If three 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 three or more jurors vote against a death sentence. The imposition of a death sentence against Mr. Suggs, where five jurors voted against recommending a death sentence, 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, "[w]hether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1971 **but by the norms that 'currently prevail.'**" (emphasis added). As the new § 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. Suggs' case formally voted for life sentences, his death sentence violates 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 sentences," a jury's vote in favor of a life recommendation has double jeopardy protection). To carry out Mr. Suggs' death sentence under these circumstances would constitute cruel and unusual punishment and violate the Eighth Amendment.

CONCLUSION

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

Respectfully submitted,

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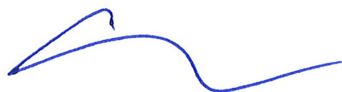
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic service to Tineshia Morris, Assistant Attorney General, (tineshia .morris@myfloridalegal.com); Joshua Mitchell, Assistant State Attorney, (jmitchell@sa01.org); and by U.S. Mail to Ernest Suggs, DOC# 220267, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083; on this date, June 15th, 2016.



Dawn B. Macready

CERTIFICATE OF FONT

Counsel certifies that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this petition is typed in Times New Roman 14-point font.

Dawn B. Macready