**IN THE SUPREME COURT OF FLORIDA**

**NO._____**

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**JAMES D. FORD,**

**Petitioner,**

**v.**

**JULIE L. JONES,**

**Secretary, Florida Department of Corrections,**

**Respondent.**

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## PETITION FOR WRIT OF HABEAS CORPUS

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## INTRODUCTION

Mr. Ford's two death sentences are unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2015). This Court noted in Mr. Ford's direct appeal:

> [Mr. Ford's] jury recommended death on each murder count by an eleven-to-one vote, and the court imposed a sentence of death on each count based on four aggravating circumstances, several statutory mitigating circumstances, and several nonstatutory mitigating circumstances.

*Ford v. State*, 802 So. 2d 1121, 1126-27 (Fla. 2001) (footnotes omitted). Thus, the factual findings necessary to impose death were made solely by the judge, contrary to the Sixth Amendment: "[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. As a result, Mr. Ford's death sentences violate the Sixth Amendment.

## REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Ford respectfully requests the opportunity to present oral argument as to his entitlement to relief on the basis of *Hurst v. Florida*.

## PROCEDURAL HISTORY

Petitioner, James D. Ford, was convicted of two counts of first degree murder, one count of sexual battery with a firearm and one count of child abuse in circuit court in Charlotte County, Florida. After the jury returned guilty verdicts, the

court conducted a penalty phase at which the jury recommended death sentences on both counts of first degree murder by votes of 11 to 1. The trial court conducted an independent sentencing and imposed two death sentences, finding four aggravating factors, two statutory mitigating factors and six nonstatutory mitigating factors (R51. 4746-66).[1] On appeal, this Court affirmed Mr. Ford's convictions and sentences, despite finding that the trial judge when weighing the aggravating and mitigating circumstances erroneously erroneously refused to recognize and weigh a number of mitigating circumstances which were in fact established by Mr. Ford. *Ford v. State*, 802 So. 2d 1121, 1135-36 (Fla. 2001).[2] The United States Supreme Court denied certiorari review on May 28, 2002. *Ford v. Florida*, 535 U.S. 1103 (2002).

Mr. Ford filed a motion in the circuit court under Rule 3.851, Fla. R. Crim. P. The court summarily denied the motion, and this Court affirmed the denial. *Ford v. State*, 955 So. 2d

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[1]Citations to the record on appeal are designated as "R[volume number]. [page number]."

[2]This Court recognized in its direct appeal opinion that Mr. Ford had presented evidence and argued that he had established five statutory mitigating circumstances and seventeen non-statutory mitigating circumstances. *Ford v. State*, 802 So. 2d at 1127 n.2 & n.3. However, the trial judge found that three of the statutory mitigators had not been proven, that four of the non-statutory mitigators had not been proven, and that seven non-statutory mitigating circumstances had been proven but were not mitigating and not weighed by the judge in determining whether the aggravating circumstances outweighed the mitigating circumstances.

550 (Fla. 2007). Mr. Ford filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. The court dismissed the petition as untimely filed. *Ford v. Secretary, Department of Corrections*, 2009 WL 3028886 (M.D. Fla. 2009).

Mr. Ford filed a second motion under Rule 3.851 in the circuit court. Included in this 3.851 motion was Mr. Ford's claim that the failure to require juror unanimity at Mr. Ford's penalty phase violated the Eighth Amendment's evolving standards of decency. The court summarily denied the motion, and this Court affirmed the denial.[3] *Ford v. State*, 168 So. 3d 224 (Fla. 2015) (table). Mr. Ford filed a petition for a writ of habeas corpus in this Court, and the Court denied the petition in the same order in which it affirmed the summary denial of the Rule 3.851 motion. *Id*.

**JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF**

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[3]This Court addressed the merits of Mr. Ford's argument that the failure to require the jury to return a unanimous verdict at the penalty phase was unconstitutional. This Court wrote:

> Ford's third claim, challenging this Court's general jurisprudence that nonunanimous jury recommendations of the death sentence are constitutional, has also been repeatedly rejected by this Court.

*Ford v. State*, 168 So. 3d 224, at *1 (Fla. 2015) (Table). For this assertion, this Court relied upon its precedent rejecting *Ring v. Arizona*, 536 U.S. 584 (2002), as inapplicable to Florida's capital sentencing scheme.

