IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC13-819 & SC14-22

RODERICK MICHAEL ORME,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

RODERICK MICHAEL ORME,
Petitioner,

v.

JULIE L. JONES, ETC.
Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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CASELAW

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS[1]

In 1992, Roderick Michael Orme was indicted with one count of first degree murder, robbery, and sexual battery (R. 3-4). The jury found Mr. Orme guilty as charged and recommended death by a vote of 7-5 (R. 629). Thereafter, the trial court sentenced Mr. Orme to death for the murder, 15 years for the robbery and 22 years for the sexual battery (R. 632). While this Court affirmed on direct appeal, see Orme v. State, 677 So. 2d 258 (Fla. 1996), it subsequently granted in postconviction a resentencing proceeding on the basis of trial counsel's ineffective assistance. Orme v. State, 896 So. 2d 725 (Fla. 2005).

During Mr. Orme's resentencing proceeding, the jury was repeatedly informed that its penalty phase verdict was a recommendation and/or advisory in nature (R2. 3759, 3774, 3803, 3806, 3818, 3827, 3840, 3853, 3867, 3890, 3904, 3923, 3928, 3943, 3964, 3982, 4007, 4022, 4053, 4077, 4097, 4111, 4156, 4179, 4194, 4204, 4223, 4450, 4542, 4582, 4597, 4615, 4639; RT. 12, 1270, 1276, 1277, 1278). The jury was also instructed in conformity with Florida statutory law that the first fact question to be considered during the penalty phase deliberations was whether sufficient aggravating circumstances existed to justify the imposition of the death penalty:

> It is now your duty to advise this Court as to

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[1]Citations in this supplemental initial brief are as follows: References to the direct appeal record of Mr. Orme's trial are designated as "R. ____". References to the direct appeal record of Mr. Orme's resentencing are designated as "R2. ___". References to the transcript of Mr. Orme's resentencing are designated as "RT. ____".

> what punishment should be imposed upon the Defendant for his crime of murder in the first degree.
>
> As you have been told the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by me and render to me, 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. Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

(RT. 1270). Mr. Orme's jury was then told that its advisory verdict did not need to be unanimous (RT. 1277). After deliberations were completed, the jury returned a death recommendation by a vote of 11-1 (RT. 1285).

Thereafter, the trial judge conducted an independent sentencing as required by the Florida statute and imposed a sentence of death. In doing so, the judge—and the judge alone—made the findings of fact required under Florida law to make Mr. Orme eligible for a sentence of death.

On the direct appeal of his resentencing, Mr. Orme asserted a claim based on Ring v. Arizona, 536 U.S. 584 (2002):

> To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Bottoson v. Moore, 863 So.2d 393 (Fla. 2002); and King v. Moore, 831 So.2d 403 (Fla. 2002). Because this argument involves only matters of law, this Court should review it de novo.
>
> Before trial, Orme filed a "Motion for findings of fact," citing the United States Supreme Court Opinion in Apprendi v. New Jersey, 530 U.S. 446 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). (15 R 2693-95). The trial court denied it (39 R 3556).

> Orme recognizes this Court has repeatedly and recently rejected arguments that Ring has any application to Florida's death penalty. As mentioned, however, that holding is incorrect. But realizing the futility of making an argument this Court has rejected, he simply raises it now in the hopes that this Court will come to its senses, realize its error, and grant Orme a new sentencing hearing. If that hope is futile, he raises the issue simply to preserve it to argue before another court on another day.

Orme v. State, Case No. SC08-182, Initial Brief of Appellant at 68.