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 directly concern the continued viability and constitutionality of Mr. Ford'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 Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida 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. Ford's 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 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)(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"). 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. Ford'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. Instead, this Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

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; *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). 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

### MR. FORD'S DEATH SENTENCES ARE UNCONSTITUTIONAL UNDER *HURST V. FLORIDA*, 136 S.CT. 616 (2016), AND MUST BE VACATED.

In *Hurst v. Florida*, 136 S.Ct. 616 (2015), the Supreme Court held that a Florida jury, rather than a judge alone, must find the facts necessary for imposition of a death sentence. *Hurst* identified the fact findings in Florida's capital sentencing statute which should have been found by Mr. Ford's 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).

136 S.Ct. at 622.

Mr. Ford's jury was instructed that it could consider the four aggravating circumstances that the State asserted it had established, and it was instructed that it could consider one statutory mitigating circumstance argued by the defense along with seventeen non-statutory mitigating circumstances (R50. 4680-83).[4] In conformity with the statutory language quoted in *Hurst*,

[4]In its sentencing memorandum to the judge, the defense argued five statutory mitigating circumstances were present and

Mr. Ford's jury was instructed on these elements of capital murder:

> [I]t is your duty to . . . render to the Court an advisory sentence 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.

(R50. 4679). However, the jury was also instructed that its penalty phase verdict was merely a "recommendation" or an "advisory verdict" to be returned by a majority vote, and that "the final decision as to what punishment shall be imposed is the responsibility of the Judge" (*Id.*). *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The jury returned recommendations for two death sentences on a form which stated: "A majority of the jury, by a vote of 11 to 1, advise and recommend to the Court that it impose the death penalty upon James Dennis Ford" (R50. 4692).

The jury's recommendations did not identify any findings regarding aggravating circumstances or indicate how many jurors

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should be considered (R. 4756-62). The defense also argued in its sentencing memorandum that seventeen non-statutory mitigators had been shown and should be considered. However as explained by this Court in its direct appeal opinion, the judge rejected three statutory mitigators and three non-statutory mitigators as not proven. *Ford v. State*, 802 So. 2d at 1127 n.3. The judge found seven other non-statutory mitigating circumstances were proven, but refused to consider them because she found them not to be mitigating. This Court concluded that the judge erred in excluding these mitigating circumstances from her sentencing calculus because the circumstances were in fact mitigating. *Ford v. State*, 802 So. 2d at 1135-36. This Court's subsequent conclusion that this error was harmless cannot stand in the wake of *Hurst v. Florida.*

found which aggravating circumstance. The jury's verdict did not indicate whether sufficient aggravating circumstances had been found to exist, nor did it indicate how many jurors found sufficient aggravating circumstances existed. The jury's verdict did not indicate whether it found the statutory mitigating circumstance or which of the sixteen non-statutory mitigating circumstances had been found, nor did it indicate how many jurors found which mitigating circumstances. The jury's verdict did not indicate whether the mitigating circumstances had been found insufficient to outweigh the aggravating circumstances, nor did it indicate how many jurors found the mitigating circumstances insufficient to outweigh the aggravating circumstances. The advisory jury's findings of fact simply do not exist - it made no findings of fact.

The statute under which Mr. Ford was sentenced to death authorized a death sentence only when the sentencer found two facts to have been established: (1) "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty"[5] and (2) "whether sufficient mitigating

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[5]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. The Supreme Court has explained this 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

circumstances exist to outweigh any aggravating circumstances found to exist." § 921.141(3), Fla. Stat. (1996); *Hurst*, 136 S.Ct. at 622. These factual findings are the 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

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> 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 identified. 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 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).

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'" (quoting *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 section 921.141(3), the sentencer not only must 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 now the State labels it--must be found by a jury beyond a reasonable doubt." 136 S.Ct. at 620.

In addition to *Hurst*'s requirement that a jury find the elements of capital first degree murder, those findings 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, 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. Rule 3.440. Fla. R. Crim. P, provides, "[n]o verdict may be

rendered unless all of the trial jurors concur in it." Florida juries are instructed, "[w]hatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." Fla. Std. Jury Instr. (Crim.) 3.10. In combination with *Hurst*'s requirement that a jury find the facts necessary to impose a death sentence, Florida law thus requires those fact findings 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 circumstances does not equate to a finding of sufficient aggravating circumstances and does not cure *Hurst* error. Rather, a jury must find "sufficient aggravating circumstances exist to justify the imposition of the death penalty." Thus, in Mr. Ford's 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.

Further, the jury was not informed that any findings of fact that it made would be binding upon the judge in conformity with

*Caldwell v. Mississippi*. This too was constitutional error.

The United States Supreme Court in *Hurst* declined to reach Florida's harmless error argument and stated that it was leaving any question of harmless error to be first addressed by Florida courts on remand:

> **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. 616, 624 (2016) (emphasis added). In so doing, however, 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.[6]

The citation to *Neder* was not a determination that *Hurst* error is subject to harmless error analysis. Indeed, *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 error subject to harmless error analysis. It is certainly Mr. Ford's position that the

[6]Here, Mr. Ford contested the presence of the statutorily defined facts. This on its face takes Mr. Ford's case outside the scope of *Neder*.

*Hurst* error in his case is structural error that can never be harmless, particularly since the elements identified in *Hurst* were contested in Mr. Ford's case, unlike the circumstances in *Neder*.[7]

*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. Ford's case. Mr. Ford's jury was not instructed that any aspect of its sentencing recommendation would be binding

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[7]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. Ford did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover a reversal in Mr. Ford'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 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. Ford 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 1999 trial, Mr. Ford 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*. The full ramifications of *Hurst* on Florida capital trials at the moment can only be guessed.

on the sentencing judge in compliance with *Caldwell v. Mississippi*. Mr. Ford's jury did not specify which, if any, aggravating circumstances it found unanimously and did not return a unanimous verdict finding "sufficient aggravating circumstances exist[ed] to justify the imposition of the death penalty." His jury also did not return a unanimous verdict finding insufficient mitigating circumstances existed to outweigh the aggravating circumstances.

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, 280 (1993). "[T]o hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be-would violate the jury-trial guarantee." *Id.* at 279. The deprivation of the jury-trial guarantee, as in Mr. Ford's case, has "consequences that are necessarily unquantifiable and indeterminate" and therefore "unquestionably qualifies as 'structural error.'" Id. at 281-82.

Even assuming arguendo 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. Certainly it cannot be harmless in Mr. Ford's case where the jury's

advisory recommendation was not unanimous. Certainly, it cannot be harmless in a case in which the defense challenged whether the State had proven the aggravators on which it was relying. Certainly it cannot be harmless in a case in which the jury heard the defense argue it had established statutory mitigation and seventeen non-statutory mitigators. 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). Certainly, before this Court could making a finding that the *Hurst* error was harmless, it must afford Mr. Ford an opportunity to present evidence at a hearing of the impact pre-*Hurst* law had on defense counsel, just as this Court did in *Meeks*.[8]

Since Florida law requires unanimity, there is no way to conclude beyond a reasonable doubt that Mr. Ford's jury if properly instructed that its determination of the statutorily defined facts would be binding on the judge would have

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[8]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. Certainly on the basis of *Meeks*, this Court can similarly remand Mr. Ford's case to the trial court should it determine that an evidentiary hearing is warranted on any argument that the State makes that the *Hurst* error in Mr. Ford's case is harmless.

unanimously found the statutorily defined facts necessary to authorize a death sentence. Under *Hurst*, Mr. Ford's death sentences cannot stand.

Mr. Ford is also entitled to the benefit of *Hurst* under *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). "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." *Witt*, 387 So. 2d at 925 (quotations omitted). *Hurst* rejects as constitutionally infirm the process under which Mr. Ford was sentenced to death. The *Witt* retroactivity standard is a yardstick for determining when "[c]onsiderations of fairness and uniformity" trumps "[t]he doctrine of finality." *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987).

This Court's decisions finding *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987), retroactive establish that *Hurst* also applies retroactively. In June 1978, the United States Supreme Court decided *Lockett*, holding Ohio's capital sentencing statute unconstitutional because it limited mitigating circumstances to those enumerated in the statute itself. William Thompson was sentenced to death in September 1978. *Thompson*, 515 So. 2d at 175. In December 1978, this Court addressed *Lockett* in *Songer v. State*, 365 So.2d 696 (Fla.1978),

and construed the Florida statute as allowing the jury and judge to consider nonstatutory mitigating circumstances in the sentencing proceeding.

In post-conviction proceedings in Thompson's case, the Court concluded: "we have no alternative but to conclude Thompson's death sentence was imposed in violation of *Lockett*, and in violation of the United States Supreme Court's *Hitchcock* decision." *Id*. *Accord Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (*Hitchcock* rejected this Court's misreading of *Lockett*, and thus Downs' penalty phase was conducted in violation of *Lockett*); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987) ("Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits.").