In denying Mr. Orme's claim, this Court stated:

> Orme raises the same Ring claim raised in his appeal of the denial of postconviction relief, but also recognizes that this Court has repeatedly rejected arguments that Ring has any application to Florida's capital sentencing scheme. As we stated in Orme's postconviction appeal and as Orme concedes, similar arguments have been addressed and rejected by this Court. Orme, 896 So.2d at 736-37; see also Fennie v. State, 855 So.2d 597, 607 n. 10 (Fla.2003); Doorbal v. State, 837 So.2d 940, 963 (Fla.2003). Moreover, Orme was convicted not only of first-degree murder, but also of two additional violent felonies: sexual battery and robbery. We have consistently found that Ring is satisfied when a defendant commits a murder in the course of an enumerated felony. See generally Parker v. State, 873 So.2d 270 (Fla. 2004). Accordingly, relief is denied on this claim.

Orme v. State, 25 So. 3d 536, 552 (Fla. 2009).

On June 1, 2011, Mr. Orme filed a Rule 3.850 motion as to the resentencing proceeding (PC-R2. 73-169). He was denied relief by the trial court and filed an appeal before this Court. Following briefing by the parties and an oral argument, this Court affirmed the denial of postconviction relief on December 10, 2015. Orme v. State, Nos. SC13-819, SC14-22 (Fla. December

10, 2015).[2] Mr. Orme filed a motion for rehearing on December 24, 2015, which is currently pending before this Court.

On January 12, 2016, the U.S. Supreme Court issued its decision in Hurst v. Florida, 136 S.Ct. 616 (2016), finding that Florida's capital sentencing statute is unconstitutional. In light of that decision, Mr. Orme filed a motion in this Court seeking an opportunity to raise and brief the impact of Hurst on the constitutionality of his death sentence in the above-entitled appeal. This Court granted Mr. Orme's motion on March 29, 2016. See Orme v. State, Nos. SC13-819, SC14-22 (Fla. March 29, 2016).

ARGUMENT I

THE CAPITAL SENTENCING STATUTE UNDER WHICH MR. ORME WAS TRIED, CONVICTED AND SENTENCED TO DEATH IS UNCONSTITUTIONAL, AND AS A RESULT, HIS DEATH SENTENCE STANDS IN VIOLATION OF THE SIXTH AMENDMENT.

A. HURST V. FLORIDA

On January 12, 2016, the U.S. Supreme Court issued its decision in Hurst v. Florida, 136 S.Ct. 616 (2016), finding that Florida's capital sentencing statute is unconstitutional. The Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. The Hurst opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed:

> The State fails to appreciate the central and singular role the judge plays under Florida law. As described above and by the Florida Supreme Court, **the Florida sentencing statute does not make a defendant eligible**

[2]Mr. Orme also filed a state habeas petition, which was denied by this Court in the same opinion.

> **for death until "findings by the court that such person shall be punished by death.**" Fla. Stat. § 775.082(1) (emphasis added). The trial court alone **must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.**" § 921.141(3). "[T]he jury's function under the Florida death penalty statute is advisory only." The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

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

The decision in Hurst relied upon Ring v. Arizona, 536 U.S. 584 (2002). There, the U.S. Supreme Court held: "Capital defendants, no less than noncapital defendants ... **are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.**" Ring, 536 U.S. at 589 (emphasis added). This holding in Ring tied the Sixth Amendment right to a jury trial to the legislatively defined facts that authorize an increase in the maximum punishment.

Under Florida's statute, a death sentence is not authorized unless two statutorily defined facts are found. A unanimous verdict finding the defendant guilty of first degree murder by itself does not authorize a death sentence. The two statutorily defined facts required to authorize the imposition of a death sentence on an individual convicted of first degree murder are 1) the existence of "sufficient aggravating circumstances"[3] and 2)

[3]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 U.S. Supreme Court has recently explained the purpose of the narrowing requirement as follows:

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

Because Florida's statute did not require a jury to return a

> Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Atkins, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Godfrey v. Georgia, 446 U.S. 420, 428–429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 568 (2005). When Florida's capital scheme was adopted after Furman, there were 8 aggravators identified. See State v. Dixon, 283 So. 2d 1, 5-6 (Fla. 1973). In the years since, the list of aggravators has doubled. 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 U.S. Supreme Court found the statute to facially comply with Furman:

> 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).

verdict finding that these two statutorily defined facts have been proven by the State beyond a reasonable doubt, Florida's capital sentencing statute violated the Sixth Amendment. Hurst, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.").