In *Meeks v. Dugger*, 576 So. 2d 713 (Fla. 1991), this Court was presented with a *Hitchcock*/*Lockett* claim in a case in which the death sentence became final in 1976. Even though Meeks' death sentence was final two years before *Lockett* issued, this Court gave Meeks the benefit of *Hitchcock*: "We have previously recognized that the recent Hitchcock decision represents a sufficient change in the law to defeat a claim that the issue is procedurally barred." *Meeks*, 576 So. 2d at 715. In a special concurrence, Justice Kogan wrote, "I believe that both this Court and the trial court must directly confront the root cause of the

problem we face today: This Court's own inconsistent pronouncements on the admissibility of mitigating evidence during trials conducted in the 1970s." *Meeks*, 576 So 2d at 717. Justice Kogan explained:

> In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975). . . . In 1978, the United States Supreme Court declared such a practice invalid in *Lockett v. Ohio* . . . . Only weeks later, this Court disingenuously stated that *Cooper* [*v. State*, 336 So. 2d 1133 (Fla. 1976),] and other cases never had restricted defendants solely to the statutory list. In *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978) (on rehearing), . . . we retroactively amended *Cooper* with a few sentences arguing that our precedents "indicate unequivocally that the list of mitigating factors is not exhaustive." *Id*.

*Meeks*, 576 So.2d at 717. Within this context, Justice Kogan concluded that the underlying principles of *Witt*'s retroactivity analysis warranted giving Meeks the benefit of *Hitchcock*: "*Cooper* and *Songer*, read together with an honest and objective mind, reveal a serious injustice that now must be corrected." *Meeks*, 576 So.2d at 718.

This Court similarly misconstrued the application of *Apprendi* and *Ring* to Florida's capital sentencing statute, holding that these decisions did not apply in Florida. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). In these cases, the Court denied the petitioners' *Apprendi*/*Ring* claims on the merits stating in

identical language in both majority opinions:

> Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue.

*King v. Moore*, 831 So. 2d at 144 (footnote 4 omitted); *Bottoson v. Moore*, 833 So. 2d at 695 (footnote omitted). In footnote 4, the Court relied upon *Hildwin v. Florida*, *490 U.S. 638 (1989)*, and *Spaziano v. Florida*, 468 U.S. 447 (1984).

In *Hurst v. Florida*, the Supreme Court specifically addressed this Court's opinion in *Bottoson v. Moore* and concluded that the Court's reliance on *Hildwin* and *Spaziano* to hold that *Ring* and *Apprendi* had no application to Florida's capital sentencing scheme was error. *Hurst*, 136 S.Ct. at 623 (the conclusions in *Hildwin* and *Spaziano* were "wrong, and irreconcilable with *Apprendi*"). The Supreme Court thus "expressly overule[d] *Spaziano* and *Hildwin* in relevant part." *Id.*

As with *Hitchcock*, *Hurst* has now held that this Court misconstrued *Apprendi* and *Ring* as having no application to Florida's capital sentencing statute. Thus, "[c]onsiderations of fairness and uniformity," *Witt*, 387 So. 2d at 925, cannot justify denying the benefit of Hurst to those like Mr. Ford whose death sentences were final before *Hurst* issued.

It is also worth noting that Mr. 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). This was nearly contemporaneous with this Court affirmance of Mr. Ford's death sentences in his direct appeal. 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 proceeding, was Hurst able to present his Sixth Amendment challenge to Florida's capital sentencing scheme a second time in his second direct appeal.

To deny Mr. Ford the benefit of the ruling in *Hurst v. Florida*, while Mr. Hurst obviously gets the benefit, would mean that all that separates Mr. Hurst prevailing on the Sixth Amendment claim from Mr. Ford not prevailing is the ineffectiveness of Mr. 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*:

> 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.**"

387 So. 2d at 925 (emphasis added) (quotations omitted). 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 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.**

*Id.* (emphasis added). Thus, the *Witt* standard is employed to determine when "[c]onsiderations of fairness and uniformity" trumps "[t]he doctrine of finality."

Arbitrarily depriving Mr. Ford of the benefit of *Hurst*'s determination that the capital sentencing scheme under which he received a sentence of death is unconstitutional cannot be justified. Certainly, that would violate the Eighth Amendment. *Hurst* is undoubtedly a "development of fundamental significance" within the meaning of *Witt*, 387 So. 2d at 931, and thus principles of fairness dictate that *Hurst* be given retroactive effect. The Court recently explained these principles of fairness in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), writing:

> As this Court stated in *Witt*, "[c]onsiderations 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.'" Here, if *Miller* is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the *Miller* decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively.

162 So. 3d at 962 (citations omitted). If the unfairness resulting from loss of liberty demands retroactive application,

then so too does loss of life. If the unfairness to juveniles in indistinguishable cases receiving different non-capital sentences is too great, then so too is the unfairness of executing Mr. Ford while defendants with indistinguishable cases will receive the benefit of *Hurst* and not be put to death under an unconstitutional death penalty scheme.

Mr. Ford's death sentences are unconstitutional under *Hurst*, and he is entitled to the benefit of *Hurst*. The next question, therefore, is the remedy for Mr. Ford's unconstitutional death sentences.

Mr. Ford first contends that his death sentences should be vacated and replaced with life sentences under section 775.082(2), Fla. Stat.[9] The effect of *Hurst* should be the same as the effect of *Furman v. Georgia*, 408 U.S. 238 (1972). While the Supreme Court did not specifically address Florida's capital sentencing scheme in *Furman*, Florida's Attorney General conceded before this Court that *Furman* rendered Florida's death penalty

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[9]Section 775.082(2) provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

scheme unconstitutional under the Eighth Amendment. After *Furman* was recognized as rendering Florida's capital sentencing scheme unconstitutional, this Court considered the impact of Furman upon death sentences that had been imposed pursuant to an unconstitutional sentencing scheme. In fact, Chapter 72-118, which added the pertinent language contained in section 775.082(2), was enacted in the 1972 legislative session in anticipation of *Furman*.

The State's current position, asserted in other cases, is that § 775.082(2) does not apply after *Hurst* because the death penalty has not been declared unconstitutional *per se*. However, *Furman* held that the procedures then in place did not comport with the Eighth Amendment. In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), this Court acknowledged as much, writing, "[*Furman*] does not abolish capital punishment" and "Capital punishment is not, *per se*, violative of the Constitution of the United States . . . or of Florida." *Id.* at 6-7. *See also Breedlove v. State*, 413 So. 2d 1, 9 (Fla. 1982) ("Both the United States Supreme Court and this Court have found that the death penalty is not per se violative of either the federal or state constitution."). In *Furman*, the procedure or scheme for imposing the death penalty rendered Florida's death penalty unconstitutional under the Eighth Amendment. When this Court determined that section 775.082(2) applied, it was after Florida's procedure for imposing

death sentences had been found unconstitutional, not the death penalty itself. Accordingly, this Court should vacate Mr. Ford's death sentences and direct the trial court to impose life sentences instead.

Should this Court reject Mr. Ford's argument that he should receive life sentences, Mr. Ford must discuss Chapter 2016-13, Laws of Florida (2016), which amended section 921.141 and became effective on March 7, 2016, because he believes it would provide the substantive law that would govern at a resentencing, while this Court would be required to make a procedural tweak to insure compliance with *Hurst*.[10] The final Staff Analysis of the Criminal Justice Subcommittee accompanying the legislation explained: "The bill amends Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling" in *Hurst*. The staff analysis noted that amendment of Florida's capital sentencing scheme was necessary because "the United States Supreme Court held Florida's capital sentencing scheme

[10]The procedural tweak that Mr. Ford believes is necessary under *Hurst* would be to require the jury to unanimously find: 1) whether the State had proven that sufficient aggravating circumstances exist to justify a death sentence, and 2) whether the State had proven that the sufficient aggravating circumstances outweighed the mitigating circumstances. The provision in Chapter 2016-13 providing for a 10-2 vote by the jury in order to return a death recommendation cannot be read as permitting the requisite factual findings by less than a unanimous vote. Further, this Court would also have to insure that a resentencing jury receive instructions compliant with *Caldwell v. Mississippi*, properly advising the jury of the binding effect of its factual determinations.

unconstitutional."[11]

The new section 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 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

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[11]House of Representatives Final Bill Analysis to HB 7101, at 1 (March 17, 2016), https://www.flsenate.gov/Session/Bill/2016/7101/Analyses/h7101z.CRJS.PDF.

> death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Ch. 2016-13.

Subsection (2) requires that the jury unanimously find each aggravating factor. However, although the new statute requires the jury to determine whether "sufficient aggravating factors" exist to support a death sentence--one of the facts *Hurst* held was required to be made by a jury--the statute does not require that this finding be unanimous. As discussed above, Florida law requires that this finding be made unanimously. The same unanimity requirement applies to the jury's determination of "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist" and, contrary to subsection (2)(c), to the jury's decision "whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death." This Court must construe the statute in a way to render it constitutional under *Hurst*.