B. RETROACTIVITY

With regard to any retroactivity issue, Mr. Orme notes that the decision in Hurst is based on Ring v. Arizona, 536 U.S. 584 (2002). Indeed, as the U.S. Supreme Court explained in Hurst,

> We granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. 575 U. S. ___ (2015). We hold that it does, and reverse.

Id. at 621. The U.S. Supreme Court's decision in Hurst did not create new law; it reaffirmed the decision in Ring and determined that this Court violated the dictates of that decision. Given that Mr. Orme's sentence became final after the decision in Ring, Mr. Orme submits that there is no retroactivity issue.

To the extent that it is determined otherwise, Mr. Orme submits that Hurst must be found to apply retroactively under Florida law. This Court's retroactivity analysis was set forth in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980), where this Court stated:

> 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.**"

(Emphasis added) (quotations omitted). Accordingly, this Court in

Witt concluded that:

> 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.**

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

This Court's previous holding in Johnson v. State, 904 So. 2d 400 (Fla. 2005), that Ring was not retroactive was premised upon this Court's misunderstanding of Ring's holding. In Johnson, this Court read Ring to hold that the Sixth Amendment only required that one aggravator had to be found by a jury.[4] But, Ring actually held that the Sixth Amendment jury trial right was

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[4]In Ring, the U.S. Supreme Court stated: "in Arizona, a 'death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt.' 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703)." Ring, 536 U.S. at 597. But, this was only due to Arizona's statutory law which the Supreme Court in Ring noted: "**Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'** [citation], the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 509 (emphasis added).

tied to the legislatively defined facts. This was the core holding in Ring:

> The dispositive question, we said, "is one not of form, but of effect." Id. at 494. **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.**

536 U.S. at 602 (emphasis added).[5] Thus, Ring was much more significant and much broader than this Court understood in Johnson, and as Hurst has now demonstrated. Florida's statute, which governed Mr. Orme's case, provided that a death sentence could not be imposed unless sufficient aggravators were found to exist and insufficient mitigators were found to outweigh the aggravators.[6] This Court's Witt analysis in Johnson simply misread Ring and its intersection with Florida law.[7]

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[5]The citation within this quote was to Apprendi v. New Jersey, 530 U.S. 466 (2000). There, the U.S. 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). In his concurrence, 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).

[6]The recent enactment of House Bill 7101, which inserts a provision for the jury to return a verdict unanimously finding at least one aggravator, simply underscores that prior to March 7, 2016, Florida's capital scheme did not include such a provision.

[7]In Johnson, this Court stated that "the question is whether Ring is of 'sufficient magnitude' to require retroactive application." 904 So. 2d at 409. Because it did not perceive the true scope of Ring and the magnitude of the jurisprudential

When the proper Witt analysis is employed, it is clear that Hurst must be applied retroactively. Hurst is undoubtedly a "development of fundamental significance" within the meaning of Witt, and thus principals of fairness dictate that Hurst be given retroactive effect. Absent full retroactivity, there is no question but that indistinguishable cases will receive the benefit of Hurst simply because those cases are pending on direct appeal or are pending for a retrial or a resentencing. Whether relief is granted to those individuals or not, they will receive the benefit of the decision simply because of when Hurst issued. Those receiving the benefit of Hurst also include capital defendants who received death sentences long ago, but who have received collateral relief and are awaiting a new trial or a resentencing.[8] Arbitrarily depriving Mr. Orme of the benefit of

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upheaval it engendered, this Court's opinion in Johnson simply does not control as to the retroactivity of Hurst, which was of such magnitude that Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984), were formally and expressly overruled.