Mr. Ford is aware that some capital defendants have argued to this Court that the language in subsection (2) stating that if the jury "finds at least one aggravating factor, the defendant is eligible for a sentence of death" means that the new statute has done away with the requirements that the jury determine "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found

to exist." On the contrary, those facts are still explicitly set forth in the statute as determinations the jury must make. The only possible function of the language stating that if the jury "finds at least one aggravating factor, the defendant is eligible for a sentence of death" is to indicate that once the jury has found at least one aggravating factor, the jury should proceed to make the fact findings regarding "whether sufficient aggravating factors exist" and "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." If the jury does not find at least one aggravating factor, the jury need not proceed any further and should return a verdict for life.

The "eligibility" sentence may have been the Legislature's effort to address an Eighth Amendment function of narrowing the class of persons who may be subjected to the death penalty. If that was the intent, it cannot withstanding scrutiny under the Eighth Amendment. If the statute is construed by this Court as authorizing the imposition of death merely upon the finding of one of the sixteen aggravating circumstances listed in subsection (6) of the statute, the statute violates the Eighth Amendment. The list of sixteen aggravating circumstances includes aggravators that on their own clearly do not sufficiently narrow the class of individuals who may be sentenced to death under the Eighth Amendment. For example, a defendant who was on probation for possession of ecstasy, a well-known party drug, at the time

of the homicide would have an aggravating circumstance which certainly cannot render him death eligible under the Eighth Amendment.[12] *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. *** [T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State"); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) ("the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.").

Construing chapter 2016-13 as actually rendering a defendant death eligible on the basis a finding of one aggravator--which based upon the facts of a given case may not perform the narrowing function required by the Eighth Amendment--would render the capital sentencing scheme unconstitutional under the Eighth Amendment. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("our

[12]The technical presence of one of the statutorily defined aggravators cannot be talismanic when it could be found and yet fail to perform the narrowing function required by the Eighth Amendment.

cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

In any event, the issue under the Sixth Amendment and under *Hurst* is what fact or facts must be found to be present before a judge is authorized to imposed a death sentence. The Legislature's labeling is not relevant for Sixth Amendment purposes. The use of the word "eligibility" in chapter 2016-13 is not determinative of what is or is not an element that is subject to the Sixth Amendment right to a jury trial. In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that legislative labels do not govern as to what statutorily defined fact or facts must be found by the jury to authorize the imposition of 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.[13] What matters is how the statutory scheme functions, i.e. what are the

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

facts that must be found before a death sentence can actually be imposed. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court 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).[14]

Despite the language in chapter 2016-13 asserting death eligibility arises from the finding of just one aggravating circumstance, **a death sentence cannot in fact be imposed without a factual determination that "there are sufficient aggravating factors to warrant the death penalty," and a factual finding that "the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.**" *See* § 921.141(2)(b)(2), Fla. Stat. (2016). A person cannot be sentenced to death simply based upon the jury finding one aggravating factor.

To comply with the Eighth Amendment and with *Hurst* and the Sixth Amendment, the new section 921.141 should be construed as

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[14]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 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).

authorizing the imposition of a death sentence only when a jury makes the factual determinations that sufficient aggravating circumstance exist to justify a death sentence and that those aggravating circumstances outweigh the mitigating circumstances. Under *Hurst*, those facts are elements of the offense of capital first degree murder for Sixth Amendment purposes.

It is also imperative that when a jury is charged with responsibility of making the findings of fact necessary to authorize a death sentence, it must be properly instructed as its role in authorizing the imposition of a death sentence. *See Caldwell v. Mississippi*, 472 U.S. at 341 ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility.").

If this Court rejects Mr. Ford's arguments for the imposition of life sentences as a result of the *Hurst* error, this Court should remand for a resentencing under chapter 2016-13 as long as it is construed in the fashion set forth herein. The only alternative would be to order a resentencing under the statute declared unconstitutional in *Hurst* with procedural fixes that are *Hurst* and *Caldwell* compliant.

## CONCLUSION

For all the reasons discussed herein, Mr. Ford respectfully

urges this Court to vacate his death sentences and order the imposition of life sentences, or if this Court rejects Mr. Ford's argument on that point, it should order a resentencing at which the jury is given *Caldwell* compliant instructions and required to unanimously find whether the State has proven the facts necessary to authorize the trial judge to impose death 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 Carol Dittmar, Assistant Attorney General, on this 26 day of April, 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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