[8]It is also worth noting that 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. State, 819 So. 2d 689 (Fla. 2002). In his 2002 direct appeal, Hurst argued that his death sentence stood in violation of the Sixth Amendment principles enunciated in Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court rejected the claim saying:

> Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the Apprendi case applies to Florida's capital sentencing scheme. See Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); Mann v. Moore, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the Mills decision and find that Apprendi does apply to capital sentencing schemes.

Hurst's determination that the capital sentencing scheme under which he received a sentence of death is unconstitutional cannot be justified. Certainly, this would violate the Eighth Amendment principles set forth in Furman.

C. HURST ERROR AT MR. ORME'S TRIAL

Mr. Orme's 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. Further, the jury was instructed that its recommendation was to be by a majority vote, and it returned a death recommendation by a vote of 11-1. Because the jury did not return a unanimous verdict finding the presence of the facts necessary under Florida law to authorize the imposition of a death sentence, Mr. Orme's death sentence stands in violation of the Sixth Amendment under Hurst.

The jury did not return a verdict in compliance with the Sixth Amendment finding sufficient aggravating circumstances existed to justify a death sentence and finding insufficient mitigating circumstances existed to outweigh the aggravating

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> Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the Mills decision, and thus we reject Hurst's final claim.

Hurst, 819 So. 2d at 703. 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.

circumstances. As Hurst noted, a jury's advisory recommendation does not satisfy the Sixth Amendment. 136 S.Ct. at 619 ("[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.").

The statute expressly precluded the imposition of a death sentence absent findings of fact that sufficient aggravators existed and that insufficient mitigators existed to outweigh the aggravators. As noted in Hurst, a defendant was not "eligible" for a death sentence until those facts had been found. 136 S.Ct. at 622. Unless those facts were found, a death sentence could not be imposed. Thus as explained in Hurst, those facts had to be found by a jury. Since that did not happen here, Mr. Orme's death sentence stands in violation of the Sixth Amendment.

D. A LIFE SENTENCE SHOULD BE IMPOSED

Section 921.141, Fla. Stat., sets forth Florida's death penalty scheme. Prior to March 7, 2016, upon the conviction of first degree murder alone, the only sentence permitted pursuant to Hurst v. Florida is a life sentence. As it relates to his death sentence, all that Mr. Orme stands convicted of now is first degree murder. He was not convicted of first degree murder along with a finding of the statutorily defined facts which must be found in order for a death sentence to be authorized, i.e. the element or elements necessary to authorize an increase in the punishment above that authorized for just a conviction of first degree murder. The only possible punishment authorized by the conviction of first degree murder alone was life imprisonment

without the possibility of parole. Pursuant to the statutory scheme in place at the time, the Sixth Amendment requires that Mr. Orme be sentenced to life because his jury did not convict him of first degree murder and the additional elements needed to authorize a death sentence.

E. AVAILABILITY OF HARMLESS ERROR ANALYSIS

As noted previously, Hurst v. Florida held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. Hurst cited the statutorily defined facts that Florida law required to be found for a death sentence to be authorized: "**'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'**" 136 S.Ct. at 622 (emphasis added). Under Florida's then governing statute and under Hurst, there had to be a finding of fact by a jury that sufficient aggravating circumstances existed to justify a death sentence, and insufficient mitigating circumstances existed to outweigh the aggravating circumstances.

The issue of the availability of harmless error was noted in Hurst although the Supreme Court did not resolve its availabilty:

> **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.

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

The citation to Neder was not a finding that Hurst error is subject to a harmless error analysis. Within Neder, there is an extended discussion of when harmless error is available as to constitutional error and when constitutional error should not be subject to harmless error analysis. Under that analysis, Hurst error should be found to be structural error that can never be harmless.[10]

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

[10]Unlike the circumstances in Neder, the element at issue under Hurst is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in Neder where the presence of the element was not contested, Mr. Orme did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover, a reversal in Mr. Orme'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. Orme 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.

Further, Mr. Orme 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

Assuming arguendo that Hurst error is subject to harmless error analysis, the Hurst error present on the face of the record shows that the State cannot prove that the error was harmless beyond a reasonable doubt; certainly not in Mr. Orme's case where a juror voted in favor of a life sentence as to the death sentence, presumably because the juror did not find the statutorily defined facts.[11] Since Florida law requires unanimity, there is no way to find beyond a reasonable doubt that Mr. Orme's jury, if properly instructed that its findings would be binding on the judge, would have unanimously found the statutorily defined facts necessary to authorize a death sentence.[12] Accordingly, Mr. Orme's death sentence must be vacated.

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errors harmless when counsel's strategic decisions were made on the basis of misinformation as to factual issues the Sixth Amendment required the jury to determine. Voir dire would be conducted differently. The exercise of peremptory challenges may be impacted. The jury instructions as to the importance of its role as to the sentence that would be imposed would have to comply with Caldwell v. Mississippi, 472 U.S. 320 (1985). The full ramifications of Hurst on Florida capital trials at the moment can only be guessed.

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

[12]Florida law requires elements to be found unanimously by the jury. Since before Florida was admitted into the union as a state, Florida juries have been required to find elements of an offense unanimously. "[T]he requirement was an integral part of all jury trials in the Territory of Florida in 1838." Bottoson v. Moore, 833 So. 2d 693, 715 (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.

F. IF A RESENTENCING IS ORDERED, WHAT LAW GOVERNS

House Bill 7101 became effective March 7, 2016, when it was signed into law. The final Staff Analysis of the Criminal Justice Subcommittee accompanying the bill explained its purpose as "amend[ing] Florida's capital sentencing scheme to comply with the United States Supreme Court's ruling" in Hurst. Whether House Bill 7101 would govern at a resentencing turns on whether it has made substantive as opposed to procedural changes. There is also the question of whether House Bill 7101 includes an Eighth Amendment violation.

First, House Bill 7101 provides that eligibility for a death sentence exists if the jury unanimously finds one aggravator from a list of 16. However, the list of 16 aggravators includes aggravators that do not appear to sufficiently narrow under Furman. Construing the statute as rendering a defendant death eligible on the basis of a finding of one of the non-narrowing aggravators would render the statute unconstitutional under the Eighth Amendment.

Further, the U.S. Supreme Court in Ring held that legislative labels do not necessarily govern as to what statutorily defined fact or facts must be found by the jury to render a defendant eligible for 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. Despite the language in House Bill 7101

tying eligibility to the finding of just one aggravator, a death sentence still cannot be imposed without a finding that "there are sufficient aggravating factors to warrant the death penalty," and a finding that "the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." See § 921.141(4), page 8 of House Bill 7101. In fact, if 3 jurors conclude that either there are insufficient aggravators or that the aggravators do not outweigh the mitigators, a death sentence cannot be imposed. Since sufficient aggravators must be found as a matter of fact and they must also be found to outweigh the mitigators in order for a death sentence to be imposed, those are factual determinations that constitute elements to which the Sixth Amendment jury trial right attaches under Hurst and Ring.

To the extent that a factual finding that sufficient aggravators exist that outweigh the mitigators is still necessary to render a capital defendant death eligible, the Eighth Amendment challenge to the inadequate narrowing of the 16 aggravating circumstances dissipates. This is because, as under the old statute, the sufficiency of the aggravators that exist is what would perform the narrowing function required by the Eighth Amendment.

Statutes should be construed to the extent possible in a way that insures that they are constitutional. Recognizing that even under House Bill 7101, death eligibility is still dependent on a factual determination that sufficient aggravators exist that outweigh the mitigators, this comports with Hurst and Ring and insures that the statutory scheme complies with Furman.

Construing the statute in this fashion also means that the elements of what is in essence capital first degree murder would remain virtually unchanged. This in turn would mean that House Bill 7101 would only have made procedural changes, not substantive ones, and that it could be applied retrospectively.

It should be recognized that if House Bill 7101 actually changed the elements of capital first degree murder and did away with the requirement that sufficient aggravators must be found to exist which outweigh the mitigators before a death sentence was authorized, the change would be substantive and could not apply in homicide cases that were committed before March 7, 2016.

G. CONCLUSION

Under Hurst, Mr. Orme's death sentence cannot stand. He was not convicted by a jury of first degree murder plus the statutorily defined facts that constitute elements of capital first degree murder and which must be found before a death sentence is authorized.

ARGUMENT II

HOUSE BILL 7101 ESTABLISHES A CONSENSUS FOR EIGHTH AMENDMENT PURPOSES THAT A DEATH SENTENCE MAY NOT BE IMPOSED WHEN THREE JURORS DURING A PENALTY PHASE PROCEEDING HAVE VOTED IN FAVOR OF A LIFE SENTENCE.[13]

At Mr. Orme's first penalty phase proceeding in 1993, five jurors voted in favor of a life sentence. House Bill 7101 now provides that when three jurors vote in favor of a life sentence,

[13]This claim could not have been presented before the enactment of House Bill 7101 on March 7, 2016. Thus, it is timely presented herein.

a death sentence may not be imposed. This represents a consensus for Eighth Amendment purposes that a death sentence may not be imposed on a capital defendant when three or more jurors in one penalty phase proceeding voted in favor a life sentence.

The Eighth Amendment has been construed by the U.S. Supreme Court to require that punishment for crimes comports with "the evolving standards of decency that mark the progress of a maturing society." Roper, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop, 356 U.S. at 100. "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation." Id. at 103. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman, 408 U.S. at 382 (Burger, C.J., dissenting)). "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy, 554 U.S. at 420. "Though the death penalty is not invariably unconstitutional [citation], the Court insists upon confining the instances in which the punishment can be imposed." Id. For example, the Eighth Amendment requires that: "States must give narrow and precise definition to the aggravating factors that can

result in a capital sentence." Roper, 543 U.S. at 568. Further, "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Hall v. Florida, 134 S.Ct. 1986, 2001 (2014).

There is now a consensus that when three or more jurors vote for the imposition of a life sentence in a particular case, neither the crime nor the defendant have been shown to be among the worst of the worst as the Eighth Amendment requires before a death sentence can be imposed. See Atkins v. Virginia, 536 U.S. 304, 319 (2002) (the death penalty must be reserved for those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."). When three or more jurors vote for a life sentence, there is not a strong enough basis for the imposition of a death sentence under the Eighth Amendment. Three or more jurors voting for a life sentence clearly is objective indicia of societal standards.

While Mr. Orme received a resentencing after the 1993 penalty phase, the 1993 verdict in which five jurors voted for a life sentence is entitled to double jeopardy protection. In Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991), this Court held:

> Double jeopardy principles apply to the penalty phase of capital punishment trials in Florida under section 921.141 of the Florida Statutes (1985), because the Florida procedure is comparable to a trial for double jeopardy purposes. See Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); accord Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d

> 270 (1981). Florida law also protects individuals facing the death penalty from being twice placed in jeopardy.

Under House Bill 7101, the 7-5 death recommendation in 1993 means that Mr. Orme's death sentence stands in violation of the Eighth Amendment. Accordingly, Mr. Orme's death sentence must be vacated and his case remanded for the imposition of a life sentence.

CONCLUSION

Mr. Orme submits that relief is warranted in the form of a life sentence or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Initial Brief has been furnished by electronic service to Tineshia Morris, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 13th day of April, 2016.

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CERTIFICATION OF TYPE SIZE AND STYLE

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